

# THE ALL ENGLAND LAW REPORTS 2005

European Cases

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The reference 14 *Halsbury's Laws* (4th edn) para 185 refers to paragraph 185 on page 90 of volume 14 of the fourth edition of *Halsbury's Laws of England*.

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- Driving licence – Mutual recognition of driving licences issued by member states – Member state cancelling driver's right to drive – Driver obtaining new licence in another member state after expiry of cancellation period – Whether member state permitted to refuse to recognise driving licence issued by another member state where licence holder failing to meet requirement as to residence in issuing member state at date of issue – Whether member state permitted to reserve to itself right to issue new driving licence to person in respect of whom member state had cancelled right to drive

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## **RULES ON COMPETITION**

- Abuse of dominant position – Undertaking marketing ice cream products in Ireland – Undertaking supplying freezer cabinets to retailers at no or nominal charge for use exclusively for sale of undertaking's products – Whether agreements preventing, restricting or distorting competition – Whether undertaking entitled to exemption from competition rules – Whether undertaking abusing dominant position – Whether application of competition rules infringing undertaking's right to property

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## **RULES ON COMPETITION (CONT'D)**

- Mergers – Commission declaring proposed concentration incompatible with the common market – Whether Court of First Instance erring in infringing Commission's appraisal of concentration and failing to take account of the Commission's discretion regarding factual and economic matters

**European Commission v Tetra Laval BV (Case C-12/03 P) ..... ECJ 1059**

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- Power of Council unanimously to authorise state aid – Commission declaring state aid contrary to common market and ordering repayment – Member state requesting that Council authorise subsequent aid intended to compensate for repayment obligation – Whether Council competent to declare compatible with common market aid allocating to beneficiaries of unlawful aid an amount designed to compensate for requisite repayments

**European Commission v European Council (supported by Portugal) (Case C-110/02) ..... ECJ 397**

## **STATE AIDS**

- Aid for environmental protection – Member state notifying Commission of proposed measure to assist undertaking's investment in technologically innovative manufacturing plant – New plant reducing polluting and noise emissions – Commission declaring proposed measure incompatible with common market – Commission concluding that proposed investment for economic and industrial purposes, and that environmental benefits inherent in process – Whether undertaking pursuing environmental objectives

**Ferriere Nord SpA v European Commission (Case T-176/01) ..... CFI 851**

- State aids – Public subsidies – Public services – Grant of licences to provide public transport to company requiring subsidies to operate services – Whether subsidies subject to prohibition on state aid – Whether subsidies compensating for deficits in public transport permitted

**Altmark Trans GmbH v Nahverkehrsgesellschaft Altmark GmbH (Oberbundesanwalt beim Bundesverwaltungsgericht, third party) (Case C-280/00) ..... ECJ 610**

## **TAXATION**

- Discrimination – Denmark having no domestic production of motor vehicles and charging duty upon first registration of new or used motor vehicle imported into national territory – Whether duty having 'equivalent effect to a quantitative restriction' or being 'internal taxation' – Whether duty precluded by Community law

**De Danske Bilimportører v Skatteministeriet, Told- og Skattestyrelsen (Case C-383/01) ..... ECJ 553**

- Internal taxation – Recovery of sums paid but not due – Court of Justice finding national levying of duty on alcoholic beverages contrary to Community law but limiting retroactivity of judgment – National provisions precluding reimbursement where economic burden of duty passed on by taxable person to final consumer – National provisions making claims for reimbursement based on domestic constitutional law more favourable – Whether national provisions compatibility with principle of sincere co-operation

**Weber's Wine World Handels-GmbH v Abgabenberufungskommission Wien (Case C-147/01) ..... ECJ 224**



## TRADE MARKS

- Community trade mark – Registration – Absolute grounds of refusal to register – Distinctive character – Composite words marks – Whether all relevant facts and circumstances to be taken into account – Postkantoor – Whether registration of mark on the basis of not possessing a particular characteristic possible

**Koninklijke KPN Nederland NV v Benelux-Merkenbureau (Case C-363/99) ..... ECJ 19**

- Exhaustion of right conferred by trade mark – Putting on the market of goods by proprietor of trade mark – Interpretation of directive

**Peak Holding AB v Axolin-Elinor AB (Case C-16/03) ..... ECJ 723**

- Infringement – Application of mark on labelling or packaging – Sticker affixed to packaging stating replaceable razor blades compatible with claimant companies' handle – Limitation of the effects of trade mark – Honest practices in industrial or commercial matters – Criteria for determining whether use of trade mark necessary to indicate intended purpose of product

**Gillette Co v LA-Laboratories Ltd Oy (Case C-228/03) ..... ECJ 940**

- Registration – Distinctiveness – Surname – Factors to be taken into account in assessment of distinctive character – Common surname – Whether limitation on proprietor's rights in relation to other's trade use of own name relevant to assessment

**Nichols plc v Registrar of Trade Marks (Case C-404/02) ..... ECJ 1**



# Nichols plc v Registrar of Trade Marks

(Case C-404/02)

COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES (SECOND CHAMBER)  
JUDGES TIMMERMANS (PRESIDENT OF THE CHAMBER), GULMANN (RAPPORTEUR),  
PUISSOCHET, SCHINTGEN AND COLNERIC  
ADVOCATE GENERAL RUIZ-JARABO COLOMER  
27 NOVEMBER 2003, 15 JANUARY, 16 SEPTEMBER 2004

*European Community – Trade marks – Registration – Distinctiveness – Surname – Factors to be taken into account in assessment of distinctive character – Common surname – Whether limitation on proprietor’s rights in relation to other’s trade use of own name relevant to assessment – Council Directive (EEC) 89/104, arts 3(1)(b), 6(1)(a).*

Nichols, a company incorporated in the United Kingdom, applied to the Registrar of Trade Marks (the registrar) for registration of the surname ‘Nichols’ as a trade mark for products including vending machines, and food and drink of the type typically dispensed through such machines. The registrar granted the application in respect of vending machines, but refused it in respect of all other products. He found that the surname ‘Nichols’, including its phonetic equivalent ‘Nicholls’ and its singular form ‘Nichol’, was common in the United Kingdom and was not capable of communicating that food and drink goods originated from one and the same undertaking. In view of the nature of the business involved and the potential size of the market for those goods, ‘Nichols’ could be used by other manufacturers and providers and, accordingly, the surname was devoid of distinctive character; the market for vending machines, however, was more specialised, with fewer people trading in it and therefore the mark could be registered in respect of those goods. Nichols appealed to the Chancery Division of the High Court of England and Wales, which considered that a question had arisen whether a fairly common surname had to be regarded as ‘devoid of distinctive character’ until it had acquired a distinctive character through use; and that it was proper to take account of the limitation of the effects of the mark as provided for in art 6(1)(a)<sup>a</sup> of First Council Directive (EEC) 89/104 (to approximate the laws of the member states relating to trade marks). Article 6(1)(a) provided that a trade mark would not entitle the proprietor to prohibit a third party from using, in the course of trade, his own name or address provided he used them in accordance with honest practices in industrial or commercial matters. Accordingly, the national court stayed the proceedings and referred to the Court of Justice of the European Communities for a preliminary ruling pursuant to art 234 EC (formerly art 177 of the EC Treaty) questions concerning, inter alia, in what circumstances should a trade mark (ie a ‘sign’ which complied with the requirements of art 2<sup>b</sup> of Directive 89/104) consisting of a single surname be refused registration as being in itself ‘devoid of any distinctive character’

a Article 6(1), so far as material, is set out at judgment para 5, below

b Article 2 is set out at judgment para 3, below

within the meaning of art 3(1)(b)<sup>c</sup> and what conditions applied to the assessment, in the context of art 3(1)(b), of the distinctiveness or otherwise of a trade mark constituted by a surname, particularly where that surname was common, and whether the fact that the effects of registration were limited pursuant to art 6(1)(a) had an impact on that assessment.

**Held** – In the context of art 3(1)(b) of Directive 89/104, the assessment of the existence or otherwise of the distinctive character of a trade mark constituted by a surname, even a common one, had to be carried out specifically, in accordance with the criteria applicable to any sign covered by art 2 of the directive, in relation, first, to the products or services in respect of which registration was applied for and, second, to the perception of the relevant consumers. The fact that the effects of registration of the trade mark were limited by virtue of art 6(1)(a) had no impact on that assessment. Article 2 contained a list of signs which could constitute a trade mark, provided that such signs were capable of distinguishing the goods or services of one undertaking from those of other undertakings, ie that they fulfilled the trade mark's function as an indicator of origin. That list expressly includes 'personal names'. Furthermore, in assessing distinctiveness, art 3(1)(b) drew no distinction between different categories of trade mark. The criteria for assessment of the distinctive character of trade marks constituted by a personal name were therefore the same as those applicable to the other categories of trade mark. Whilst it could prove more difficult to establish the distinctive character of trade marks in certain categories than that of those in other categories, that could not justify the assumption that such marks were a priori devoid of distinctive character or could not acquire such character through use. Article 6(1)(a) limited in a general way the right granted by a mark after its registration, that is after the existence of the mark's distinctive character had been established. It could not therefore be taken into account for the purposes of the specific assessment before the trade mark was registered (see judgment paras 25, 29, 33, 34, below).

## Notes

For lack of distinctive character, see 48 *Halsbury's Laws* (4th edn) (2000 reissue) para 210.

## Cases cited

*Deutsche Krankenversicherung AG (DKV) v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* Case C-104/00 P [2002] ECR I-7561, ECJ.

*Glaverbel SA v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* (OHIM) Case C-445/02 P (2004) Transcript (order), 28 June, ECJ.

*Gut Springenheide GmbH v Oberkreisdirektor des Kreises Steinfurt—Amt für Lebensmittelüberwachung* Case C-210/96 [1998] ECR I-4657, ECJ.

*Henkel KGaA* Case C-218/01 (2003) Transcript (opinion), 14 January, (2004) Transcript (judgment), 12 February, ECJ.

*Henkel KGaA v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* Joined cases C-456/01 P and C-457/01 P, *Procter & Gamble Co v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* Joined cases

<sup>c</sup> Article 3(1), so far as material, is set out at judgment para 4, below



- a C-468–472/01 P, *Procter & Gamble Co v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* Joined cases C-473/01 P and C-474/01 P [2005] IP&T 1, ECJ.
- Libertel Groep BV v Benelux-Merkenbureau* Case C-104/01 [2004] IP&T 187, [2004] Ch 83, [2004] 2 WLR 1081, [2003] ECR I-3793, ECJ.
- b *Linde AG v Deutsches Patent- und Markenamt* Joined cases C-53/01 and C-55/01 [2004] IP&T 172, [2003] ECR I-3161, ECJ.
- Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel BV* Case C-342/97 [1999] All ER (EC) 587, [1999] ECR I-3819, ECJ.
- Philips Electronics NV v Remington Consumer Products Ltd* Case C-299/99 [2002] All ER (EC) 634, [2003] Ch 159, [2003] 2 WLR 294, [2002] ECR I-5475, ECJ.
- c *The Procter & Gamble Co v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* Case C-383/99 P [2002] All ER (EC) 29, [2002] Ch 82, [2002] 2 WLR 485, [2001] ECR I-6251, ECJ.
- Windsurfing Chiemsee Produktions- und Vertriebs GmbH (WSC) v Boots- und Segelzubehör Walter Huber* Joined cases C-108/97 and C-109/97 [2000] Ch 523, [2000] 2 WLR 205, [1999] ECR I-2779, ECJ.

## d Reference

This reference for a preliminary ruling under art 234 EC (formerly art 177 of the EC Treaty) from the High Court of Justice of England and Wales, Chancery Division, was made by decision of 3 September 2002, concerned the interpretation of art 3(1)(b) and art 6(1)(a) of the First Council Directive (EEC) 89/104 (to approximate the laws of the member states relating to trade marks).

e The reference was made in the course of proceedings between Nichols plc, a company incorporated in the United Kingdom, and the Registrar of Trade Marks concerning the latter's refusal to register a common surname as a trade mark for certain products. Observations were submitted on behalf of:

f Nichols plc, by C Morcom QC; the United Kingdom government, by P Ormond, acting as agent, assisted by D Alexander, Barrister; the Greek government, by G Skiani and S Trekli, acting as agents; the French government, by G de Bergues and A Bodard Hermant, acting as agents; the Commission of the European Communities, by K Banks, acting as agent. The language of the case was English. The facts are set out in the opinion of

g the Advocate General.

15 January 2004. **The Advocate General (D Ruiz-Jarabo Colomer)** delivered the following opinion<sup>1</sup>.

## I—INTRODUCTION

h 1. The present proceedings raise the problem of the distinctive character of common surnames within the sphere of intellectual property.

The United Kingdom Trade Marks Registry consistently refuses to register ordinary surnames which occur frequently in the London telephone directory, provided that there is a large number of operators in the market for the goods or services designated.

i It should be noted at the outset that neither the Trade Marks Directive<sup>2</sup> nor any general principle requires surnames to be treated differently from other

1 Original language: Spanish.

2 First Council Directive (EEC) 89/104 (to approximate the laws of the member states relating to trade marks) (OJ 1989 L40 p 1).

types of mark. Their specific distinctive character must be assessed in relation to the products which they are intended to cover and the perception of the consumers concerned. Nevertheless, it must be recognised that such consumers are accustomed, particularly in the case of services carried out by certain professional practitioners, to the use of a surname to indicate the origin of the service. Very frequently occurring surnames in a given sector may be disqualified from use as trade marks on the ground that they lack the necessary distinctive character.

## II—LEGISLATIVE BACKGROUND

### 1—Community law: the Trade Marks Directive

#### 2. According to art 2 of the directive, a trade mark—

‘may consist of any sign capable of being represented graphically, particularly words, including personal names, designs, letters, numerals, the shape of goods or of their packaging, provided that such signs are capable of distinguishing the goods or services of one undertaking from those of other undertakings.’

#### 3. Article 3(1) goes on to provide:

‘1. The following shall not be registered or if registered shall be liable to be declared invalid:

- (a) signs which cannot constitute a trade mark;
- (b) trade marks which are devoid of any distinctive character;
- (c) trade marks which consist exclusively of signs or indications which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, geographical origin, or the time of production of the goods or of rendering of the service, or other characteristics of the goods or service;
- (d) trade marks which consist exclusively of signs or indications which have become customary in the current language or in the *bona fide* and established practices of the trade ...
- (g) trade marks which are of such a nature as to deceive the public, for instance as to the nature, quality or geographical origin of the goods or service ...’

4. The Trade Marks Directive authorises registration of a sign which falls within any of the cases described in para (1)(b), (c) or (d), if it in fact enables the origin of the goods or services to be identified. Article 3(3) states:

‘A trade mark shall not be refused registration or declared invalid in accordance with paragraph 1(b), (c) or (d) if, before the date of application for registration and following the use which has been made of it, it has acquired a distinctive character.’

5. Article 6(1), under the heading ‘Limitation of the effects of a trade mark’, provides:

‘The trade mark shall not entitle the proprietor to prohibit a third party from using, in the course of trade,

- (a) his own name or address;
- (b) indications concerning the kind, quality, quantity, intended purpose, value, geographical origin, the time of production of goods or of rendering of the service, or other characteristics of goods or services;

a (c) the trade mark where it is necessary to indicate the intended purpose of a product or service, in particular as accessories or spare parts; provided he uses them in accordance with honest practices in industrial or commercial matters.’

b 6. The provisions of the directive cited above coincide almost exactly with arts 4, 7(1) and (3) and 12(1) of the Community Trade mark Directive<sup>3</sup>.

## 2—Domestic legislation

7. The Trade Marks Directive was incorporated in domestic law by means of the Trade Marks Act 1994, which superseded a statute that had been in force since 1938.

c 8. In May 2000, the Registrar of Trade Marks published Practice Amendment Circular 6/00 (hereinafter PAC 6/00), concerning the registration of names and surnames.

9. The following passages from that circular are particularly relevant:

d ‘5. In judging the capacity of a surname to distinguish the goods or services of one undertaking the Registrar will consider:

a. the commonness of the surname;

b. the number of undertakings engaged in the trade and from whom the goods or services specified in the application can be said to originate.

e 6. For this purpose the number of relevant undertakings includes manufacturers, designers and *specialist* retailers of goods, and providers of services.

f 7. The Registrar will continue to have regard to the London Telephone Directory in assessing the commonness of a surname. However, with the continuing increase in the number of telephone users it is now possible for a name which appears a significant number of times in the London Telephone Directory to be quite uncommon. Consequently, the Registrar will not regard a surname as “common” unless it appears 200 times in the London or other appropriate telephone directory.’

g 10. The reasoning underlying the two criteria of assessment set out in the circular is that the smaller the number of operators active in a given market, the more likely it is that the average consumer will perceive in a surname, even one that occurs frequently, a sign capable of distinguishing the goods or services of a particular undertaking. PAC 6/00 gives as examples the producers of agricultural chemicals and providers of airline services<sup>4</sup>.

h 11. Conversely, where a very large number of operators are involved, it is more difficult for the public to identify a commercial origin on the basis of a common surname. By way of illustration, the circular refers to manufacturers of clothing and foodstuffs or drinks, and law firms<sup>5</sup>.

## III—FACTUAL BACKGROUND

i 12. Nichols plc (hereinafter Nichols) is a commercial company incorporated in the United Kingdom. On 8 August 2000 it applied to the United Kingdom

3 Council Regulation (EC) 40/94 (on the Community trade mark) (OJ 1994 L11 p 1), as amended by Council Regulation (EC) 3288/94 (amending Regulation 40/94 on the Community trade mark for the implementation of the agreements concluded in the framework of the Uruguay Round) (OJ 1994 L349 p 83).

4 PAC 6/00, para 8.

5 PAC 6/00, para 9.



Trade Marks Registry for registration of a word sign 'Nichols' to designate goods belonging to classes 29, 30 and 32 of the Nice Agreement<sup>6</sup>. The goods concerned are automatic vending machines and products frequently sold by that means, essentially foodstuffs and drinks. The company did not claim acquisition of distinctiveness through use.

13. By decision of 11 May 2001, the Trade Marks Registry granted the application regarding automatic vending machines but refused it in relation to the other indications. In giving its reasons, it relied on the two criteria laid down in PAC 6/00<sup>7</sup>, taking the view.

First, that the surname 'Nichols', together with phonetically similar names, such as 'Nicholls' or, in the singular, 'Nichol', are common surnames in the United Kingdom, since they appear 483 times in the London telephone directory.

Second, that the food and drinks market, covered by classes 29, 30 and 32, in respect of which registration was applied for, is made up of a large number of operators, so that it is difficult for consumers to identify the commercial origin of the products from a common surname.

As regards automatic vending machines (included in class 9), the Registry recognised that this is a rather more specialised sector, in which fewer undertakings operate.

14. Nichols appealed against that decision by application of 14 February 2002, which came before the High Court of Justice of England and Wales, Chancery Division (which has jurisdiction at first instance in, among others, industrial property matters) under s 76(3) of the 1994 Act.

15. In his order for reference, Jacob J, after explaining the practice followed by the United Kingdom Trade Marks Registry regarding the registration of common surnames as trade marks, adds that the real question is whether a fairly common surname should be regarded as 'devoid of any distinctive character' unless and until it has acquired a distinctive character following use (see [2002] EWHC 1424 (ChD), [2003] RPC 16).

According to the judge himself, the problem associated with a frequently occurring surname lies in the fact that, until it has distinctiveness acquired by use, it does not really indicate goods as coming from a particular undertaking. That applies with greater force to services.

<sup>6</sup> Nice Agreement concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks (Nice, 15 June 1957; UKTS 71 (1970); Cmnd 3466), as revised and amended.

'Class 9

Vending machines; electrically-controlled automatic dispensers and token operated dispensers for food and drinks; parts and fittings for all the aforesaid goods.'

'Class 29

Milk and milk powders; preparations made with milk, ad-mixtures of milks, fats, starches and sugars for use in making beverages; dairy toppings; yoghurt and yoghurt drinks; desserts; flavoured extracts from juices made from fruit and vegetables.'

'Class 30

Coffee, tea, cocoa, drinking chocolate; coffee essence, coffee extracts, mixtures of coffee and chicory, all for use as substitutes for coffee; sugar, confectionery, edible ice, cakes and frozen foods; dessert toppings, and preparations for making desserts, drinks.'

'Class 32

Non-alcoholic drinks and preparations for making such drinks; soups and concentrates for making non-alcoholic drinks; fruit flavoured beverages; ice beverages.'

'Class 42

Restaurant, cafeteria and catering services.'

<sup>7</sup> See para 6 et seq, above.

a In that connection, a trade mark which has become established by use displays the notable feature of having already foreclosed the position for others of the same or a similar name.

He also points out that registration confers a monopoly not merely of use of the word as registered but also regarding similar words whenever there is a risk of confusion.

b 16. In the order for reference, the basis of assessment applied by the United Kingdom Trade Marks Registry is accounted for by the aim of obviating a monopoly for certain common names and variants thereof which might be misleading.

c 17. Common surnames as such, in the absence of use establishing them, are not capable of indicating that goods come from a particular undertaking. Their use to a sufficient extent over time presupposes that they have excluded others which are the same or similar.

d 18. The national court, rather than taking a purely theoretical approach, prefers to take a realistic view of the functioning of the registered trade mark system. Accordingly, he suggests that attention be paid to the risk of monopolisation deriving from the registration of a common surname to cover a wide range of goods or services. In view of that danger, the possibility, which is costly in terms of time and money, of challenging some of those indications on the ground of non-use, after the expiry of five years following registration, does not seem to be an effective remedy.

e For the same reasons, it is inappropriate to take account, when analysing the distinctiveness of a trade mark, of considerations concerning the limitation of its effects, even though that seems to be the approach adopted in para 37 of the *Baby-Dry* judgment<sup>8</sup>. In practice, favourable treatment is accorded to whoever has secured registration.

f 19. After considering those matters, the national court raises questions as to the impact of art 6(1) of the Trade Marks Directive on the assessment of the distinctiveness of surnames.

#### IV—THE QUESTIONS ON WHICH A PRELIMINARY RULING IS SOUGHT

g 20. In the course of the appeal before it, the High Court decided to stay the proceedings and seek a preliminary ruling from the Court of Justice on the following questions:

h (1) In what circumstances, if any, must a trade mark (ie a “sign” which complies with the requirements of Article 2 of the Trade Marks Directive 89/104/EC) consisting of a single surname be refused registration as being in itself “devoid of any distinctive character” within the meaning of Article 3(1)(b) of the Directive?

i (2) In particular (a) must or (b) may such a sign, before it has acquired distinctive character by use, be refused registration if it is a common surname in the Member State in which the trade mark is sought to be registered or if it is a common surname in one or more of the other Member States?

(3) If the answer to either Question 2(a) or (b) is in the affirmative, is it appropriate for national authorities to determine the matter by reference to the presumed expectations of an average customer in relation to the goods/services in question in the Member State, taking into account

<sup>8</sup> The *Procter & Gamble Co v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* Case C-383/99 P [2002] All ER (EC) 29, [2001] ECR I-6251.



the commonness of the surname, the nature of the goods/services at issue, and the prevalence (or otherwise) of the use of surnames in the relevant trade? a

(4) Is it of significance for the purpose of determining whether a surname is “devoid of any distinctive character” within Article 3(1)(b) of the Directive that the effects of registration of the trade mark are restricted under Article 6(1)(a)? b

(5) If so, (a) is the word “person” in Article 6(1)(a) of the Directive to be understood as including a corporation or a business and (b) what amounts to “honest practices in industrial or commercial matters”; in particular, does that expression apply where (i) the Defendant is not, in practice, deceiving the public by the use of his own name or (ii) the Defendant is merely causing unintentional confusion thereby? c

#### V—PROCEEDINGS BEFORE THE COURT OF JUSTICE

21. The order for reference was received at the Registry of the Court of Justice on 12 November 2002.

22. Submissions were lodged by the appellant in the main proceedings and also by the United Kingdom, Greek and French governments and by the Commission of the European Communities. d

23. At the hearing on 27 November 2003, the representatives of the above-mentioned governments and of the Commission presented oral argument. e

#### VI—OBSERVATIONS OF THE PARTIES

##### *The first three questions*

24. For Nichols, the appellant in the main proceedings, the United Kingdom Registry’s practice is not compatible with art 3(1) of the Trade Marks Directive. In its view, registration of a trade mark should never be refused solely because it uses a common surname, a criterion whose application by reference to a telephone directory in any event produces arbitrary results. f

25. The Greek and French governments agree that the commonness of a surname does not render it unsuitable for use as a trade mark. Its specific capacity to identify the products or services concerned should be assessed, in each case, from the standpoint of the relevant average consumer. g

26. The Commission is critical of the fact that, without any justification whatsoever, the United Kingdom Registry has adopted a method radically different from that generally used for assessing the potential capacity of a trade mark to distinguish goods or services.

27. For its part, the United Kingdom government maintains that a common surname does not possess the distinctive nature required by art 3(1)(b) of the Trade Marks Directive. That requirement is not satisfied by the fact that a mark is recognisable; it must also, in the eyes of an average consumer, be identifiable with, and actually identified with, the products and services of an undertaking. The United Kingdom Registry’s practice seeks to ensure that, as far as common surnames are concerned, only those capable of designating a commercial origin are registered. h  
i

##### *The fourth and fifth questions*

28. According to Nichols, it is necessary to take account of art 6(1)(a) of the Trade Marks Directive when analysing the distinctive character of a sign under

a art 3(1)(b). In addition, there is no reason for restricting its effect so as to benefit only natural persons. The term 'honest practices' should be construed as meaning 'bona fide use'.

29. For the Greek government, it is possible to use a business name in the context of art 6(1)(a) of the directive, provided that it comprises a person's name. For the rest, an assessment as to whether use is in good faith must take

b account of the conception of social ethics of the average well-advised person.  
30. All the other parties coincide in the view that assessment of the specific distinctive character of a trade mark should be separated from any assessment of the limitation of its effects. A negative reply to the fourth question would render the fifth question academic.

c VI—LEGAL ANALYSIS

*The first three questions*

31. Like most of the parties to the proceedings before this court, I also consider that the first three questions submitted by the United Kingdom court must be dealt with together. The essential issue is whether trade marks  
d consisting of a common surname are subject to specific conditions regarding their capacity to distinguish products or services, in particular when their specific distinctive character under art 3(1)(b) of the Trade Marks Directive is being appraised

32. It must first be observed that a surname fulfils the minimum requirements to constitute a trade mark under art 2 of the directive, since it is  
e capable of distinguishing the products or services of one undertaking from those of others.

Article 2 itself refers, in its non-exhaustive list<sup>9</sup>, to 'personal names'.

Moreover, surnames, including common ones, represent one of the categories of trade mark to which operators most frequently resort.

f Finally, the wording of art 6(1) gives the impression that the Community legislature was aware that surnames were suitable for registration as trade marks.

That statement of principle is, therefore, generally accepted.

33. It must also be borne in mind that surnames are not included in the list of marks given in art 3(1)(c) of the directive. They are not therefore, at first sight,  
g generic or descriptive signs for specific products or services. As I shall explain shortly, it follows from this fact that it is not possible, in relation to the differentiating capacity of the surname in question, to rely on considerations of a general nature with a view to ensuring their availability for the generality of operators.

34. The Commission states in its written observations that the practice  
h followed by the United Kingdom Registry in determining whether a surname is suitable for registration as a trade mark is at odds with that provided for in the directive, as interpreted by the Court of Justice.

i The United Kingdom Registry verifies whether the surname sought to be registered as a trade mark is common, for which purpose it customarily refers to the London telephone directory. When the result of its search is positive, it calculates the number of operators active in the relevant markets, so that registration is granted or refused depending on the resulting figure.

<sup>9</sup> As is apparent from its actual wording and from that of the seventh recital in the preamble to the Trade Marks Directive.

It has been suggested that that method is inappropriate since it involves setting an arbitrary threshold above which a surname is deemed to be common. It is not for this court to make value judgments concerning national legislation but rather to rule as to its compatibility with the Community rules. For my part, I recognise that any method used to identify the distinctiveness of a mark inevitably involves some degree of subjectivity. a

35. In this case, it seems clear that the method employed by the United Kingdom Registry differs from the approach preferred by the Court of Justice to date in assessing the distinctive character of a mark. However, no sufficient reasons have been put forward in favour of choosing another interpretative method. b

36. I agree with the majority of the parties that the question whether a surname, however common, may indicate the commercial origin of products and services must be analysed in relation to the specific market concerned. The fact that, in a given commercial sector, ordinary surnames are customarily used for identification of that kind, with certain possible consequences regarding the assessment of distinctiveness, cannot be transposed, without more, to any other sector<sup>10</sup>. Reference could be made, in the last resort, to specific particular features, linked to the peculiarities of the products or services designated, rather than to a special characteristic inherent in a category of marks<sup>11</sup>. c  
d

37. For the rest, there is nothing in the directive to justify treating surnames differently, since art 6(1)(a), the only provision specifically devoted to them, is concerned with limiting the protective effects of trade marks, and that is quite separate from the question of examining absolute grounds for refusal, as I shall have occasion to explain shortly. e

38. In those circumstances, any judgment as to the distinctiveness of a surname must observe the same guidelines as those applicable to other types of word marks.

39. According to the Court of Justice, for a trade mark to fulfil its principal task, it is sufficient if it enables the public to distinguish the product or the service which it designates from others which have another commercial origin, and to conclude that it was manufactured, marketed or rendered under the control of the proprietor of the trade mark, who accepts responsibility for its quality. In that respect, art 2 of the directive makes no distinction between different categories of marks, for which reason similar criteria must be used to assess their distinctiveness in all cases<sup>12</sup>. f  
g

40. The distinctive character must be analysed from the viewpoint of the average consumer of such types of products or services<sup>13</sup>, the consumer being deemed to be 'reasonably well informed and reasonably observant and circumspect'<sup>14</sup>.

41. In that context, it is necessary to take into account, for example, the particularity that, in certain sectors, common names or surnames are h

10 As appears to be the case—according to the view expressed by the United Kingdom government at the hearing—with regard to the supply of services such as those of the legal profession.

11 As, for example, in the case of three-dimensional forms deriving from the shape of the product.

12 See *Philips Electronics NV v Remington Consumer Products Ltd* Case C-299/99 [2002] All ER (EC) 634, [2002] ECR I-5475 (paras 47, 48). i

13 See *Windsurfing Chiemsee Produktions- und Vertriebs GmbH (WSC) v Boots- und Segelzubehör Walter Huber* Joined cases C-108/97 and C-109/97 [2000] Ch 523, [1999] ECR I-2779 (para 29).

14 See *Gut Springenheide GmbH v Oberkreisdirektor des Kreises Steinfurt—Amt für Lebensmittelüberwachung* Case C-210/96 [1998] ECR I-4657 (paras 30–32) and *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel BV* Case C-342/97 [1999] All ER (EC) 587, [1999] ECR I-3819 (para 26).



a assiduously used to designate a commercial origin, sometimes by way of trade mark. If that is the case, there is nothing to prevent the registration authorities from finding that the mark has no capacity to distinguish. Such a finding must be specific and must not be made in an all-embracing or abstract manner.

b 42. However, it is not possible, under art 3(1)(b) of the Trade Marks Directive, to take account of a general interest in order to make sure that certain very frequently occurring surnames are available to all present and potential operators.

c 43. As I have already stated<sup>15</sup>, the purpose of the absolute ground for refusal in that provision is to prohibit the registration of signs which are devoid of any real distinctive character, that is to say, those signs which the average consumer, who is reasonably well informed and reasonably observant and circumspect, does not identify as reliably indicating the commercial origin of the product. It is, of course, in the general interest to prevent certain operators from appropriating to themselves three-dimensional shapes which are useful from an aesthetic or technical point of view, or from monopolising certain signs apt to describe the product per se, its actual or supposed qualities and other characteristics, such as where it originates from. Subparagraphs (c) and (e) of art 3(1) of the Trade Marks Directive deal with those concerns.

d It is also appropriate to consider the similar general interest in keeping available, for use by all, signs which are customary in the current language or in the bona fide and established practices of the trade, which—under sub-para (d)—may not be registered.

e 44. However, it does not seem that extensive protection should be afforded to signs which, without being descriptive, are for other reasons devoid of any specific distinctive character. I do not believe that there is any general interest in maintaining in the public domain signs which are incapable of identifying the commercial origin of the goods or services which they designate.

f 45. Nor does the directive contain any provision to ensure that no relative advantage is granted to the first operator who applies for registration of a given surname.

g 46. Consequently, the potential distinctiveness of a surname depends on whether, in relation to the goods or services in respect of which registration is sought, the relevant consumer considers that the sign identifies those of one undertaking rather than those of another. The commonness of the surname is one of the factors which it is appropriate to take into consideration, once more in relation to certain goods or services, although it is not decisive.

#### *The fourth question*

h 47. By its fourth question, the national court wishes to determine whether, in order to ascertain, under art 3(1)(b) of the Trade Marks Directive, to what extent a sign comprising a surname is distinctive, it is appropriate to take account of the fact that the effects of registration of the trade mark are limited pursuant to art 6(1)(a).

i 48. The answer must be negative.

<sup>15</sup> Opinion in *Henkel KGaA v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* Joined cases C-456/01 P and C-457/01 P, *Procter & Gamble Co v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* Joined cases C-468–472/01 P, *Procter & Gamble Co v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* Joined cases C-473/01 P and C-474/01 P [2005] IP&T 1 (para 78 et seq).



49. Nothing in the directive requires a less rigorous examination for the purposes of classification, having regard to the existence of provisions restricting the effects of the trade mark.

50. Although, as indicated in the order for reference<sup>16</sup>, in specifying the legal basis for the reasoning concerning the distinctiveness of a word sign, the *Baby-Dry* judgment refers to art 12 of Regulation 40/94, which has the same wording as art 6 of the directive, that judgment does not draw any practical inference whatsoever from that reference.

51. I have had occasion to point out that there is nothing in art 12 of Regulation 40/94 to suggest that the task of assessing the descriptiveness of a trade mark should be transferred from the Office at the time of registration to the courts responsible for ensuring that the rights conferred by the mark are exercised in practice. Rather the opposite: the long list of obstacles to registration in arts 4 and 7, and the extensive system of appeals available in the event of a refusal to register, suggest that examination for the purposes of registration is intended to be more than summary in nature. Nor, moreover, do I believe that approach to be appropriate from the point of view of judicial policy since, in disputes where art 12 is relied on, the proprietor of the trade mark will always enjoy an advantage, as a result of the inertia created by general acceptance of the effect of official records, and because of the inherent difficulty of delimiting the descriptive from that which is not descriptive<sup>17</sup>.

52. The foregoing has been confirmed by the Court of Justice very clearly in its judgment in *Libertel Groep BV v Benelux-Merkenbureau*<sup>18</sup>, in which it considered that art 6 of the Trade Marks Directive concerns the limits on the effects of a Community trade mark once it has been registered. Furthermore, it stated that the consequence of a minimal review of the grounds for refusal at the time when the application for registration is considered, on the basis that the risk that certain operators might appropriate certain signs which, owing to their very nature, ought to remain available, is neutralised by the limitation mentioned above, is to withdraw the assessment of the grounds for refusal from the competent authority at the time when the mark is registered in order to transfer it to the courts with responsibility for ensuring that the rights conferred by the trade mark can be exercised in practice. That approach is incompatible with the scheme of the directive, which is founded on an analysis prior to registration, not on an ex post facto review. There is nothing in the directive to suggest that art 6 leads to such a conclusion. On the contrary, the number and the detailed nature of the obstacles to registration set out in arts 2 and 3, and the wide range of remedies available in the event of refusal, suggest that the examination carried out at the time when registration is applied for must not be brief, but must be stringent and thorough in order to prevent trade marks from being improperly registered<sup>19</sup>.

53. Those considerations, relating to art 6(1)(b) of the Trade Marks Directive (or art 12(1) of Regulation 40/94) can perfectly well be applied to sub-para (a). The basic idea is that the provisions on limitation of the effects of trade marks do not affect the type of review carried out when the judgment is made as to whether or not the marks are subject to absolute grounds of refusal.

<sup>16</sup> See para 16, above.

<sup>17</sup> See paras 85 and 86 of my opinion of 14 May 2002 in *DKV Deutsche Krankenversicherung AG v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* Case C-104/00 P [2002] ECR I-7561.

<sup>18</sup> Case C-104/01 [2004] IP&T 187, [2003] ECR I-3793.

<sup>19</sup> See paras 58, 59.

a 54. Consequently, the fact that the effects of a trade mark comprising a surname are restricted by virtue of art 6(1)(a) of the Trade Marks Directive has no impact whatsoever on the assessment of the distinctiveness of the mark in question under art 3(1)(b).

b *The fifth question*

55. The last question was submitted, as is apparent from the order for reference, only in the event of the previous question being answered in the affirmative. That not being the case, it need not be answered.

#### VII—CONCLUSION

c 56. In view of all the foregoing considerations, I propose that the Court of Justice give the following answers to the questions referred to it by the High Court of Justice (England and Wales), Chancery Division:

d (1) The distinctiveness, for the purposes of art 3(1) of First Council Directive (EEC) 89/104 (to approximate the laws of the member states relating to trade marks), of a sign comprising a surname depends on whether, in relation to the goods or services for which registration is sought, the relevant consumer considers that it identifies the goods and services of an undertaking as compared with those of others. The frequency of occurrence of the surname in question is one of the factors which may be taken into consideration, again in relation to certain goods or services, although it is not decisive.

e (2) The fact that the effects of a trade mark comprising a surname may be limited pursuant to art 6(1)(a) of the directive has no impact whatsoever on the appraisal of its distinctiveness under art 3(1)(b).

f 16 September 2004. **The COURT OF JUSTICE (Second Chamber)** delivered the following judgment.

1. This reference for a preliminary ruling concerns the interpretation of art 3(1)(b) and art 6(1)(a) of the First Council Directive (EEC) 89/104 (to approximate the laws of the member states relating to trade marks) (OJ 1989 L40 p 1).

g 2. The reference was made in the course of proceedings between Nichols plc (Nichols), a company incorporated in the United Kingdom, and the Registrar of Trade Marks concerning the latter's refusal to register a common surname as a trade mark for certain products.

#### LEGAL BACKGROUND

h 3. Article 2 of Directive 89/104, entitled 'Signs of which a trade mark may consist', is worded as follows:

i 'A trade mark may consist of any sign capable of being represented graphically, particularly words, including personal names, designs, letters, numerals, the shape of goods or of their packaging, provided that such signs are capable of distinguishing the goods or services of one undertaking from those of other undertakings.'

4. Article 3 of that directive, entitled 'Grounds for refusal or invalidity', provides:

'1. The following shall not be registered or if registered shall be liable to be declared invalid:

- (a) signs which cannot constitute a trade mark;
- (b) trade marks which are devoid of any distinctive character ...'

5. Article 6, entitled 'Limitation of the effects of a trade mark' states:

'1. The trade mark shall not entitle the proprietor to prohibit a third party from using, in the course of trade,

- (a) his own name or address ...

provided he uses them in accordance with honest practices in industrial or commercial matters.'

THE MAIN PROCEEDINGS AND THE QUESTIONS FOR THE COURT OF JUSTICE

6. Nichols applied to the Registrar of Trade Marks for registration of the surname 'Nichols' as a trade mark for products including vending machines, and food and drink of the kind typically dispensed through such machines.

7. By decision of 11 May 2001, the Registrar of Trade Marks granted that application in respect of vending machines, but refused it in respect of all other products.

8. He found that the surname 'Nichols', including its phonetic equivalent 'Nicholls' and its singular form 'Nichol', is common in the United Kingdom, given the number of times it appears in the London telephone directory.

9. With regard to food and drink, that surname is therefore not of itself capable of communicating the fact that such goods originate from one and the same undertaking. In view of the nature of the business involved and the potential size of the market for those goods, the surname 'Nichols' could be used by other manufacturers and providers. The public are therefore unlikely to consider that there is only one trader operating under that surname in the market. A mark in the form of that surname is therefore devoid of any distinctive character in respect of food and drink products.

10. On the other hand, the market for vending machines is more specialised, with fewer people trading in it. The mark can therefore be registered in respect of those goods.

11. Nichols appealed against that decision to the Chancery Division of the High Court of Justice of England and Wales.

12. That court states that the United Kingdom Trade Marks Registry takes the view that the registration of names, and particularly of common surnames, should be considered carefully to ensure that unfair advantage is not given to the first applicant for such a name. Broadly, the more common the surname, the less willing is the Registry to accept an application for registration without proof that that name has in fact become distinctive. The Trade Marks Registry also takes into account the number of goods and services, and the number of people with the same or a similar name, which might be affected by the registration.

13. The national court considers that the question arises whether a fairly common surname must be regarded as 'devoid of any distinctive character' until it has acquired a distinctive character through use.

14. It considers that it is proper to take account of the limitation of the effects of the mark which is provided for in art 6(1)(a) of Directive 89/104 and relates to a third party's use of its own name. In its view, the wider the potential limitation laid down in that provision, the less of an impost on the persons concerned the registration would be. It is therefore necessary to consider the extent to which the limitations laid down in art 6 of Directive 89/104 are relevant when considering the distinctive character of a mark of which registration is sought.



- a 15. In that regard, the national court raises the question whether art 6(1)(a) applies not only to the names of natural persons but also to company names. It is also uncertain as to the meaning of the expression 'honest practices' used in that provision.
- b 16. In those circumstances, the Chancery Division of the High Court of Justice of England and Wales ([2002] EWHC 1424 (ChD), [2003] RPC 16) stayed the proceedings pending a preliminary ruling from the Court of Justice on the following questions:
- c '(1) In what circumstances, if any, must a trade mark (ie a "sign" which complies with the requirements of Article 2 of the Trade Marks Directive 89/104/EC) consisting of a single surname be refused registration as being in itself "devoid of any distinctive character" within the meaning of Article 3(1)(b) of the Directive?
- d (2) In particular (a) must or (b) may such a sign, before it has acquired distinctive character by use, be refused registration if it is a common surname in the Member State in which the trade mark is sought to be registered or if it is a common surname in one or more of the other Member States?
- e (3) If the answer to either Question 2(a) or (b) is in the affirmative, is it appropriate for national authorities to determine the matter by reference to the presumed expectations of an average customer in relation to the goods/services in question in the Member State, taking into account the commonness of the surname, the nature of the goods/services at issue, and the prevalence (or otherwise) of the use of surnames in the relevant trade?
- f (4) Is it of significance for the purpose of determining whether a surname is "devoid of any distinctive character" within Article 3(1)(b) of the Directive that the effects of registration of the trade mark are restricted under Article 6(1)(a)?
- g (5) If so, (a) is the word "person" in Article 6(1) of the Directive to be understood as including a corporation or a business and (b) what amounts to "honest practices in industrial or commercial matters"; in particular, does that expression apply where (i) the Defendant is not, in practice, deceiving the public by the use of his own name or (ii) the Defendant is merely causing unintentional confusion thereby?

#### THE FIRST FOUR QUESTIONS

- h 17. By its first four questions, which it is appropriate to consider together, the national court seeks essentially to ascertain what conditions apply to the assessment, in the context of art 3(1)(b) of Directive 89/104, of the distinctiveness or otherwise of a trade mark constituted by a surname, particularly where that surname is common, and whether the fact that the effects of registration of the trade mark are limited pursuant to art 6(1)(a) of the same directive has an impact on that assessment.

#### i *Observations submitted to the court*

18. Nichols submits that registration of a trade mark cannot be refused solely on the ground that it is a common surname. It considers that the criterion used in the main proceedings of the number of occurrences of a surname in the London telephone book is arbitrary. Surnames cannot be subjected to special treatment which is more severe than that applied to other signs which are



capable of constituting a trade mark. Like all other signs, they should be registered if they enable the products or services for which registration is sought to be distinguished, according to their origin. In the assessment of distinctiveness, account should be taken of art 6(1)(a) of Directive 89/104. a

19. The Greek and French governments and the Commission of the European Communities also consider that surnames, even common ones, should be treated in the same way as other categories of signs, having regard to the products or services involved and the perception of the relevant public regarding the function of the trade mark as an indicator of origin. b

20. The United Kingdom government considers that it is highly unlikely that a common surname will denote only the goods or services of the undertaking that applies for registration of that surname as a trade mark. A trade mark which did not designate solely the products or services of a given undertaking could not be registered because it would not comply with art 3(1)(b) of Directive 89/104. In such a case, it would not serve to indicate origin. Account must be taken of the presumed expectations of an average consumer with regard to the trade mark. The factors to be taken into consideration might include the commonness of the surname, the number of undertakings supplying products or services of the type concerned and the prevalence or otherwise of the use of surnames in the relevant trade. c

21. The French and United Kingdom governments, and the Commission, consider that art 6(1)(a) of Directive 89/104 has no impact on the assessment of the distinctiveness carried out under art 3(1)(b) of the same directive. d

#### *Findings of the court*

22. Article 2 of Directive 89/104 contains a list, described as a 'list of examples' in the seventh recital in the preamble to that directive, of signs which may constitute a trade mark, provided that such signs are capable of distinguishing the goods or services of one undertaking from those of other undertakings, that is to say to fulfil the trade mark's function as an indicator of origin. That list expressly includes 'personal names'. e

23. According to art 3(1)(b) of Directive 89/104, the distinctive character of a mark must be assessed in relation to the goods or services in respect of which registration is applied for and in relation to the perception of the relevant consumers (see *Philips Electronics NV v Remington Consumer Products Ltd* Case C-299/99 [2002] All ER (EC) 634, [2002] ECR I-5475 (paras 59, 63) and *Henkel KGaA* Case C-218/01 (2003) Transcript (opinion), 14 January, (2004) Transcript (judgment), 12 February (para 50)). f

24. In that regard, the provision concerned draws no distinction between different categories of trade mark (see, to that effect, *Linde AG v Deutsches Patent- und Markenamt* Joined cases C-53/01 and C-55/01 [2004] IP&T 172, [2003] ECR I-3161 (para 42), and, regarding the identical provision in art 7(1)(b) of Council Regulation (EC) 40/94 (on the Community trade mark) (OJ 1994 L11 p 1), the order of 28 June 2004 in *Glaverbel SA v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* (OHIM) Case C-445/02 P (2004) Transcript (order), 28 June (para 21)). g

25. The criteria for assessment of the distinctive character of trade marks constituted by a personal name are therefore the same as those applicable to the other categories of trade mark. h

26. Stricter general criteria of assessment based, for example, on: a predetermined number of persons with the same name, above which that name may be regarded as devoid of distinctive character; the number of i

a undertakings providing products or services of the type covered by the application for registration; or the prevalence or otherwise of the use of surnames in the relevant trade, cannot be applied to such trade marks.

27. The distinctive character of a trade mark, in whatever category, must be the subject of a specific assessment.

b 28. In the context of that assessment, it may indeed appear, for example, that the perception of the relevant public is not necessarily the same for each of the categories and that, accordingly, it could prove more difficult to establish the distinctive character of trade marks in certain categories than that of those in other categories (see, in particular, the *Henkel* case (para 52), and, in relation to art 7(1)(b) of Regulation 40/94, *Procter & Gamble Co v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* Joined cases C-468–472/01 P (2003) Transcript (opinion), 6 November, (2004) Transcript (judgment), 29 April (para 36) and the order in the *Glaverbel* case (para 23)).

c 29. However, such greater difficulty as might be encountered in the specific assessment of the distinctive character of certain trade marks cannot justify the assumption that such marks are a priori devoid of distinctive character or cannot acquire such character through use, pursuant to art 3(3) of Directive 89/104.

d 30. In the same way as a term used in everyday language, a common surname may serve the trade mark function of indicating origin and therefore distinguish the products or services concerned where it is not subject to a ground of refusal of registration other than the one referred to in art 3(1)(b) of Directive 89/104, such as, for example, the generic or descriptive character of the mark or the existence of an earlier right.

e 31. The registration of a trade mark constituted by a surname cannot be refused in order to ensure that no advantage is afforded to the first applicant since Directive 89/104 contains no provision to that effect, regardless, moreover, of the category to which the trade mark whose registration is sought belongs.

f 32. In any event, the fact that art 6(1)(a) of Directive 89/104 enables third parties to use their name in the course of trade has no impact on the assessment of the distinctiveness of the trade mark, which is carried out under art 3(1)(b) of the same directive.

g 33. Article 6(1)(a) of Directive 89/104 limits in a general way, for the benefit of operators who have a name identical or similar to the registered mark, the right granted by the mark after its registration, that is to say after the existence of the mark's distinctive character has been established. It cannot therefore be taken into account for the purposes of the specific assessment of the distinctive character of the trade mark before the trade mark is registered.

h 34. The answer to the first four questions must therefore be that, in the context of art 3(1)(b) of Directive 89/104, the assessment of the existence or otherwise of the distinctive character of a trade mark constituted by a surname, even a common one, must be carried out specifically, in accordance with the criteria applicable to any sign covered by art 2 of the said directive, in relation, first, to the products or services in respect of which registration is applied for and, second, to the perception of the relevant consumers. The fact that the effects of registration of the trade mark are limited by virtue of art 6(1)(a) of that directive has no impact on that assessment.

i

## THE FIFTH QUESTION

35. An answer to the fifth question was sought only in the event of a positive answer being given to the fourth question. Since the fourth question has been answered in the negative, there is no need to answer the fifth. a

## COSTS

36. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. The costs incurred in submitting observations to the court, other than the costs of those parties, are not recoverable. b

On those grounds, the Court of Justice (Second Chamber), rules as follows:

In the context of art 3(1)(b) of the First Council Directive (EEC) 89/104 (to approximate the laws of the member states relating to trade marks), the assessment of the existence or otherwise of the distinctive character of a trade mark constituted by a surname, even a common one, must be carried out specifically, in accordance with the criteria applicable to any sign covered by art 2 of that directive, in relation, first, to the products or services in respect of which registration is applied for and, second, to the perception of the relevant consumers. The fact that the effects of registration of the trade mark are limited by virtue of art 6(1)(a) of that directive has no impact on that assessment. c  
d

*a* **Koninklijke KPN Nederland NV v  
Benelux-Merkenbureau**  
(Case C-363/99)

*b* COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES (SIXTH CHAMBER)  
JUDGES SKOURIS (ACTING FOR THE PRESIDENT OF THE SIXTH CHAMBER),  
GULMANN, CUNHA RODRIGUES, SCHINTGEN AND MACKEN (RAPPORTEUR)  
ADVOCATE GENERAL RUIZ-JARABO COLOMER

*c* 15 NOVEMBER 2001, 31 JANUARY 2002, 12 FEBRUARY 2004

*e* *European Community – Trade marks – Community trade mark – Registration – Absolute grounds of refusal to register – Distinctive character – Composite words marks – Whether all relevant facts and circumstances to be taken into account – Postkantoor – Whether registration of mark on the basis of not possessing a particular characteristic possible – Council Directive (EEC) 89/104, art 3.*

*d* The Regional Court of Appeal, The Hague, referred to the Court of Justice of the European Communities for a preliminary ruling pursuant to art 234 EC (formerly art 177 of the EC Treaty) nine questions on the interpretation of arts 2<sup>a</sup> and 3<sup>b</sup> of First Council Directive (EEC) 89/104 (to approximate the laws of the member states relating to trade marks). Those questions arose in proceedings between KPN and the Benelux Trade Mark Office (BTMO) concerning the latter's refusal to register as a trade mark the sign 'Postkantoor' applied for by KPN for various goods and services, including paper, advertising, insurance, postage stamps, telecommunications and technical information and advice. The word 'Postkantoor' may be translated as 'post office'. The BTMO refused registration on the basis that it possessed no distinctive character as provided for in art 6a(i)(a)<sup>c</sup> of the Uniform Benelux Law on Trademarks.

*g* **Held** – (1) Article 3 of Directive 89/104 was to be interpreted as meaning that a trade mark registration authority had to have regard, in addition to the mark as filed, to all the relevant facts and circumstances, before adopting a final decision on an application to register a trade mark. A court asked to review a decision on an application to register a trade mark also had to have regard to all the relevant facts and circumstances, subject to the limits on the exercise of its powers as defined by the relevant national legislation (see judgment paras 29, 36, 37, below).

*h* (2) The fact that a trade mark had been registered in a member state in respect of certain goods or services had no bearing on the examination by the trade mark registration authority of another member state of an application for registration of a similar mark in respect of goods or services similar to those in respect of which the first mark was registered. It was for the competent authority to have regard to the characteristics peculiar to the mark for which registration is sought and the goods or services in respect of which it was sought (see judgment paras 42–44, below).

*a* Article 2 is set out at judgment para 7, below

*b* Article 3, so far as material, is set out at judgment para 8, below

*c* Article 6a is set out at judgment para 11, below



(3) Article 3(1)(c) precluded registration of a trade mark which consisted exclusively of signs or indications which might serve, in trade, to designate characteristics of the goods or services in respect of which registration was sought, and that was the case even when there were more usual signs or indications for designating the same characteristics and regardless of the number of competitors who might have an interest in using the signs or indications of which the mark consisted. Where the applicable national law provided that the exclusive right conferred by registration, by a competent authority in an area in which a number of officially recognised languages coexisted, of a word mark expressed in one of those languages extended automatically to its translation in the other languages, the authority had to ascertain as regards each of those translations whether the mark actually consisted exclusively of signs or indications which might serve, in trade, to designate characteristics of those goods or services (see judgment paras 53–61, below).

(4) Article 3(1) of the directive had to be interpreted as meaning that a mark which was descriptive of the characteristics of certain goods or services, but not of those of other goods or services for the purposes of art 3 could not be regarded as necessarily having distinctive character in relation to those other goods or services for the purposes of sub-para (b) of the provision. It was of no relevance that a mark was descriptive of the characteristics of certain goods or services under art 3(1)(c) of the directive when it came to assessing whether the same mark had distinctive character in relation to other goods or services for the purposes of art 3(1)(b) of the directive (see judgment paras 67–70, 74–76, 79, below).

(5) Article 3(1)(c) had to be interpreted as meaning that a mark consisting of a word composed of elements, each of which was descriptive of characteristics of the goods or services in respect of which registration was sought, was itself descriptive of the characteristics of those goods or services for the purposes of that provision, unless there was a perceptible difference between the word and the mere sum of its parts: that assumed either that because of the unusual nature of the combination in relation to the goods or services the word created an impression which was sufficiently far removed from that produced by the mere combination of meanings lent by the elements of which it was composed, with the result that the word was more than the sum of its parts, or that the word had become part of everyday language and had acquired its own meaning, with the result that it was now independent of its components. In the latter case, it was necessary to ascertain whether a word which had acquired its own meaning was not itself descriptive for the purposes of the same provision. For the purposes of determining whether art 3(1)(c) applied to such a mark, it was irrelevant whether or not there were synonyms capable of designating the same characteristics of the goods or services mentioned in the application for registration or that the characteristics of the goods or services which might be the subject of the description were commercially essential or merely ancillary (see judgment paras 93, 95, 97–100, 104, below).

(6) Directive 89/104 prevented a trade mark registration authority from registering a mark for certain goods or services on condition that they did not possess a particular characteristic. Such a practice would lead to legal uncertainty as to the extent of the protection afforded by the mark. Third parties—particularly competitors—would not, as a general rule, be aware that for given goods or services the protection conferred by the mark did not extend to those products or services having a particular characteristic, and might be

a led to refrain from using the signs or indications of which the mark consisted and which were descriptive of that characteristic for the purpose of describing their own goods (see judgment paras 112, 114, 115, 117, below).

(7) The practice of a trade mark registration authority which concentrated solely on refusing to register manifestly inadmissible marks was incompatible with art 3 of the directive (see judgment paras 122, 123, 125, 126, below).

b

### Notes

For lack of distinctive character, see 48 *Halsbury's Laws* (4th edn) (2000 reissue) para 210.

### c Cases cited

*Bayerische Motorenwerke AG (BMW) v Deenik* Case C-63/97 [1999] All ER (EC) 235, [1999] ECR I-905, ECJ.

*Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc (formerly Pathe Communications Corp)* Case C-39/97 [1998] All ER (EC) 934, [1998] ECR I-5507, ECJ.

d *Gut Springenheide GmbH v Oberkreisdirektor des Kreises Steinfurt—Amt für Lebensmittelüberwachung* Case C-210/96 [1998] ECR I-4657, ECJ.

*Libertel Groep BV v Benelux Merkenbureau* Case C-104/01 [2004] IP&T 187, [2004] 2 WLR 1081, [2003] ECR I-3793, ECJ.

*Linde AG v Deutsches Patent- und Markenamt* Joined cases C-53–55/01 [2004] IP&T 172, [2003] ECR I-3161, ECJ.

e *Loendersloot (t/a F Loendersloot Internationale Expeditie) v George Ballantine & Son Ltd* Case C-349/95 [1997] ECR I-6227, ECJ.

*Merz & Krell GmbH & Co v Deutsches Patent- und Markenamt* Case C-517/99 [2002] All ER (EC) 441, [2001] ECR I-6959, ECJ.

*Parfums Christian Dior SA v Evora BV* Case C-337/95 [1997] ECR I-6013, ECJ.

f *Philips Electronics NV v Remington Consumer Products Ltd* Case C-299/99 [2002] All ER (EC) 634, [2003] Ch 159, [2003] 2 WLR 294, [2002] ECR I-5475, ECJ.

*SABEL BV v Puma AG, Rudolf Dassler Sport* Case C-251/95 [1997] ECR I-6191, ECJ.

*SA CNL-SUCAL NV v HAG GF AG* Case C-10/89 [1990] ECR I-3711, ECJ.

*Shield Mark BV v Kist (t/a Memex)* Case C-283/01 [2004] All ER (EC) 277, [2004]

g 2 WLR 1117, ECJ.

*Sieckmann v Deutsches Patent- und Markenamt* Case C-273/00 [2004] All ER (EC) 253, [2003] Ch 487, [2003] 3 WLR 424, [2002] ECR I-11737, ECJ.

*The Procter & Gamble Co v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* Case C-383/99 P [2002] All ER (EC) 29, [2002] Ch 82, [2002] 2 WLR 485, [2001] ECR I-6251, ECJ.

h *Windsurfing Chiemsee Produktions- und Vertriebs GmbH (WSC) v Boots- und Segelzubehör Walter Huber* Joined cases C-108/97 and C-109/97 [2000] Ch 523, [2000] 2 WLR 205, [1999] ECR I-2779, ECJ.

*Wm Wrigley Jr Co v Office of Harmonisation in the Internal Market (Trade Marks and Designs)* Case C-191/01 P [2004] All ER (EC) 1040, ECJ.

i

### Reference

By judgment of 3 June 1999, received at the Court of Justice of the European Communities on 1 October 1999, the *Gerechtshof te 's-Gravenhage* (Regional Court of Appeal, The Hague) referred to the court for a preliminary ruling pursuant to art 234 EC (formerly art 177 of the EC Treaty) nine questions (set

out at judgment para 18, below) on the interpretation of arts 2 and 3 of First Council Directive (EEC) 89/104 (to approximate the laws of the member states relating to trade marks) (OJ 1989 L40 p 1). Those questions were raised in proceedings between Koninklijke KPN Nederland NV (KPN) and the Benelux Merkenbureau (Benelux Trademark Office; the BTMO) concerning the latter's refusal to register as a trade mark the sign Postkantoor applied for by KPN for various goods and services. Written observations were submitted on behalf of: Koninklijke KPN Nederland NV, by K Limperg and T Cohen Jehoram, Advocaten; the Benelux-Merkenbureau, by JH Spoor and L De Gryse, Advocaten; the Commission of the European Communities, by K Banks and HMH Speyart, acting as agents. Oral observations were submitted by Koninklijke KPN Nederland NV, the Benelux-Merkenbureau and the Commission. The language of the case was Dutch. The facts are set out in the opinion of the Advocate General.

31 January 2002. **The Advocate General (D Ruiz-Jarabo Colomer)** delivered the following opinion<sup>1</sup>.

1. By order of 3 June 1999, the Gerechtshof te 's-Gravenhage (Regional Court of Appeal, The Hague, Netherlands) referred to the Court of Justice of the European Communities ten questions<sup>2</sup> concerning the interpretation of arts 2 and 3 of First Council Directive (EEC) 89/104 (to approximate the laws of the member states relating to trade marks) (the Trade Marks Directive)<sup>3</sup>.

#### I—THE FACTS AND THE MAIN PROCEEDINGS

2. On 2 April 1997, Koninklijke KPN Nederland NV (KPN) lodged with the Benelux Trade Marks Office (the Benelux-Merkenbureau; 'Merkenbureau') an application for registration of 'Postkantoor' as a word sign for paper, card and products manufactured therefrom<sup>4</sup>, and a wide variety of services<sup>5</sup>. In Dutch, 'postkantoor' means 'post office'.

3. On 16 June 1997, the Merkenbureau informed KPN that it was provisionally refusing registration because the sign applied for did not have distinctive character, since it merely described the goods and services it was intended to identify.

4. KPN raised objections to the provisional refusal of the application and requested either that the refusal be withdrawn or that consultations be initiated with a view to disclaiming the protection afforded by the mark for the products and services which the sign described. The Merkenbureau saw no reason to review its decision and, by letter of 28 January 1998, it notified KPN that its decision to refuse the application was now final.

5. KPN brought an action forthwith before the Gerechtshof, seeking an order requiring the Merkenbureau to register the sign in respect of all the classes applied for or, at any rate, in respect of such classes as the court might determine in its judgment.

<sup>1</sup> Original language: Spanish.

<sup>2</sup> By the same order, the Gerechtshof refers a further 15 questions to the Benelux Court of Justice.

<sup>3</sup> OJ 1989 L40 p 1.

<sup>4</sup> Class 16 under the Nice Agreement of 15 June 1957 concerning the international classification of goods and services for the purposes of registration of marks, as revised and amended.

<sup>5</sup> Included in classes 35, 36, 37, 38, 39, 41 and 42.



- a     6. By an interim decision dated 3 December 1998, the Gerechtshof notified the parties that it would be appropriate to refer to the Court of Justice, and to the Benelux Court, a number of questions concerning the interpretation of the Trade Marks Directive and the Uniform Benelux Law on trade marks (the Uniform Law)<sup>6</sup>. Finally, by order of 3 June 1999, the Gerechtshof stayed the proceedings and referred those questions, on which it had sought the views of the parties, to both courts.

## II—THE QUESTIONS REFERRED FOR A PRELIMINARY RULING

7. The questions which the Gerechtshof has referred to the Court of Justice are worded as follows:

- c     ‘IV.(a) Must the Benelux Trademarks Office, which under the Protocol of 2 December 1992 amending the Uniform Benelux Law on Trademarks (Trb 1993, 12) is responsible for the assessment of the absolute grounds for refusal to register a trademark laid down in Article 3(1) in conjunction with Article 2 of First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trademarks (OJ 1989 L40, p 1) have regard not only to the sign as it appears in the application for registration but also to all the relevant facts and circumstances known to it, including those of which it was informed by the applicant (for example, the fact that, prior to the application, the applicant already used the sign widely as a trademark for the relevant products, or the fact that investigation shows that use of the sign for the goods and/or services mentioned in the application will not be of such a nature as to deceive the public)? ...

- e     V. Does the reply to the [first] question ... also apply to consideration by the Benelux Trademarks Office of the question whether its objections to registration of the application have been removed by the applicant, as well as to its decision to refuse registration in whole or in part, as provided for in Article 6a(4) of the UBL?<sup>7</sup>

- f     VI. Does the reply to Question IV(a) and (b) also apply to the judicial review to which Article 6b of the UBL refers? ...

- g     IX. In the light of the provisions of Article 6 quinquies (B)(2) of the Paris Convention, do the marks which under Article 3(1)(c) of the directive are not to be registered or, if registered, may be declared invalid, also include marks composed of signs or indications which may serve, in trade, to indicate the kind, quality, quantity, intended purpose, value, geographical origin or the time of production of the goods or of rendering of service or other characteristics of the goods or services, even if that configuration is not the (only or most) usual indication used? Does it make any difference in that connection whether there are many or only a few competitors who may have an interest in using such indications (see the judgment of the Benelux Court of Justice of 19 January 1981, NJ 1981, 294, in *P Ferrero & Co SpA v Alfred Ritter Schokoladefabrik GmbH (Kinder)*)?

- h     Is it also relevant that under Article 13C of the UBL the right to a trademark expressed in one of the national or regional languages of the Benelux area extends automatically to its translation in another of those languages? ...

6 Uniform Benelux Law on trade marks of 19 March 1962, as amended (Nederlands Traktatenblad 1962, No 58, pp 11–39, and 1983, No 187, pp 2–10).

7 The Uniform Benelux Law on trade marks.



X.(a) In the assessment of the question whether a sign consisting of a (new) word made up of components which in themselves have no distinctive character with regard to the goods or services in respect of which the application is made answers the description given in Article 2 of the directive (and Article 1 of the UBL) of a mark, must a (new) word of that kind be taken to have in principle a distinctive character? a

X.(b) If not, must a word of that kind (leaving aside the fact that it may have acquired distinctive character through use, "inburgering") be taken to have in principle no distinctive character, it being otherwise only where, because of other circumstances, the combination is more than the sum of its parts? b

Is it relevant in that connection whether the sign is the only or an obvious term for indicating the relevant quality or (combination of) qualities, or whether there are synonyms which may reasonably also be used, or that the word indicates a commercially essential or rather an incidental quality of the product or service? c

Is it also relevant that, under Article 13C of the UBL, the right to a trademark expressed in one of the national or regional languages of the Benelux area extends automatically to its translation in another of those languages? ... d

XI. Does the mere fact that a descriptive sign is also lodged for registration as a mark for goods and/or services of which the sign is not descriptive warrant the conclusion that the sign thereby has distinctive character in relation to those goods and/or services (for example, the sign "Postkantoor" for furniture)? e

If not, in order to determine whether such a descriptive sign has distinctive character for such goods and/or services, must regard be had to the possibility that, in the light of its descriptive meaning or meanings, (a part of) the public will not perceive that sign as a distinctive sign for (all or some of) those goods or services? f

XII. In the assessment of the abovementioned questions, is significance to be attached to the fact that, since the Benelux countries have chosen to have applications for registration of trademarks examined by the Benelux Trademarks Office as a requirement prior to registration, the appraisal policy of the Office under Article 6a of the UBL, according to the common commentary of the Governments, "must be a cautious and restrained one whereby all concerns of commercial life must be taken into account and efforts must be focused on establishing solely which applications are manifestly inadmissible and rectifying or refusing them"? If so, under what rules does it fall to be determined whether an application is "manifestly inadmissible"? g

It is assumed that in invalidity proceedings (which may be initiated after registration of a sign) it is not necessary, in addition to reliance on the nullity of the sign lodged as a mark, for the sign to be "manifestly inadmissible". h

XIII. (a) Is it consistent with the scheme of the directive and the Paris Convention for a sign to be registered for specific goods or services subject to the limitation that the registration applies only to those goods and services in so far as they do not possess a specific quality or specific qualities (for example, registration of the sign "Postkantoor" for the services of direct-mail campaigns and the issue of postage stamps "provided they are not connected with a post office")? ... i

- a XVI. Is it also material to the answer to be given to the questions whether a corresponding sign for similar goods or services is registered as a trademark in another Member State?

### III—THE LEGAL FRAMEWORK

b 1—*The international protection of trade marks*

8. Trade marks, like other forms of industrial property, have long enjoyed extensive international protection, which was initiated by the Paris Convention for the Protection of Industrial Property (the Paris Convention) of 20 March 1883<sup>8</sup>, to which all the member states are signatories<sup>9</sup>.

- c 9. As I pointed out in a previous opinion, the first provision of the convention establishes the Union for the protection of industrial property (art 1(1)), known as the Union of Paris. The Paris Convention constitutes a point of reference, which the laws of the signatory states and the agreements and treaties entered into by those states between themselves must respect (arts 25 and 19)<sup>10</sup>.

- d 10. The substantive provisions of the Paris Convention, which regulate the international protection of the different forms of industrial property (arts 1 to 11), contain a notable number of articles providing for the protection of trade marks, including art 6quinquies(B), pursuant to which:

‘Trademarks covered by this Article may be neither denied registration nor invalidated except in the following cases ...

- e 2. when they are devoid of any distinctive character, or consist exclusively of signs or indications which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, place of origin, of the goods, or the time of production, or have become customary in the current language or in the bona fide and established practices of the trade of the country where protection is claimed ...’

- f 11. Article 6quinquies(C)(1) of the convention provides that:

‘In determining whether a mark is eligible for protection, all the factual circumstances must be taken into consideration, particularly the length of time the mark has been in use.’

g 2—*Trade marks in Community law*

A—*The Treaty establishing the European Community*

12. Article 30 EC (formerly art 36 of the EC Treaty) provides:

‘The provisions of Articles 28 and 29 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of ... the protection of industrial and commercial property. Such

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8 As regards trade marks (UN Treaty Series No 11851 vol 828 pp 305–388), the convention was extended by the two Madrid Agreements of 1891, one concerning the repression of false and deceptive indications of source on goods and the other concerning the international registration of marks; by the Trade Mark Law Treaty of 1994; and by the Nice Agreement, cited in footnote 4.

i 9 The Netherlands has been a state party to the Convention since 7 July 1884.

10 See the opinion of 18 January 2001 in *Merz & Krell GmbH & Co v Deutsches Patent- und Markenamt* Case C-517/99 [2002] All ER (EC) 441, [2001] ECR I-6959, and in particular point 6 thereof. Article 2(1) of the Agreement on Trade-Related Aspects of Intellectual Property Rights, annexed to the Agreement establishing the World Trade Organisation (Marrakesh, 15 April 1994; TS 12 (1996); Cm 3045) (OJ 1994 L336 pp 214 to 223), provides that, in respect of, inter alia, trade marks, member states shall comply with arts 1 to 12, and art 19, of the Paris Convention.

prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.’ a

*B—The Trade Marks Directive*

13. With a view to the establishment and functioning of the internal market, the Trade Marks Directive is aimed at approximating the laws of the member states relating to trade marks. However, it is only aimed at partial approximation, meaning that the role of the Community legislature is limited to trade marks acquired by registration, leaving member states free to fix the provisions of procedure concerning the registration, revocation and invalidity of trade marks so acquired<sup>11</sup>. b

14. Article 2 sets out the signs of which a trade mark may consist: c

‘A trade mark may consist of any sign capable of being represented graphically, particularly words, including personal names, designs, letters, numerals, the shape of goods or of their packaging, provided that such signs are capable of distinguishing the goods or services of one undertaking from those of other undertakings.’ d

15. Article 3 of the Trade Marks Directive lists the cases in which a trade mark registration may be refused or, where appropriate, declared invalid:

‘1. The following shall not be registered or if registered shall be liable to be declared invalid—(a) signs which cannot constitute a trade mark; (b) trade marks which are devoid of any distinctive character; (c) trade marks which consist exclusively of signs or indications which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, geographical origin, or the time of production of the goods or of rendering of the service, or other characteristics of the goods or service; (d) trade marks which consist exclusively of signs or indications which have become customary in the current language or in the bona fide and established practices of the trade ...’ e

3. A trade mark shall not be refused registration or be declared invalid in accordance with paragraph 1(b), (c) or (d) if, before the date of application for registration and following the use which has been made of it, it has acquired a distinctive character. Any Member State may in addition provide that this provision shall also apply where the distinctive character was acquired after the date of application for registration or after the date of registration.’ f

16. Article 5 governs the rights of the proprietors of trade marks in the following manner: g

‘1. The registered trade mark shall confer on the proprietor exclusive rights therein. The proprietor shall be entitled to prevent all third parties not having his consent from using in the course of trade—(a) any sign which is identical with the trade mark in relation to goods or services which are identical with those for which the trade mark is registered; (b) any sign where, because of its identity with, or similarity to, the trade mark and the identity or similarity of the goods or services covered by the trade h

<sup>11</sup> See the first, third, fourth and fifth recitals in the preamble to, and art 1 of, the Trade Marks Directive. i



a mark and the sign, there exists a likelihood of confusion on the part of the public, which includes the likelihood of association between the sign and the trade mark.

2. Any Member State may also provide that the proprietor shall be entitled to prevent all third parties not having his consent from using in the course of trade any sign which is identical with, or similar to, the trade mark in relation to goods or services which are not similar to those for which the trade mark is registered, where the latter has a reputation in the Member State and where use of that sign without due cause takes unfair advantage of, or is detrimental to, the distinctive character or the repute of the trade mark ...'

c 17. Article 6 limits the rights conferred by ownership of a trade mark, stipulating that:

'1. The trade mark shall not entitle the proprietor to prohibit a third party from using, in the course of trade ... (b) indications concerning the kind, quality, quantity, intended purpose, value, geographical origin, the time of production of goods or of rendering of the service, or other characteristics of goods or services ...'

### C—*The Community trade mark regulation*

e 18. On 20 December 1993, the Council adopted Council Regulation (EC) 40/94 (on the Community trade mark) (the Trade Marks Regulation)<sup>12</sup>, in order, as I pointed out in the opinion referred to above, that the internal market could enjoy conditions similar to those in a national market and, in particular, conditions which, from a legal perspective, 'enable undertakings to adapt their activities to the scale of the Community, whether in manufacturing and distributing goods or in providing services'<sup>13</sup>. The aim was to create 'trade marks ... which are governed by a uniform Community law directly applicable in all Member States'<sup>14</sup>. This aim is to be pursued but does not purport to replace the laws of the member states on trade marks<sup>15</sup>.

f 19. The Trade Marks Regulation adopts the same approach as and uses identical wording to the Trade Marks Directive, in that it lists the signs of which a Community trade mark may consist (art 4) and then goes on to set out the grounds for refusal of registration (arts 7 and 8). Like the directive, it stipulates the rights conferred by a Community trade mark (art 9) and the limitations of the effects of such a trade mark (art 12).

### 3—*Trade marks in the Benelux Economic Union*

h 20. With the aim of promoting the free movement of goods between their respective territories, the three member states of the Benelux Economic Union signed a convention on trade marks on 19 March 1962<sup>16</sup>, under which they were each required to transpose into their national legal systems the accompanying Uniform Law.

i 21. The convention, which entered into force on 1 July 1969, created a new administrative body, the Benelux-Merkenbureau, which is situated in the

12 OJ 1994 L11 p 1.

13 First recital in the preamble to the regulation.

14 Third recital in the preamble.

15 Fifth recital in the preamble.

16 *Nederlands Traktatenblad* 1962, No 58, pp 1 to 9.



Hague and is responsible for enforcing the Uniform Law and its implementing provisions. The courts of the three Benelux states are responsible for interpreting the legislation, and the Benelux Court has jurisdiction to give preliminary rulings<sup>17</sup>. a

22. With a view to transposing the Trade Marks Directive into Benelux law, and to supplementing it with the relevant provisions governing the Community trade mark, on 2 December 1992, Belgium, Luxembourg and the Netherlands signed a protocol aimed at amending the Uniform Benelux Law<sup>18</sup>. Under art 8, the protocol and the amendments it inserted into the Uniform Law entered into force on 1 January 1996. b

23. The final paragraph of point I(6) of the common commentary of the governments in question regarding the protocol states that: c

‘the appraisal policy of the Benelux-Merkenbureau ... must be a cautious and restrained one, which takes account of all commercial concerns and is focused on rectifying or refusing evidently inadmissible applications. Needless to say, the examination must remain within the boundaries laid down in Benelux case law, in particular that of the Benelux Court.’ d

24. In accordance with art 1 of the Uniform Benelux Law:

‘The following may be registered as individual marks: names, designs, imprints, stamps, letters, numerals, the shape of goods or their packaging, and any other signs which serve to distinguish the goods of an undertaking. e

However, shapes which result from the nature of the goods themselves, or which affect the substantial value of the goods, or which give rise to a technical result may not be registered as trade marks.’

25. Article 6a provides:

‘1. The Benelux-Merkenbureau shall refuse registration where, in its view: (a) the sign applied for does not satisfy the description in Article 1 of a mark, in particular where it is devoid of any distinctive character within the meaning of Article 6 quinquies (B)(2) of the Paris Convention ... f

2. Refusal of registration must relate to the whole of a sign constituting a mark. It may be limited to one or more of the goods for which the mark is intended. g

3. The Benelux Trade Mark Office shall inform the applicant forthwith in writing of its intention to refuse registration wholly or in part, stating the reasons therefor, and shall afford the applicant the possibility of replying within such period as may be laid down in the implementing regulations. g

4. If the objections of the Benelux Trade Mark Office to registration are not lifted within the period laid down, registration shall be refused in whole or in part. The office shall forthwith inform the applicant in writing of such refusal, stating the reasons therefor and informing him of his right of action against the decision under Article 6b.’ h

17 See art 10. Established by a treaty dated 31 March 1965 and inaugurated on 1 January 1974, the judicial role fulfilled by the Benelux Court of Justice is the same as that which is assigned to the Court of Justice of the European Communities at a Community level; namely, the interpretation of provisions of uniform Benelux law by means of replies to questions referred for preliminary rulings by the three member states. Advocate General Jacobs remarked on this similarity of roles in the opinion he delivered on 29 April 1997 in *Parfums Christian Dior SA v Evora BV* Case C-337/95 [1997] ECR I-6013 (paras 13, 26). i

18 *Nederlands Traktatenblad* 1993, No 12, pp 1 to 12.

a 26. Article 6b provides that:

‘Within two months of the notification mentioned in Article 6a(4), the applicant may apply to the Hof van Beroep [Court of Appeal] te Brussel, the Gerechtshof te ‘s-Gravenhage, or the Cour d’appel [Court of Appeal] de Luxembourg for an order for registration.’

b 27. Article 13C provides that the exclusive right to a trade mark expressed in one of the national or regional languages of the Benelux territory ‘extends to its translation in another of those languages’.

#### IV—ANALYSIS OF THE QUESTIONS REFERRED FOR A PRELIMINARY RULING

c 1—Introduction

28. It is worrying that a court of recognised competence should harbour so many doubts concerning the application of Community trade mark provisions. There appears to be a significant distortion within the system, since it is difficult to believe that the work of the European Union legislature could be so lacking in this area, or that those who are responsible for its implementation should fail to understand their role. Regardless of the reason, the Court of Justice is required to supplement and facilitate the work of others within the interpretative role conferred on it under art 234 EC (formerly art 177 of the EC Treaty).

2—Criteria for interpretation

e 29. In the opinion I delivered in the *Merz & Krell* case I noted the special structure of Community trade mark law<sup>19</sup>, which, rather like an onion, is made up of different layers which sit one on top of the other. The first, purely internal, layer corresponds to the Community Trade Marks Regulation. The second comprises the laws of the member states, which have been harmonised pursuant to the Trade Marks Directive. The third and final layer consists of the international trade mark obligations entered into by all the member states.

f 30. The present case sees the insertion of another layer between the last two, which corresponds to the uniform Benelux legislation on this type of industrial property. The three member states of that economic association unified their respective trade mark laws, but, in addition, they harmonised those same laws with the laws of the other member states of the European Union by adapting the Uniform Law to the Trade Marks Directive, and naturally they did so in compliance with their commitments under the Paris Convention.

g 31. Therefore, the court is required to provide an integrated interpretation of the provisions of the Trade Marks Directive referred to in the Gerechtshof’s questions, and in doing so the court must have regard to the whole body of Community trade mark law.

h 32. When performing that task, it is important not to lose sight of the *raison d’être* of trade mark law, which is to guarantee the identity of the origin of the product or service identified by the sign to the consumer or end-user, by enabling him to distinguish that product or service from products or services having a different origin, thereby contributing to the establishment of a genuine system of competition in the internal market<sup>20</sup>. In order to achieve

19 See points 23 to 29 of that opinion.

20 See the judgments in *SA CNL-SUCAL NV v HAG GF AG* Case C-10/89 [1990] ECR I-3711 (para 14) (the *HAG II* case), and in *Loendersloot (t/a F Loendersloot Internationale Expeditie) v George Ballantine & Son Ltd* Case C-349/95 [1997] ECR I-6227 (para 24).

that goal, the trade mark owner is granted an assortment of rights and powers which must be considered in the light of the latter objective. The rights of advantage which ownership of a trade mark confers on its owner exist so that consumers will be able to distinguish the marked product or service from products or services of different origins. As such, they may also be subject to restrictions, including restrictions deriving from the fact that it is in the public interest to ensure that certain names remain as widely available as possible (the requirement of availability). a  
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33. In short, the relationship between the rights conferred by ownership of a registered trade mark and the trade mark itself is instrumental. For that reason, in order to determine the precise scope of the exclusive right granted to a trade mark owner, regard must be had to the essential function of the trade mark<sup>21</sup>. c

*3—The nature of the assessment of distinctive character (questions IV(a), V, VI, XI, XIII(a) and XVI)*

34. By these questions the national court seeks to understand the nature of the judicial assessment of whether a sign is capable of constituting a trade mark. d

35. First of all (questions IV(a), V and VI), the Gerechtshof wishes to know, in detail, if the assessment of whether a sign is capable of constituting a trade mark must be carried out in the abstract or, alternatively, by reference to the specific circumstances of each case. In that regard, the Gerechtshof points out that, prior to lodging its application, the applicant had already used the sign on a large scale as a trade mark for the products in question, and that it appeared on inquiry that, vis-à-vis the goods and services which it was intended to identify, the sign would not be liable to mislead the public. e

36. By way of a preliminary point, the facets of the Gerechtshof's questions which relate to the individual procedural stages under current Benelux law, namely, the initial appraisal carried out by the trade mark office (question IV(a)), the assessment—by the same body—of the applicant's objections (question V), and the subsequent judicial assessment (question VI), must be disregarded. The Trade Marks Directive contains no provisions governing the regulation of the registration procedure, stating instead that member states are free to organise that procedure as they see fit<sup>22</sup>. The court's reply must, therefore, be restricted to the assessment carried out by 'the competent authorities in accordance with domestic law'. f  
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37. Additionally, and for similar reasons, no special significance should be attached to the fact that question IV(a) refers only to 'the absolute grounds for refusal ... as laid down in art 3(1) in conjunction with art 2 of ... [the] Directive'. Although it is correct that, under the Community law scheme, the first circumstance mentioned by the national court is required to be assessed in the context of the absolute grounds for refusal, the second circumstance—which relates to the likelihood of error or confusion—must be assessed in the context of the relative grounds listed in art 4. Since—and I must reiterate this—the Trade Marks Directive is neutral in relation to the member states' procedural options, there is nothing to preclude a national legal system from stipulating that both matters must be assessed simultaneously. The court's reply cannot disregard that fact. h  
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21 See the judgment in the *HAG II* case (para 14 in fine), cited above.

22 Fifth recital in the preamble.



a 38. On that basis, it can be concluded that an assessment of the conditions which must be met in order for a sign to be eligible for protection by registration as a trade mark must—essentially—be specific in nature, in the sense that a variety of factual circumstances must be taken into consideration, as quite clearly follows from the absolute rule laid down in art 6quinquies(C)(1) of the Paris Convention<sup>23</sup>.

b 39. Under art 3(1)(a) of the Trade Marks Directive, in conjunction with art 2, during the relevant procedural phase the competent authority is required to have regard not only to whether the sign applied for is capable of distinguishing the goods or services in question, but also to whether it is capable of being represented graphically. Where, as in the main proceedings, the sign in question is a word, it is difficult to imagine that that would not be the case<sup>24</sup>.  
c This is the only assessment which may be somewhat abstract in nature.

40. The authority is then required to establish whether the sign meets the conditions laid down in art 3(1)(b), (c) and (d), namely that it must distinguish the goods or services in question, and that it must not be descriptive of or generic to those goods or services. Each condition is independent of the others  
d and requires a separate assessment, although, in practice, the same sign may frequently fail to meet more than one condition<sup>25</sup>. It is also necessary to assess whether a sign, despite being devoid of any distinctive character for the purposes of art 3(1)(b), (c) and (d), has acquired such character through use, as laid down in art 3(3).

It follows from art 3(3) that signs which meet the conditions laid down in  
e sub-para (b), (c) and (d) have 'distinctive character'. It is regrettable that the legislature created such ambiguity, as a result of which it is necessary to consider whether a sign is 'capable of distinguishing' or has a potentially distinctive character (art 2), whether it has a definite distinctive character (art 3(1)(b)), or whether it has a distinctive character as a category (art 3(3)),  
f thereby adding to the already considerable difficulties involved in conceptual delimitation.

The competent authority must also ensure that the sign in respect of which registration is sought is not liable to deceive the public as to the nature, quality or geographical origin of the product or service (art 3(1)(g)), and that it is not likely to cause confusion with other, earlier trade marks (art 4(1)(b)). The  
g factual assessment does not end there, since the Trade Marks Directive provides that signs which are contrary to public policy or to accepted principles of morality are to be refused registration or are liable to be declared invalid (art 3(1)(f)).

41. It is almost impossible to imagine that an assessment of each of the above conditions could be carried out in the abstract, in particular the condition as to  
h the distinctive character of a sign recognised as a category of goods or services. Indeed, signs distinguish, are descriptive or are generic by reference to the specific goods or services which they are intended to designate, and in relation to which protection is sought<sup>26</sup>.

23 See para 11, above.

i 24 The same cannot be said of sensory phenomena, such as smells, which are not capable of being represented graphically (in that connection, see the opinion I delivered in *Sieckmann v Deutsches Patent- und Markenamt* Case C-273/00 [2004] All ER (EC) 253, [2002] ECR I-11737).

25 As the Commission rightly notes in its written observations, a descriptive sign will generally be devoid of distinctive character for the purposes of art 3(1)(b).

26 On the likelihood of confusion, see *SABEL BV v Puma AG, Rudolf Dassler Sport* Case C-251/95 [1997] ECR I-6191 (para 22).



The limitation of protection to one or a few categories of goods or services, together with the limitation created by the territorial area in which the trade mark will take effect, mean that the assessment of distinctive character should be conducted from the point of view of the average consumer of the same types of goods or services in the territory in respect of which registration is applied for<sup>27</sup>, such a consumer being presumed to be 'reasonably well-informed and reasonably observant and circumspect'<sup>28</sup>.

Despite a recent judgment of the court<sup>29</sup>, it is my view that the linguistic factor must also be assessed only by reference to the average consumer specifically characterised above. In other words, it is necessary to have regard not so much to whether that consumer speaks the language in which the sign is formulated as to whether, irrespective of the language or languages of the territory concerned, the consumer taken as a reference can reasonably be expected to perceive in the sign a meaning such as to enable it to qualify under art 3(1)(b), (c) and (d)<sup>30</sup>.

42. In short, it is appropriate to reply to the referring court that, when assessing whether a sign is eligible for registration as a trade mark, the competent authority must have regard not only to the sign as per the application for registration but to all the other relevant circumstances, including the possibility that the sign has acquired distinctive character through use, and the likelihood of error or confusion perceived from the point of view of an average consumer, bearing in mind at all times the goods or services identified by the sign.

43. The referring court also asks whether the mere fact that a descriptive sign has been lodged for registration as a trade mark for goods or services in respect of which it is not descriptive is sufficient for a finding that the sign has distinctive character. If that is not the case, the national court goes on to ask whether any importance should be attached to the fact that, specifically on account of the sign's descriptive character, the public does not perceive the sign as being capable of distinguishing all, or any of, the relevant goods or services (question XI).

44. As I indicated above, each of the conditions stipulated in art 3(1)(b), (c) and (d) of the Trade Marks Directive requires a separate assessment. Accordingly, the fact that a sign is not descriptive does not necessarily mean that it has distinctive character, either in a broad sense (in other words, as a category of sign which meets all the conditions of art 3(1)(b), (c) and (d)) or, still less, in a strict sense (ex art 3(1)(b)). Moreover, as I have also pointed out, signs are distinctive, descriptive or generic only by reference to the goods or services being identified. Descriptiveness, like the other attributes in question,

27 See *Windsurfing Chiemsee Produktions- und Vertriebs GmbH (WSC) v Boots- und Segelzubehör Walter Huber* Joined cases C-108/97 and C-109/97 [2000] Ch 523, [1999] ECR I-2779 (para 29).

28 See, inter alia, *Gut Springenheide GmbH v Oberkreisdirektor des Kreises Steinfurt—Amt für Lebensmittelüberwachung* Case C-210/96 [1998] ECR I-4657 (paras 30–32).

29 See *Procter & Gamble Co v Office of Harmonisation in the Internal Market (Trade Marks and Designs)* Case C-383/99 P [2002] All ER (EC) 29, [2001] ECR I-6251 (para 42) (the *Baby-Dry* case), in which it was held without any explanation that an assessment only needed to be carried out from the point of view of an English-speaking consumer.

30 Thus, for example, a sign intended to identify computing goods or services must be assessed not merely by reference to the language of the territory but also by reference to certain English terminology with which operators and consumers in that sector are assumed to be familiar. The same applies to foreign terms which have become part of the shared global lexicon and which frequently acquire a separate meaning that does not necessarily correspond to their meaning in the original language. Consider the words 'light', 'premium', and perhaps even 'baby' or 'dry'.

a is a purely relative quality and, therefore, under the Trade Marks Directive the scenario to which the *Gerechtshof* refers in the alternative cannot arise.

45. The Netherlands court also inquires whether a system under which it is permissible to register a sign, limiting protection to goods and services which do not possess a specific characteristic, is consistent with the Trade Marks Directive (question XIII(a)).

b This question concerns the so-called 'disclaimer' mechanism, which is recognised under Benelux trade mark law and by means of which an applicant may disclaim the protection afforded by a trade mark for certain goods which either possess, or are devoid of, a particular characteristic.

c I can find nothing in the wording of the Trade Marks Directive to preclude national authorities from administering their registration system on the basis of such disclaimers which, in any event, by merely specifying the goods or services to which protection applies, do not affect the primary purpose of enabling consumers to identify the undertaking of origin. Nor is my opinion changed by the *Nice Agreement*<sup>31</sup>, whose classification system is, in any event, not mandatory.

d 46. Finally, the *Gerechtshof* wishes to know whether the fact that a corresponding sign has been registered in another member state for similar goods or services is material to the assessment of the sign (question XVI).

e 47. The Trade Marks Directive seeks to approximate the laws of the member states, without unifying them. National courts are therefore required to interpret domestic law in the light of the wording and purpose of the directive in order to achieve the result pursued by the latter and thereby comply with the third paragraph of art 249 EC<sup>32</sup> (formerly art 189 of the EC Treaty), referring questions to the Court of Justice for a preliminary ruling where appropriate.

f There is, however, no hierarchical relationship between the Court of Justice and the national courts, nor between the national courts themselves. Nor is there any requirement that those courts must reach the same conclusions, save that they apply the same principles of interpretation. Therefore, the practices of one member state are not binding on the authorities of another member state. Nevertheless, in the interests of prudence and mutual trust, the basis for which is the pursuit of the above-mentioned objective, those practices—and, in particular, the reasoning on which they are based—constitute a useful indication to which the competent authority may refer in its assessment of whether a sign has distinctive character.

g

#### 4—Descriptive marks (question IX(a))

h 48. Article 3(1)(c) of the Trade Marks Directive prohibits marks which consist exclusively of signs which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, geographical origin, or the time of production of the goods or of rendering of the service, or other characteristics of the goods.

i 49. In connection with such signs or indications, which may be described succinctly as 'descriptive', the *Gerechtshof* seeks guidance from the court regarding.

31 Cited in footnote 4, above.

32 On the question of the harmonisation of trade marks, see the judgment in *Bayerische Motorenwerke AG (BMW) v Deenik* Case C-63/97 [1999] All ER (EC) 235, [1999] ECR I-905 (para 22).

—The scope for prohibiting or permitting signs or names which describe the service or product in question, but which are not the only ones to do so, nor the ones which are used most regularly. a

—The bearing which the number of competitors who may have an interest in using the indications might have on the assessment of whether the indications are descriptive in character, in addition to the relevance to that assessment of the fact that, under domestic law, the right to a trade mark expressed in one of the national or regional languages of the Benelux area automatically extends to its translation in the other Benelux languages. b

50. According to the parties, the *Gerechtshof* seeks guidance in relation to descriptive marks because it is uncertain as to whether the case law of the Benelux Court which preceded the amendment of the Uniform Law to comply with the Trade Marks Directive *Kinder*<sup>33</sup> and *Juicy Fruit*<sup>34</sup> is still applicable<sup>35</sup>. Such a question may not be raised before this court. It is not for the Court of Justice either to review the national laws of the member states or of regional unions such as the Benelux Union or, indeed, to review the case law of their courts. As regards references for preliminary rulings, the court's task is to provide a correct interpretation of Community law. Accordingly, it is not appropriate to analyse the Uniform Law as it stood prior to its adaptation to the Trade Marks Directive or the interpretation of the Law delivered by the competent courts. Instead, the task to be performed entails determining the scope of art 3(1)(c) of the Trade Marks Directive in relation to descriptive trade marks. c  
d

51. Article 3(1)(c) precludes so-called descriptive trade marks on the basis that that type of representation of signs and products lacks the capacity to distinguish, the reason being that where the kind, quality, quantity or other characteristics of an object are designated, it is the object itself which is being described. It is precisely because such signs fail to individualise the goods or services to which they relate that no one is permitted to register them in order to distinguish their goods and services from those of other persons. e  
f

However, in assessing whether or not a sign is descriptive, regard may also be had to certain public-interest considerations which are different in nature.

52. As the Commission of the European Communities rightly points out in its observations, the question posed by the referring court relates to the question whether the so-called 'requirement of availability' principle of German law (*Freihaltebedürfnis*) applies within the context of the Trade Marks Directive. According to that proposition, in addition to the impediments associated with a lack of distinctive character, there are also other public-interest considerations which militate in favour of limiting the registration of certain signs so that they may be used freely by all operators. g  
h

33 Judgment of the Benelux Court of Justice of 19 January 1981 in *Ferrero v Ritter* Case A 80/3, Jurisprudence Cour de Justice Benelux, 1980–1981, vol 2, p 69.

34 Judgment of the Benelux Court of Justice of 5 October 1982 in *Wrigley v Benzon* Case A 81/4, Jurisprudence Cour de Justice Benelux, 1980–1982, vol 3, p 20.

35 Pursuant to that case law, in order to determine whether a sign is descriptive the following must be taken into consideration: (a) whether the words of which the mark is composed are the only ones which are appropriate to designate the product or, alternatively, whether there are synonyms which could be used; (b) whether, from a commercial perspective, the words designate an essential attribute of the product or merely an incidental characteristic; (c) the nature of the product and the definition of the target consumer; and (d) the level of repute which the mark enjoys. Signs which, while not classed as descriptive, are evocative of the product or service in question may be registered as trade marks. i



a    53. The Court of Justice explained the extent to which those considerations apply to the Trade Marks Directive in the *Windsurfing Chiemsee* case.

54. In that case, the court held that art 3(1)(c) of the Trade Marks Directive pursues an aim which is in the public interest, namely that descriptive signs may be freely used by all, including as collective marks or as part of complex or graphic marks. Article 3(1)(c) therefore prevents such signs from being reserved to one undertaking alone because they have been registered as trade marks<sup>36</sup>.

b    55. As regards indications of geographical origin, the court held that it is in the public interest that they remain available, because they may be an indication of the characteristics of the goods concerned, and may also give rise to a favourable response<sup>37</sup>. As a result of that proviso, which relates to 'indications which may serve to designate the geographical origin', the competent authority is required to assess whether a geographical name, in respect of which application for registration as a trade mark is made, designates a place which is currently associated in the mind of the relevant class of persons with the category of goods concerned (as with geographical locations which are already well-known for those goods), or whether it is reasonable to assume that such an association may be established in the future<sup>38</sup>.

c    56. The same reasoning applies, *mutatis mutandis*, to all categories of descriptive sign<sup>39</sup>.

e    57. The Court of Justice thus held that underlying art 3(1)(c) there is a requirement that any assessment is guided by the fact that it is in the public interest to keep certain signs available but that it is not necessary for that requirement of availability to be real, current or serious as had been held under German case law. Such an assessment is not, however, possible in relation to art 3(3) of the Trade Marks Directive, since this article does not permit any differentiation as regards distinctiveness by reference to the perceived importance of keeping the geographical name available for use by other undertakings<sup>40</sup>.

f    58. I must also point out that, while the *Baby-Dry* judgment does not expressly contradict that case law, it does not restate it either. Although the *Baby-Dry* case concerned the interpretation of the Community Trade Mark Regulation, as opposed to the Trade Marks Directive, the two pieces of legislation are intended to be applied uniformly.

g    Therefore, at para 37 of the *Baby-Dry* case, the court held that the purpose of prohibiting registration of purely descriptive signs or indications as trade marks is to prevent protection being afforded to signs or indications which, because they are no different from the usual way of designating the relevant goods or services, or their characteristics, are not able to fulfil the function of identifying the undertaking that markets them and are thus devoid of the distinctive character needed for that function.

h    59. That recent judgment thus fails to refer to the public interest there is in availability. It is the case that in the *Baby-Dry* case, unlike in the *Windsurfing*

i    36 See the *Windsurfing Chiemsee* case (para 25).

37 See footnote above (para 26).

38 See footnote above (paras 29–31).

39 This can be inferred from the wording of para 26 of the judgment in the *Windsurfing Chiemsee* case (more particularly), and from the general wording of para 35.

40 Judgment in the *Windsurfing Chiemsee* case (paras 35, 48).



*Chiemsee* case, the issue was not specifically debated<sup>41</sup>, but it is also the case that the appellant raised the issue at that time, claiming that the reasoning of the Court of First Instance of the European Communities amounted to an acceptance that Community law does recognise, to some extent, the requirement of availability and that the Court of Justice avoided the issue and delivered a judgment in general terms. There is, therefore, some uncertainty as to whether the proposition applies to Community trade mark law, which it is for the court to dispel by either approving or overruling expressis verbis its earlier case law.

60. In light of that uncertainty, it would be desirable, when assessing whether a sign is descriptive, to continue to bear in mind the possibility that there may be public-interest considerations aimed at retaining a certain degree of availability, as was found in the *Windsurfing Chiemsee* case<sup>42</sup>.

61. Recently, it has become fashionable—particularly among groups whose impartiality is questionable—to assert that, contrary to the view hitherto held, trade mark law does not create any monopoly in relation to the signs which are its object. It is said, on the one hand, that the exclusive right thereby created may be exercised only in relation to the goods and products designated and that, in any event, the descriptive terms forming part of a mark may continue to be used freely.

To my mind, that reasoning is fallacious. First, monopolies are always relative, whether to a product, to a territory, or to a moment in time. A trade mark does not monopolise a term but specifically the use of that term as a trade mark, and, furthermore, it does not impose any limitation as to time. Second, a trade mark creates a privilege which enables an operator to register a sign in order to designate its goods or services. That privilege becomes all the more excessive when it concerns expressions in everyday use. It is fair and natural that a public authority should be able to reward, with a higher level of protection, signs which demonstrate ingenuity or imagination<sup>43</sup>, and that it should require other signs, which merely reflect aspects or attributes of the products in question, to satisfy more rigorous conditions in order to be eligible for registration. Nor do I think it appropriate for economic development and the promotion of commercial initiatives that established operators should be able to register for their own benefit all the descriptive combinations imaginable, or the most effective such combinations, to the detriment of new operators, who are obliged to use invented names which are more difficult to remember and to establish.

For those reasons, in the absence of a specific statement by the court, it is my view that the rule in the *Windsurfing Chiemsee* case still applies, and that Community trade mark law does, to a certain extent, recognise the requirement of availability.

62. The *Gerechtshof* also inquires whether the fact that, under domestic law, the right to a trade mark expressed in one of the national or regional languages

<sup>41</sup> The contested judgment of the Court of First Instance does not contain an assessment based on those considerations.

<sup>42</sup> The fact that, according to the *Procter & Gamble* case, this could amount to an outdated view of trade marks (the *Baby-Dry* case (para 30)) does not affect my opinion.

<sup>43</sup> Signs which have a highly distinctive character. See *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc* (formerly *Pathé Communications Corp*) Case C-39/97 [1998] All ER (EC) 934, [1998] ECR I-5507 (para 18).

a of the Benelux area automatically extends to its translation in the other Benelux languages has any bearing on the assessment of whether the indications are descriptive in character.

b 63. When implementing the Trade Marks Directive, national authorities must ensure that its provisions are complied with in the territories over which they have sovereignty. If a particular territory has implemented a system of trade mark registration which covers several linguistic regions, it would be in keeping with the aims of the directive for an assessment of the distinctive character of a sign to be carried out in relation to each of the languages spoken.

c 5—Composite word marks (question X(a) and (b))

d 64. The Netherlands court wishes to know whether it is possible for a sign made up of various components, each of which is devoid of distinctive character, to have distinctive character itself, or whether such a sign has distinctive character only where the combination is more than the sum of its parts. In addition, the Netherlands court asks whether, for those purposes, it is relevant that there are synonyms, or that the sign indicates an essential or an incidental attribute.

65. It is first of all appropriate to note that a combination of components, each of which is devoid of distinctive character, can have distinctive character, provided that it amounts to more than just a mere sum of its parts.

e 66. It is therefore necessary to determine when a combination creates a sign which is distinct from the mere sum of its parts.

f 67. That very issue was central to the *Baby-Dry* case. The court held that, as regards trade marks composed of words, descriptiveness must be determined not only in relation to each word taken separately but also in relation to the whole which they form. Any perceptible difference between the combination of words submitted for registration and the terms used in the common parlance of the relevant class of consumers to designate the goods or services or their essential characteristics is apt to confer distinctive character on the word combination, enabling it to be registered as a trade mark<sup>44</sup>.

g Going on to assess the word combination, *Baby-Dry*, itself, the court held that, from the point of view of an English-speaking consumer, the word combination was composed of words which, despite being descriptive in themselves, were juxtaposed in an unusual manner, with the result that it was not a familiar expression in the English language, either for designating the products in question or for describing their essential characteristics. Accordingly, the word combination was capable of bestowing distinctive power and could not be refused registration<sup>45</sup>.

h 68. That judgment gives rise to a number of difficulties.

First of all—as I have already indicated—it casts doubt on the applicability of the precepts laid down barely two and a half years earlier in the *Windsurfing Chiemsee* case concerning recognition of the requirement of availability.

i Second—as I have also pointed out—it presupposes that the mother tongue of the average consumer concerned must be English, while the advantage of the disputed word combination was precisely the fact that it conveyed a highly descriptive message to a multi-linguistic public who could, nevertheless, be assumed to understand the rudiments of the lingua franca of our time.

44 Judgment in the *Baby-Dry* case (para 40).

45 See footnote above (paras 42–44).

Third, the judgment contains an assessment of factual matters, such as the perception of the descriptiveness of a word combination by likely consumers, which is not within the jurisdiction of an appeal court and which the court was not equipped to perform, since no expert evidence on the subject had been submitted<sup>46</sup>.

69. Nor do I agree with the test which was proposed in order to determine whether a word combination made up of descriptive components has distinctive character. The court held that '*any perceptible difference*' between the terms usually used to designate the product, or its essential characteristics, and the combination of words in question was sufficient for that purpose.

If that, purely minimum, test is not tempered by the 'requirement of availability' approach, to which the judgment in question did not refer, I do not believe that it is capable of ensuring that trade marks are not essentially descriptive in nature.

70. However, what is at issue is a very recent decision, which was, moreover, adopted by the court in plenary session, for which reason it will probably be of no avail to seek a reversal of precedent. Suffice it therefore to propose that, for the purposes of art 3(1)(c), a difference will be regarded as perceptible if it affects important components of either the form of the sign or its meaning. As regards form, a perceptible difference arises where, as a result of the unusual or imaginative nature of the word combination, the neologism itself is more important than the sum of the terms of which it is composed. As regards meaning, a difference will be perceptible provided that whatever is evoked by the composite sign is not identical to the sum of that which is suggested by the descriptive components.

71. That view is consistent with the one I proposed in relation to art 3(1)(e) of the Trade Marks Directive in *Philips Electronics NV v Remington Consumer Products Ltd* Case C-299/99<sup>47</sup>. Article 3(1)(e) precludes the registration of 'signs which consist exclusively of [certain shapes]', while art 3(1)(c) does likewise in relation to 'trade marks which consist exclusively of signs or indications which may serve ... to designate'. Although the two provisions have different purposes, the similarity of the wording indicates that a uniform approach to the two cases should be adopted.

72. On that occasion, I took the view that, for the purposes of art 3(1)(e), second indent, 'purely functional shape' is to be understood as any shape whose *essential characteristics* are attributable to the achievement of a technical result. I adjusted my interpretation referring to 'essential characteristics' in order to clarify that a shape only containing one arbitrary element *which, from a functional point of view, is minor*, such as its colour, does not escape the prohibition.

<sup>46</sup> Without wishing to get involved in a lengthy marketing discussion, it seems clear that ordinary consumers of disposable nappies would be people of parenting age. Furthermore, according to the judgment, they must also speak English as their mother tongue. Indeed, the court, unsupported by any external proof, decided to offer its own opinion of the descriptive character of the word combination in question, despite the fact that only one of the members of the court was a native English speaker and that all of them appeared to have left that happy stage behind them. In addition, by holding that Baby-Dry is an unusual juxtaposition of an expression that is unfamiliar in the English language, the court adopted an excessively academic view. The court should instead have considered whether the construction was capable of provoking a semantic response, such as 'This product keeps my baby dry'. Finally, had the court used as a reference point a European consumer of the age indicated, who might have known both words, then it would have been in a position to conclude that the chosen word order corresponds to that used by speakers of Romance languages.

<sup>47</sup> [2002] All ER (EC) 634, [2002] ECR I-5475.



a Nor does art 3(1)(c) permit any difference whatsoever to qualify, allowing instead only those which are relevant to the description.

73. As regards the prohibition on the registration of functional shapes as trade marks, I concluded that, although it only served to prevent a slight risk that trade mark rights might unduly encroach on the field of patents, the public interest should not have to tolerate such a risk, since operators are able to protect their products by the addition of arbitrary features.

b 74. A similar line of argument also applies to this case. The prohibition of descriptive marks means that everyone is able freely to use signs which designate goods and services, or the essential characteristics thereof. While it is true that art 6(1) of the Trade Marks Directive precludes the proprietor of a trade mark from preventing the use of such indications by third parties, it is also true that permitting the registration of descriptive marks unfairly precludes the use of such indications as *trade marks* by a section of operators, and maintains the advantage initially acquired over a resource that is very likely to be exhausted, such as, in relation to the goods they designate, descriptive terms with positive associations. I see no reason why Community law should tolerate such a risk of stagnation when operators could easily resort to solutions that are imaginative or original.

75. It follows from the above that considerations relating to the existence of synonyms or the essential, or incidental, nature of the descriptive element of a sign are immaterial to the assessment of distinctive character.

e 76. The Gerechtshof wishes to know whether the fact that the protection conferred on a trade mark expressed in one of the national or regional languages of the Benelux area extends to its translation in the other Benelux languages has any bearing on the assessment of distinctive character in relation to a sign composed of descriptive components.

f 77. As I stated above<sup>48</sup>, if a particular territory has implemented a system of trade mark registration which covers several linguistic regions, it would be in keeping with the aims of the Trade Marks Directive for an assessment of the distinctive character of a sign to be carried out in relation to each of the languages spoken.

#### 6—Peculiarities of Benelux law

g 78. By question XII(a), the national court seeks guidance concerning the significance to be attached to the appraisal policy which, under Benelux law, the Merkenbureau is obliged to follow, particularly in relation to the rules governing 'evidently inadmissible applications', and with regard to the common commentary of the governments of the Benelux area concerning the amendment of the Uniform Law on Trade Marks<sup>49</sup>.

h 79. This question clearly requires an interpretation of current Benelux legal practice, rather than Community law, and that is not within the jurisdiction of the Court of Justice. The question must therefore be held inadmissible.

#### CONCLUSION

i 80. In the light of the above, I propose that the Court of Justice should reply to the questions referred for a preliminary ruling by the Gerechtshof te 's-Gravenhage as follows:

<sup>48</sup> See paras 62, 63, above.

<sup>49</sup> See paras 23, above.



(1) In assessing whether a sign is eligible for registration as a trade mark, the competent authority must, under First Council Directive (EEC) 89/104 (to approximate the laws of the member states relating to trade marks), have regard not only to the sign as per the application for registration but to all the other relevant circumstances, including the possibility that the sign has acquired distinctive character through use, and the likelihood of error or confusion perceived from the point of view of an average consumer, bearing in mind at all times the goods or services identified by the sign. a

(2) The fact that a sign is not descriptive does not necessarily mean that it has distinctive character. Signs are distinctive, descriptive or generic only by reference to the goods or services which they identify. b

(3) The directive does not preclude a national system under which applicants may disclaim the protection afforded by a trade mark in respect of certain goods which either possess, or are devoid of, a particular characteristic. c

(4) Article 3(1)(c) of the directive does not merely prohibit the registration as trade marks of descriptive signs which are currently associated, in the relevant sectors, with the category of goods in question; instead, it also applies to signs which may, in all reasonable likelihood, be used in those sectors in the future. d

(5) If a particular territory, to which the directive applies, has implemented a system of trade mark registration which covers several linguistic regions, it is in keeping with the aims of the directive for an assessment of the distinctive character of a sign to be carried out in relation to each of the languages spoken. e

(6) As regards trade marks composed of words, descriptive character must be assessed not only in relation to each term taken separately but also in relation to the whole which they form. Any perceptible difference between the meaning conveyed by the combination of words submitted for registration and the terms used in everyday language by the relevant group of consumers to designate the product or service in question, or the essential characteristics thereof, will be apt to confer distinctive character on the word combination. For those purposes, a difference will be regarded as perceptible where it affects important aspects of the form or meaning of the sign. f  
g

12 February 2004. **The COURT OF JUSTICE (Sixth Chamber)** delivered the following judgment.

1. By judgment of 3 June 1999, received at the Court of Justice of the European Communities on 1 October 1999, the *Gerechtshof te 's-Gravenhage* (Regional Court of Appeal, the Hague) referred to the court for a preliminary ruling pursuant to art 234 EC (formerly art 177 of the EC Treaty) nine questions on the interpretation of arts 2 and 3 of First Council Directive (EEC) 89/104 (to approximate the laws of the member states relating to trade marks) (OJ 1989 L40 p 1; the directive). h

2. Those questions were raised in proceedings between *Koninklijke KPN Nederland NV* (KPN) and the *Benelux Merkenbureau* (Benelux Trademark Office; the BTMO) concerning the latter's refusal to register as a trade mark the sign 'Postkantoor' applied for by KPN for various goods and services. i

a LEGAL BACKGROUND

*Community legislation*

3. The purpose of the directive—according to the first recital in its preamble—is to approximate the trade mark laws of the member states so as to remove the disparities which may impede the free movement of goods and freedom to provide services and may distort competition within the common market.

4. However, as the third recital in its preamble makes clear, the directive does not aim for full-scale approximation of the trade mark laws of the member states and is limited to bringing about an approximation of those national provisions of law which most directly affect the functioning of the internal market.

5. The seventh recital in the preamble to the directive states that attainment of the objectives at which the approximation of the trade mark laws of the member states is aiming requires that the conditions for obtaining and continuing to hold a registered trade mark are, in general, identical in all member states and that the grounds for refusal or invalidity concerning the trade mark itself, for example, the absence of any distinctive character, are to be listed in an exhaustive manner, even if some of these grounds are listed as an option for the member states, which will therefore be able to maintain or introduce those grounds in their legislation.

6. The 12th recital in the preamble to the directive states that all member states of the Community are bound by the Paris Convention for the Protection of Industrial Property of 20 March 1883, as last revised at Stockholm on 14 July 1967 (UN Treaty Series No 11847 vol 828 pp 305–388) and that it is necessary that the provisions of the directive be entirely consistent with those of the Paris Convention.

7. Article 2 of the directive, entitled ‘Signs of which a trade mark may consist’, provides as follows:

‘A trade mark may consist of any sign capable of being represented graphically, particularly words, including personal names, designs, letters, numerals, the shape of goods or of their packaging, provided that such signs are capable of distinguishing the goods or services of one undertaking from those of other undertakings.’

8. Article 3 of the directive, which lists the grounds for refusal or invalidity, provides at paras (1) and (3):

‘1. The following shall not be registered or if registered shall be liable to be declared invalid—

(a) signs which cannot constitute a trade mark;

(b) trade marks which are devoid of any distinctive character;

(c) trade marks which consist exclusively of signs or indications which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, geographical origin, or the time of production of the goods or of rendering of the service, or other characteristics of the goods or service;

(d) trade marks which consist exclusively of signs or indications which have become customary in the current language or in the *bona fide* and established practices of the trade ...

(g) trade marks which are of such a nature as to deceive the public, for instance as to the nature, quality or geographical origin of the goods or service ... a

3. A trade mark shall not be refused registration or be declared invalid in accordance with paragraph 1(b), (c) or (d) if, before the date of application for registration and following the use which has been made of it, it has acquired a distinctive character. Any Member State may in addition provide that this provision shall also apply where the distinctive character was acquired after the date of application for registration or after the date of registration.' b

*The Uniform Benelux Law on trade marks*

9. The Uniform Benelux Law on trade marks was amended, with effect from 1 January 1996, by the Protocol of 2 December 1992 amending that law (Nederlands Traktatenblad 1993, no 12, the UBL), in order to incorporate the directive into the laws of the three Benelux States. c

10. Article 1 of the UBL provides:

'The following may be registered as individual marks: names, designs, imprints, stamps, letters, numerals, the shape of goods or their packaging, and any other signs which serve to distinguish the goods of an undertaking.' d

However, shapes which result from the nature of the goods themselves, or which affect the substantial value of the goods, or which give rise to a technical result may not be registered as trade marks.' e

11. Article 6a of the UBL provides as follows:

'1. The Benelux Trade Mark Office shall refuse registration where it considers that:

(a) the sign filed does not constitute a trade mark within the meaning of Article 1, in particular because it is devoid of any distinctive character, as provided for in Article 6 *quinquies* B(2) of the Paris Convention; f

(b) the filing relates to a trade mark referred to in Article 4(1) and (2).

2. The refusal to register must relate to the sign that constitutes the trade mark in its entirety. It may be confined to one or more of the goods for which the mark is intended to be used.

3. The Benelux Office shall inform the applicant without delay and in writing of its intention to refuse registration in whole or in part, shall state the grounds and shall allow him a right to respond within a period of time to be laid down in an implementing regulation. g

4. If the objections of the Benelux Office to registration have not been removed within the period granted, registration of the filing shall be refused in whole or in part. The Benelux Office shall notify the applicant without delay and in writing, stating the grounds for refusal and advising of the possibility of review of the decision set out in Article 6b.' h

12. Article 6b of the UBL provides:

'The applicant may, within two months following notification under Article 6a(4), file at the Cour d'Appel, Brussels, the Gerechtshof at The Hague or the Cour d'Appel, Luxembourg, an application for an order that the filing be registered. The applicant's address, that of his representative, or the postal address given upon filing shall determine which court has territorial jurisdiction.' i



- a 13. Article 13C(1) of the UBL provides:

'The exclusive right to a trade mark expressed in one of the national or regional languages of the Benelux territory extends automatically to its translation in another of those languages.'

b

THE MAIN PROCEEDINGS AND THE QUESTIONS REFERRED FOR A PRELIMINARY RULING

- c 14. On 2 April 1997, KPN lodged with the BTMO an application for registration of 'Postkantoor' (which may be translated as 'post office') as a trade mark in respect of certain goods and services falling within classes 16, 35 to 39, 41 and 42 of the Nice Agreement concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks (Nice, 15 June 1957; Cmnd 3466), as revised and amended (the Nice Agreement), classes which include paper, advertising, insurance, postage-stamps, construction, telecommunications, transport, education and technical information and advice.

- d 15. By letter of 16 June 1997, the BTMO informed KPN that it was provisionally refusing registration on the ground that 'the Postkantoor sign is exclusively descriptive of the goods and services mentioned in Classes 16, 35, 36, 37, 38, 39, 41 and 42 in relation to a post office' and that '[it] therefore ... has no distinctive character as provided for in Article 6a(i)(a) of the Uniform Benelux Law on Trademarks'.

- e 16. By letter of 15 December 1997, KPN raised an objection to the refusal but the latter was definitively confirmed by a letter from the BTMO of 28 January 1998.

- f 17. On 30 March 1998 KPN brought proceedings before the Gerechtshof te 's-Gravenhage, which held that the answer to certain questions, which concerned the interpretation of the UBL, called for a referral to the Benelux Court of Justice and that other questions, concerning the interpretation of the directive, should be referred to the Court of Justice of the European Communities.

- g 18. It was in those circumstances that the Gerechtshof te 's-Gravenhage decided to stay the proceedings and refer the following nine questions to the Court of Justice for a preliminary ruling:

- h '(1) Must the Benelux Trademarks Office, which under the Protocol of 2 December 1992 amending the Uniform Benelux Law on Trademarks (Trb 1993, 12) is responsible for the assessment of the absolute grounds for refusal to register a trademark laid down in Article 3(1) in conjunction with Article 2 of First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trademarks (OJ 1989 L40, p 1) have regard not only to the sign as it appears in the application for registration but also to all the relevant facts and circumstances known to it, including those of which it was informed by the applicant (for example, the fact that, prior to the application, the applicant already used the sign widely as a trademark for the relevant products, or the fact that investigation shows that use of the sign for the goods and/or services mentioned in the application will not be of such a nature as to deceive the public)?

- i (2) Does the reply to the [first] question ... also apply to consideration by the Benelux Trademarks Office of the question whether its objections to



registration of the application have been removed by the applicant, as well as to its decision to refuse registration in whole or in part, as provided for in Article 6a(4) of the UBL? a

(3) Does the reply to the [first] question ... also apply to the judicial review to which Article 6b of the UBL refers?

(4) In the light of the provisions of Article 6 quinquies (B)(2) of the Paris Convention, do the marks which under Article 3(1)(c) of the directive are not to be registered or, if registered, may be declared invalid, also include marks composed of signs or indications which may serve, in trade, to indicate the kind, quality, quantity, intended purpose, value, geographical origin or the time of production of the goods or of rendering of service or other characteristics of the goods or services, even if that configuration is not the (only or most) usual indication used? Does it make any difference in that connection whether there are many or only a few competitors who may have an interest in using such indications (see the judgment of the Benelux Court of Justice of 19 January 1981, NJ 1981, 294, in *P Ferrero & Co SpA v Alfred Ritter Schokoladefabrik GmbH (Kinder)*)? b  
c

Is it also relevant that under Article 13C of the UBL the right to a trademark expressed in one of the national or regional languages of the Benelux area extends automatically to its translation in another of those languages? d

(5)(a) In the assessment of the question whether a sign consisting of a (new) word made up of components which in themselves have no distinctive character with regard to the goods or services in respect of which the application is made answers the description given in Article 2 of the directive (and Article 1 of the UBL) of a mark, must a (new) word of that kind be taken to have in principle a distinctive character? e

(b) If not, must a word of that kind (leaving aside the fact that it may have acquired distinctive character through use, "inburgering") be taken to have in principle no distinctive character, it being otherwise only where, because of other circumstances, the combination is more than the sum of its parts? f

Is it relevant in that connection whether the sign is the only or an obvious term for indicating the relevant quality or (combination of) qualities, or whether there are synonyms which may reasonably also be used, or that the word indicates a commercially essential or rather an incidental quality of the product or service? g

Is it also relevant that, under Article 13C of the UBL, the right to a trademark expressed in one of the national or regional languages of the Benelux area extends automatically to its translation in another of those languages? h

(6) Does the mere fact that a descriptive sign is also lodged for registration as a mark for goods and/or services of which the sign is not descriptive warrant the conclusion that the sign thereby has distinctive character in relation to those goods and/or services (for example, the sign "Postkantoor" for furniture)? i

If not, in order to determine whether such a descriptive sign has distinctive character for such goods and/or services, must regard be had to the possibility that, in the light of its descriptive meaning or meanings, (a part of) the public will not perceive that sign as a distinctive sign for (all or some of) those goods or services?

a (7) In the assessment of the abovementioned questions, is significance to be attached to the fact that, since the Benelux countries have chosen to have applications for registration of trademarks examined by the Benelux Trademarks Office as a requirement prior to registration, the appraisal policy of the Office under Article 6a of the UBL, according to the common commentary of the Governments, “must be a cautious and restrained one whereby all concerns of commercial life must be taken into account and efforts must be focused on establishing solely which applications are manifestly inadmissible and rectifying or refusing them”? If so, under what rules does it fall to be determined whether an application is “manifestly inadmissible”?

c It is assumed that in invalidity proceedings (which may be initiated after registration of a sign) it is not necessary, in addition to reliance on the nullity of the sign lodged as a mark, for the sign to be “manifestly inadmissible”.

d (8) Is it consistent with the scheme of the directive and the Paris Convention for a sign to be registered for specific goods or services subject to the limitation that the registration applies only to those goods and services in so far as they do not possess a specific quality or specific qualities (for example, registration of the sign “Postkantoor” for the services of direct-mail campaigns and the issue of postage stamps “provided they are not connected with a post office”)?

e (9) Is it also material to the answer to be given to the questions whether a corresponding sign for similar goods or services is registered as a trademark in another Member State?

#### THE FIRST, SECOND AND THIRD QUESTIONS

f 19. By the first question, the national court asks essentially whether art 3 of the directive is to be interpreted as meaning that a trade mark registration authority must have regard, in addition to the mark as filed, to all the relevant facts and circumstances known to it. By the second and third questions, which it is appropriate to examine together, it asks at which stage of the procedure before it should the competent authority have regard to all the relevant facts and circumstances and, where application is made to a court for review, whether the court must also have regard to them.

#### *Observations submitted to the court*

h 20. KPN submits that when the BTMO examines whether a mark should be registered, it must not base its assessment exclusively on the mark but may take into account certain facts which are a matter of common knowledge and information produced by the applicant. However, it must confine itself to the relevant facts and circumstances known to it at the time when the application is filed.

i 21. KPN maintains that the BTMO should apply the same criteria for both the provisional assessment and the final assessment of an application for registration but should nevertheless be able to take into account, at the time of the final assessment, relevant facts which have been drawn to its attention since the provisional assessment.

22. Finally, KPN suggests that the court asked to review a decision of the BTMO must examine the same facts as those relied on by the latter.

23. The BTMO maintains that it is required to have regard to all the facts and circumstances known to it and which are relevant to the question whether the

mark, as filed, is able to fulfil its function of being distinctive with regard to the goods and services in respect of which registration is sought. It cannot therefore take account merely of information provided to it by the applicant or which is common knowledge, bearing in mind that if it wishes to rely on matters which are not known to the applicant it must give the latter the opportunity to comment, in accordance with the principle that the rights of the defence must be observed.

24. Furthermore, the obligation to take into account all relevant facts and circumstances applies at every stage of the procedure before it.

25. Finally, the BTMO submits, in essence, that a court asked to review one of its decisions must assess the merits of the application on the basis of all the facts and circumstances which were known to the BTMO at the time of the final refusal, and cannot take into account new facts raised for the first time before the court.

26. The Commission of the European Communities submits that it is inconceivable that either the mark applied for, or the question whether one of the grounds for refusal set out in art 3 of the directive applies to it, should be assessed in the abstract.

27. On the one hand, for each trade mark—particularly word marks—the answer to that question is dependent on the meaning of the mark, which in turn is dependent on the use to which the mark is put in economic and social intercourse, in particular as regards the public at which the mark is aimed. On the other hand, protection is never claimed in absolute terms but rather in respect of certain goods or services which must be specified in the application for registration. The ability of the mark to distinguish the goods or services of one undertaking from those of other undertakings must always be assessed in the light of the goods or services in respect of which registration of the mark is sought.

28. Finally, although member states are quite free to lay down procedural rules in the matter of trade marks, compliance with the substantive rules prescribed by the directive should not be made dependent on the stage of the procedure concerned. Therefore, the obligation to have regard to actual circumstances in the assessment of the application for registration applies both before the competent authority and before the court.

#### *The court's reply*

29. As regards the question whether a competent authority must have regard to all the relevant facts and circumstances when examining a trade mark application, it is appropriate to point out, first, that the 12th recital in the preamble to the directive states that 'all Member States of the Community are bound by the Paris Convention for the Protection of Industrial Property' and that 'it is necessary that the provisions of this Directive are entirely consistent with those of the Paris Convention'.

30. Article 6quinquiesC(1) of the Paris Convention provides that 'in determining whether a mark is eligible for protection, all the factual circumstances must be taken into consideration, particularly the length of time the mark has been in use'.

31. Second, when the competent authority examines a trade mark application and, for that purpose, must determine, inter alia, whether or not the mark is devoid of any distinctive character, whether or not it is descriptive of the characteristics of the goods or services concerned and whether or not it has become generic, it cannot carry out the examination in the abstract.



- a 32. In the course of that examination, it is for the competent authority to have regard to the characteristics peculiar to the mark for which registration is sought, including the type of mark (word mark, figurative mark, etc) and, in the case of a word mark, its meaning, in order to ascertain whether or not any of the grounds for refusal set out in art 3 of the directive apply to the mark.
- b 33. Moreover, since registration of a mark is always sought in respect of the goods or services described in the application for registration, the question whether or not any of the grounds for refusal set out in art 3 of the directive apply to the mark must be assessed specifically by reference to those goods or services.
- c 34. A trade mark's distinctiveness within the meaning of art 3(1)(b) of the directive must be assessed, first, by reference to those goods or services and, second, by reference to the perception of them by the relevant public, which consists of average consumers of the goods or services in question, who are reasonably well informed and reasonably observant and circumspect (see, *inter alia*, *Linde AG v Deutsches Patent- und Markenamt* Joined cases C-53/01 to C-55/01 [2004] IP&T 172, [2003] ECR I-3161 (para 41), and *Libertel Groep BV v Benelux Merkenbureau* Case C-104/01 [2004] IP&T 187, [2003] ECR I-3793 (paras 46, 75)).
- d 35. In its assessment, the competent authority has regard to all the relevant facts and circumstances, including, where appropriate, the results of any study submitted by the applicant seeking to establish, for example, that the mark is not devoid of any distinctive character or is not misleading.
- e 36. As to the stage of the examination procedure before the competent authority at which account must be taken of all the relevant facts and circumstances and, where national law provides for the possibility of review by a court of a decision of that authority, whether that court must also have regard to the relevant facts and circumstances, the competent authority must have regard to all the relevant facts and circumstances before adopting a final decision on an application to register a trade mark. A court asked to review a decision on an application for a trade mark registration must also have regard to all the relevant facts and circumstances, subject to the limits on the exercise of its powers as defined by the relevant national legislation.
- f 37. The answer to the first, second and third questions must therefore be that art 3 of the directive is to be interpreted as meaning that a trade mark registration authority must have regard, in addition to the mark as filed, to all the relevant facts and circumstances. It must have regard to all the relevant facts and circumstances before adopting a final decision on an application to register a trade mark. A court asked to review a decision on an application to register a trade mark must also have regard to all the relevant facts and circumstances,
- g 38. By the ninth question, which it is appropriate to examine in second place, the referring court asks whether the fact that a trade mark has been registered in a member state in respect of certain goods or services has any effect on the examination by the trade mark registration authority in another member state of an application for registration of a similar mark in respect of goods or services which are similar to those in respect of which the first mark was registered.
- h

#### THE NINTH QUESTION

- i 38. By the ninth question, which it is appropriate to examine in second place, the referring court asks whether the fact that a trade mark has been registered in a member state in respect of certain goods or services has any effect on the examination by the trade mark registration authority in another member state of an application for registration of a similar mark in respect of goods or services which are similar to those in respect of which the first mark was registered.



*Observations submitted to the court*

39. KPN submits that where a mark is registered in respect of certain goods or services in a member state the consequence is not that the same or a similar mark will in all circumstances also have to be registered for the same goods and services in other member states. A particular mark will not necessarily have the same intrinsic distinctive character in every member state. In each member state the extent to which the mark in question has distinctive character in the perception of the relevant public in that member state concerned will have to be determined.

40. The BTMO contends that it cannot take into account, for the purposes of its examination of an application for registration of a mark, not only that mark but marks filed in other member states. In addition, a mark, although originally devoid of distinctive character, may have been registered in another member state because there it has acquired distinctiveness through use and the applicant has gained recognition of that. Finally, a mark does not acquire distinctive character because another mark which is equally devoid of distinctive character has been registered in error. Errors of assessment are inevitable but should not have to be replicated on the basis of a misinterpretation of general principles of law such as the protection of a legitimate expectation or legal certainty.

41. The Commission submits that where a final registration has been made in a member state following a review of the grounds for refusal, that may provide some guidance for the competent authorities of other member states when they carry out a review pursuant to art 3(1)(b) to (d) of the directive. However, as regards word marks, such a registration is relevant only if the word concerned is a word in one of the languages of the trade mark law in question. In any event, such a registration is purely indicative and cannot function as a substitute for the assessment which the competent authorities of other member states must undertake on the basis of the specific circumstances of each case, taking account of the protection of interested parties in those member states.

*The court's reply*

42. As stated in para 32 of this judgment, it is for the competent authority to have regard to the characteristics peculiar to the mark for which registration is sought in order to ascertain whether or not any of the grounds for refusal set out in art 3 of the directive apply. Furthermore, as recalled in para 33 of the present judgment, registration of a mark is always sought in respect of the goods or services described in the application for registration.

43. Therefore, the fact that a mark has been registered in one member state in respect of certain goods and services cannot have any bearing on whether or not any of the grounds for refusal set out in art 3 of the directive apply to a similar mark, registration of which is applied for in a second member state in respect of similar goods or services.

44. The answer to the ninth question must therefore be that the fact that a trade mark has been registered in a member state in respect of certain goods or services has no bearing on the examination by the trade mark registration authority of another member state of an application for registration of a similar mark in respect of goods or services similar to those in respect of which the first mark was registered.

## THE FOURTH QUESTION

45. By the first part of the fourth question, which it is appropriate to consider in third place, the national court asks whether art 3(1)(c) of the directive

- a precludes registration of a mark composed exclusively of signs or indications which may serve, in trade, to designate characteristics of the goods or services in respect of which registration is sought, when there are more usual indications for designating the same characteristics. It also asks whether the fact that there are many or few competitors who may have an interest in using the signs or indications of which the mark is composed has any bearing on the answer to that question. By the second part of the fourth question, it asks what the consequences are for the application of art 3(1)(c) of the directive of a national rule which provides that the exclusive right conferred by registration, by a competent authority in an area in which a number of officially recognised languages coexist, of a mark expressed in one of those languages extends automatically to its translation in the other languages.
- b
- c

*Observations submitted to the court*

46. In KPN's submission, it is not unusual for a duly registered mark to have something allusive or descriptive about it. Such a mark cannot, however, be refused registration even if it immediately brings to mind, for a particular section of the public, characteristics of the goods in respect of which it is registered. Signs which, at the time of filing, are not a customary indication of a particular quality of the goods but are only allusive are not signs of the kind referred to by art 3(1)(c) of the directive.
- d

47. KPN adds that it is important to know whether competitors have any other options, since the greater the number of other possibilities, the lower the risk will be of a competitor being restricted in its use of an allusive sign as a distinctive sign.
- e

48. The BTMO contends that the ground for refusal stated in art 3(1)(c) of the directive applies where a mark consists exclusively of signs or indications which may serve, in trade, to designate characteristics of the goods or services in respect of which registration is sought and that it is irrelevant that there is scope for designating the same characteristics other than by the use of those signs or indications. That analysis is borne out by the judgment in *Windsurfing Chiemsee Produktions- und Vertriebs GmbH (WSC) v Boots- und Segelzubehör Walter Huber* Joined cases C-108/97 and C-109/97 [2000] Ch 523, [1999] ECR I-2779.
- f

49. The BTMO also contends that the question as to whether many or few competitors wish to use the signs or indications in question is not a determining factor when art 3(1)(c) of the directive is applied.
- g

50. Finally, under Benelux trade mark law, Benelux territory is one and indivisible, so that if a sign is descriptive in one only of the Benelux states or in one only of the Benelux languages or is devoid of distinctive character there for another reason, its registration as a mark must be refused throughout the Benelux territory.
- h

51. Relying on the *Windsurfing Chiemsee* case, the Commission maintains that the purpose of the prohibition on descriptive marks set out in art 3(1)(c) of the directive is to ensure that signs which are descriptive of the characteristics of the goods may be freely used by all. In that regard, it is not necessary for there to be an actual or definite risk of a monopoly being created for such marks to be prohibited. Furthermore, whether signs or indications capable of being used to describe the characteristics of the goods have synonyms has no bearing on the issue.
- i

52. Finally, the Commission submits that it is also immaterial whether few or many competitors may be affected by any monopoly created as a result of registration of a mark consisting exclusively of such signs or indications.

*The court's reply*

53. So far as the first part of the question is concerned, it is appropriate to recall that, under art 3(1)(c) of the directive, marks consisting exclusively of signs or indications which may serve, in trade, to designate characteristics of the goods or services in respect of which registration is sought are not to be registered.

54. As the court has already held (the *Windsurfing Chiemsee* case (para 25), the *Linde* case (para 73) and the *Libertel* case (para 52)), art 3(1)(c) of the directive pursues an aim which is in the public interest, namely that such signs or indications may be freely used by all. Article 3(1)(c) therefore prevents such signs and indications from being reserved to one undertaking alone because they have been registered as trade marks.

55. That public interest requires that all signs or indications which may serve to designate characteristics of the goods or services in respect of which registration is sought remain freely available to all undertakings in order that they may use them when describing the same characteristics of their own goods. Therefore, marks consisting exclusively of such signs or indications are not eligible for registration unless art 3(3) of the directive applies.

56. In those circumstances, the competent authority must, under art 3(1)(c) of the directive, determine whether a trade mark for which registration is sought currently represents, in the mind of the relevant class of persons, a description of the characteristics of the goods or services concerned or whether it is reasonable to assume that that might be the case in the future (see to that effect the *Windsurfing Chiemsee* case (para 31)). If, at the end of that assessment, the competent authority reaches the conclusion that that is the case, it must refuse, on the basis of that provision, to register the mark.

57. It is irrelevant whether there are other, more usual, signs or indications for designating the same characteristics of the goods or services referred to in the application for registration than those of which the mark concerned consists. Although art 3(1)(c) of the directive provides that, if the ground for refusal set out there is to apply, the mark must consist 'exclusively' of signs or indications which may serve to designate characteristics of the goods or services concerned, it does not require that those signs or indications should be the only way of designating such characteristics.

58. Similarly, whether the number of competitors who may have an interest in using the signs or indications of which the mark consists is large or small is not decisive. Any operator at present offering, as well as any operator who might in the future offer, goods or services which compete with those in respect of which registration is sought must be able freely to use the signs or indications which may serve to describe characteristics of its goods or services.

59. So far as the second part of the fourth question is concerned, where, as in the case before the national court, the applicable national law provides that the exclusive right, conferred where a competent authority in an area in which a number of officially recognised languages coexist registers a word mark expressed in one of those languages, extends automatically to its translation in the other languages, such a provision in fact allows a number of different marks to be registered.

60. Therefore, the authority must ascertain as regards each of those translations whether the mark does not consist exclusively of signs or indications which may serve, in trade, to designate characteristics of the goods or services in respect of which registration is sought.



- a* 61. The answer to the fourth question must therefore be that art 3(1)(c) of the directive precludes registration of a trade mark which consists exclusively of signs or indications which may serve, in trade, to designate characteristics of the goods or services in respect of which registration is sought, and that is the case even when there are more usual signs or indications for designating the same characteristics and regardless of the number of competitors who may
- b* have an interest in using the signs or indications of which the mark consists. Where the applicable national law provides that the exclusive right conferred by registration, by a competent authority in an area in which a number of officially recognised languages coexist, of a word mark expressed in one of those languages extends automatically to its translation in the other languages,
- c* the authority must ascertain as regards each of those translations whether the mark actually consists exclusively of signs or indications which may serve, in trade, to designate characteristics of those goods or services.

#### THE SIXTH QUESTION

- d* 62. By the first part of the sixth question, which it is appropriate to examine in fourth place, the national court asks, essentially, whether art 3(1) of the directive must be interpreted as meaning that a trade mark which is descriptive, for the purposes of sub-para (c) of that provision, of the characteristics of certain goods or services, but not of those of other goods or services, must be regarded as necessarily having distinctive character in relation to those other goods or services for the purposes of sub-para (b) of the provision. If that is
- e* not the case, the national court asks, by the second part of the question, if, for the purpose of determining whether such a mark is devoid of any distinctive character in relation to certain goods or services of which it is not descriptive, account must be taken of the possibility that the public will not perceive that mark as distinctive for those goods or services because it is descriptive of
- f* characteristics of other goods or services.

#### *Observations submitted to the court*

- g* 63. KPN submits, first, that if by 'descriptive sign' the national court means a word in everyday language, then where such a word is filed as a mark for goods or services of which it is not descriptive, the conditions set out in arts 1 and 3 of the directive are fulfilled as regards the mark's distinctive character. Second, the distinctive character of a mark must be assessed in relation to the goods or services in respect of which the application has been filed and not in relation to goods or services which might have some connection with the goods or services in respect of which registration of the mark is sought.

- h* 64. In the BTMO's submission, a mark like 'Postkantoor' may serve inter alia to indicate the intended purpose of the goods or services, for example furniture intended to be used in a post office. In those circumstances, the fact that the mark may be perceived by the relevant public as an indication relating to one characteristic of the goods or services concerned, notably their intended purpose, renders the mark ineligible for registration under art 3(1)(c) of the directive.

- i* 65. However, even if the public were not to perceive 'Postkantoor' for particular goods or services as an indication under art 3(1)(c) of the directive, it would remain incapable of serving as a mark by virtue of that provision. The provision is concerned not so much with the way in which the mark is currently perceived by the relevant public as with whether it may serve in trade to designate the characteristics or circumstances to which it alludes. In

addition, it is appropriate to have regard to the perception which it may reasonably be assumed the relevant sectors of the public will have of the mark in the future. a

66. The Commission submits, first, that whether a mark has distinctive character is dependent both on the goods or services for which protection is sought and on the perception which the average consumer, reasonably well informed and reasonably observant and circumspect, has of those goods or services. Second, the grounds for refusal set out in paras (b) and (c) of art 3(1) of the directive must be assessed separately, in spite of the overlapping which may appear in practice. In those circumstances, the fact that a mark is not exclusively descriptive of those goods or services is not sufficient to conclude that it has distinctive character in respect of those goods or services. b  
c

### *The court's reply*

67. As regards the first part of the question, it is clear from art 3(1) of the directive that each of the grounds for refusal listed in that provision is independent of the others and calls for a separate examination (see, inter alia, the *Linde* case (para 67)). That is true in particular of the grounds for refusal listed in paras (b), (c) and (d) of art 3(1), although there is a clear overlap between the scope of the respective provisions (see to that effect *Merz & Krell GmbH & Co v Deutsches Patent- und Markenamt* Case C-517/99 [2002] All ER (EC) 441, [2001] ECR I-6959 (paras 35, 36)). d

68. Furthermore, according to the court's case law, the various grounds for refusing registration set out in art 3 of the directive must be interpreted in the light of the public interest underlying each of them (see in particular *Philips Electronics NV v Remington Consumer Products Ltd* Case C-299/99 [2002] All ER (EC) 634, [2002] ECR I-5475 (para 77), the *Linde* case (para 71) and the *Libertel* case (para 51)). e

69. It follows that the fact that a mark does not fall within one of those grounds does not mean that it cannot fall within another (see to that effect the *Linde* case (para 68)). f

70. In particular, it is thus not open to the competent authority to conclude that a mark is not devoid of any distinctive character in relation to certain goods or services purely on the ground that it is not descriptive of them. g

71. Second, as has been observed in para 34 of this judgment, whether a mark has distinctive character for the purposes of art 3(1)(b) of the directive must be assessed by reference to the goods or services described in the application for registration.

72. Further, under art 13 of the directive— h

‘where grounds for refusal of registration ... exist in respect of only some of the goods or services for which that trade mark has been applied for ..., refusal of registration ... shall cover those goods or services only.’

73. It follows that, where registration of a mark is sought in respect of various goods or services, the competent authority must check, in relation to each of the goods or services claimed, that none of the grounds for refusal listed in art 3(1) of the directive applies to the mark and may reach different conclusions depending upon the goods or services in question. i

74. Therefore, it is not open to the competent authority to conclude that a mark is not devoid of any distinctive character in relation to certain goods or

a services purely on the ground that it is descriptive of the characteristics of other goods or services, even where registration is sought in respect of those goods or services as a whole.

b 75. As regards the second part of the question, whether a mark has distinctive character must be assessed, as has been observed in para 34 of this judgment, first, by reference to the goods or services in respect of which registration of the mark has been sought, and, second, by reference to the way in which it is perceived by the relevant public, which consists of average consumers of those goods or services, reasonably well informed and reasonably observant and circumspect.

c 76. It follows that if, on completion of the examination of a trade mark application, the competent authority finds, in the light of all the relevant facts and circumstances, that the average consumer of certain goods or services, reasonably well informed and reasonably attentive, perceives a mark as devoid of any distinctive character with regard to those goods or services, it must refuse to register the mark for those goods or services pursuant to art 3(1)(b) of the directive.

d 77. However, it is of no relevance that the average consumer of other goods or services, reasonably well informed and reasonably observant, perceives the same mark as descriptive of the characteristics of those other goods or services for the purposes of art 3(1)(c) of the directive.

e 78. It does not follow from either art 3 of the directive or from any other provisions thereof that the fact that a mark is descriptive of certain goods or services is a ground for refusing to register that mark for other goods or services. As is stated in the seventh recital in the preamble to the directive, grounds for refusal concerning the trade mark itself are listed exhaustively.

f 79. The answer to the sixth question must therefore be that art 3(1) of the directive must be interpreted as meaning that a mark which is descriptive of the characteristics of certain goods or services but not of those of other goods or services for the purposes of art 3(1)(c) of the directive cannot be regarded as necessarily having distinctive character in relation to those other goods or services for the purposes of sub-para (b) of the provision. It is of no relevance that a mark is descriptive of the characteristics of certain goods or services under art 3(1)(c) of the directive when it comes to assessing whether the same mark has distinctive character in relation to other goods or services for the purposes of art 3(1)(b) of the directive.

#### THE FIFTH QUESTION

h 80. As a preliminary point, it is appropriate to observe, first, that the purpose of art 2 of the directive is to define the types of signs of which a trade mark may consist (*Sieckmann v Deutsches Patent- und Markenamt* Case C-273/00 [2004] All ER (EC) 253, [2002] ECR I-11737 (para 43)), irrespective of the goods or services for which protection might be sought (see to that effect *Sieckmann's* case (paras 43–55), the *Libertel* case (paras 22–42) and *Shield Mark BV v Kist (t/s Memex)* Case C-283/01 [2004] All ER (EC) 277 (paras 34–41)). It provides that a trade mark may consist inter alia of 'words' and 'letters', provided that they are capable of distinguishing the goods or services of one undertaking from those of other undertakings.

i 81. In view of that provision, there is no reason to find that a word like 'Postkantoor' is not, in respect of certain goods or services, capable of fulfilling the essential function of a trade mark, which is to guarantee the identity of the origin of the marked goods or services to the consumer or end user by



enabling him, without any possibility of confusion, to distinguish the goods or services from others which have another origin (see, in particular, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc* (formerly *Pathé Communications Corp*) Case C-39/97 [1998] All ER (EC) 934, [1998] ECR I-5507 (para 28), the *Merz & Krell* case (para 22), and the *Libertel* case (para 62)). Accordingly, an interpretation of art 2 of the directive appears not to be useful for the purposes of deciding the present case. a

82. It follows, however, from the wording of the fifth question that the national court is in fact asking whether a mark for which registration is sought in respect of certain goods or services falls within any ground of refusal. Thus, the question must be taken to mean that the national court is seeking an interpretation of art 3(1) of the directive. b

83. Second, as is clear from para 15 of the present judgment, in the main proceedings the BTMO relied on the ground that the Postkantoor sign 'is exclusively descriptive of the goods and services [in question] in relation to a post office' in order to conclude that 'Postkantoor' was not distinctive. c

84. Thus, the national court's assumption that 'Postkantoor' may be devoid of distinctive character arises from the finding that the mark is descriptive of characteristics of the goods and services concerned, given that it is composed exclusively of elements which are themselves descriptive of those characteristics. d

85. In that regard, and as has been pointed out in para 67 of this judgment, although each of the grounds for refusal listed in art 3(1) of the directive is independent of the others and calls for separate examination, there is a clear overlap between the scope of each of the grounds for refusal set out in sub-paras (b), (c) and (d) of that provision respectively. e

86. In particular, a word mark which is descriptive of characteristics of goods or services for the purposes of art 3(1)(c) of the directive is, on that account, necessarily devoid of any distinctive character with regard to the same goods or services within the meaning of art 3(1)(b) of the directive. A mark may none the less be devoid of any distinctive character in relation to goods or services for reasons other than the fact that it may be descriptive. f

87. Therefore, in order to give a useful answer to the national court, the fifth question (which it is appropriate to examine in fifth place) must be construed as asking in essence whether art 3(1)(c) of the directive is to be interpreted as meaning that a mark consisting of a word composed of elements, each of which is descriptive of characteristics of the goods or services in respect of which registration is sought, may be regarded as not itself descriptive of the characteristics of those goods or services and, if so, in what circumstances. In that respect, it asks if it is of any importance whether there are synonyms for the word or that the characteristics of the goods or services capable of being described by the word are commercially essential or merely ancillary. g  
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#### *Observations submitted to the court*

88. KPN claims that when the components of a mark are devoid of any distinctive character in relation to the goods or services for which registration is sought, the mark will more often than not also be devoid of any such character. However, if the components of the mark are not devoid of all distinctive character but merely allude to the goods or services concerned, so that they could theoretically be used in trade to allude to certain of their qualities, the mark could none the less be distinctive in relation to those goods or services. i

a 89. In the BTMO's submission, each mark, whether or not it is composite, must satisfy the conditions laid down by arts 2 and 3(1)(b) to (d) of the directive. A new combination of words, each of which is devoid of distinctive character, will not be distinctive merely because it is new.

b 90. The BTMO contends that, most frequently, the issue is whether a combination of words, each of which is merely descriptive of characteristics of the goods concerned, nevertheless manages to acquire sufficient distinctiveness for the mark consisting of that combination of words not to be descriptive for the purpose of art 3(1)(c) of the directive. In that connection, if the combination is merely the sum of two components which, being descriptive, are not distinctive, the combination, although new in the strict sense, will usually not be regarded as distinctive.

c 91. Finally, the fact that there are synonyms for a mark which is by definition descriptive is not a key factor in any decision about the mark's validity.

d 92. The Commission submits that a mark composed of elements, each of which is devoid of distinctive character in relation to the goods or services referred to in the application, is also, as a general rule, except where distinctiveness has been acquired through use, itself devoid of any distinctive character, unless related circumstances, such as a graphic or semantic alteration of the combination of those elements, give the mark an additional attribute such as to render it capable, as a whole, of distinguishing the goods or services of one undertaking from those of other undertakings. Such an assessment should, however, always be based on the specific circumstances of each case.

e *The court's reply*

f 93. Article 3(1)(c) of the directive provides that marks consisting exclusively of signs or indications which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, geographical origin, or the time of production of the goods or of rendering of the service, or other characteristics of the goods or service, are not to be registered.

94. As has been pointed out in para 68 of this judgment, the various grounds for refusing registration set out in art 3 of the directive must be interpreted in the light of the public interest underlying each of them.

g 95. It follows from paras 54 and 55 of the present judgment that art 3(1)(c) of the directive pursues an aim which is in the public interest, namely that descriptive signs or indications descriptive of the characteristics of the goods or services in respect of which registration is applied for may be freely used by all. Article 3(1)(c) therefore prevents such signs and indications from being reserved to one undertaking alone because they have been registered as trade marks.

h 96. If a mark, such as that at issue in the main proceedings, which consists of a word produced by a combination of elements, is to be regarded as descriptive for the purpose of art 3(1)(c) of the directive, it is not sufficient that each of its components may be found to be descriptive. The word itself must be found to be so.

i 97. It is not necessary that the signs and indications composing the mark that are referred to in art 3(1)(c) of the directive actually be in use at the time of the application for registration in a way that is descriptive of goods or services such as those in relation to which the application is filed, or of characteristics of those goods or services. It is sufficient, as the wording of that provisions itself indicates, that those signs and indications could be used for such purposes. A word must therefore be refused registration under that provision if at least one of its possible meanings designates a characteristic of the goods or services

concerned (see to that effect, in relation to the identical provisions of art 7(1)(c) of Council Regulation (EC) 40/94 (on the Community trade mark) (OJ 1994 L11 p 1), *Wm Wrigley Jr Co v Office of Harmonisation in the Internal Market (Trade Marks and Designs)* Case C-191/01P [2004] All ER (EC) 1040 (para 32)).

98. As a general rule, a mere combination of elements, each of which is descriptive of characteristics of the goods or services in respect of which registration is sought, itself remains descriptive of those characteristics for the purposes of art 3(1)(c) of the directive. Merely bringing those elements together without introducing any unusual variations, in particular as to syntax or meaning, cannot result in anything other than a mark consisting exclusively of signs or indications which may serve, in trade, to designate characteristics of the goods or services concerned.

99. However, such a combination may not be descriptive within the meaning of art 3(1)(c) of the directive, provided that it creates an impression which is sufficiently far removed from that produced by the simple combination of those elements. In the case of a word mark, which is intended to be heard as much as to be read, that condition must be satisfied as regards both the aural and the visual impression produced by the mark.

100. Thus, a mark consisting of a word composed of elements, each of which is descriptive of characteristics of the goods or services in respect of which registration is sought, is itself descriptive of those characteristics for the purposes of art 3(1)(c) of the directive, unless there is a perceptible difference between the word and the mere sum of its parts: that assumes either that, because of the unusual nature of the combination in relation to the goods or services, the word creates an impression which is sufficiently far removed from that produced by the mere combination of meanings lent by the elements of which it is composed, with the result that the word is more than the sum of its parts, or that the word has become part of everyday language and has acquired its own meaning, with the result that it is now independent of its components. In the second case, it is necessary to ascertain whether a word which has acquired its own meaning is not itself descriptive for the purpose of the same provision.

101. Furthermore, for the reason given in para 57 of this judgment, it is irrelevant for the purposes of determining whether the ground for refusal set out in art 3(1)(c) of the directive applies to such a mark whether or not there are synonyms permitting the same characteristics of the goods or services to be designated.

102. It is also irrelevant whether the characteristics of the goods or services which may be the subject of the description are commercially essential or merely ancillary. The wording of art 3(1)(c) of the directive does not draw any distinction by reference to the characteristics which may be designated by the signs or indications of which the mark consists. In fact, in the light of the public interest underlying the provision, any undertaking must be able freely to use such signs and indications to describe any characteristic whatsoever of its own goods, irrespective of how significant the characteristic may be commercially.

103. Finally, the court has already responded, in paras 59 and 60 of this judgment, to the question concerning the effect on the interpretation of art 3(1)(c) of the directive of a national provision such as art 13C(1) of the UBL.

104. The answer to the fifth question must therefore be that art 3(1)(c) of the directive must be interpreted as meaning that a mark consisting of a word



- a* composed of elements, each of which is descriptive of characteristics of the goods or services in respect of which registration is sought, is itself descriptive of the characteristics of those goods or services for the purposes of that provision, unless there is a perceptible difference between the word and the mere sum of its parts: that assumes either that because of the unusual nature of the combination in relation to the goods or services the word creates an impression which is sufficiently far removed from that produced by the mere combination of meanings lent by the elements of which it is composed, with the result that the word is more than the sum of its parts, or that the word has become part of everyday language and has acquired its own meaning, with the result that it is now independent of its components. In the latter case, it is necessary to ascertain whether a word which has acquired its own meaning
- b* is not itself descriptive for the purposes of the same provision. For the purposes of determining whether art 3(1)(c) of the directive applies to such a mark, it is irrelevant whether or not there are synonyms capable of designating the same characteristics of the goods or services mentioned in the application for registration or that the characteristics of the goods or services which may
- c* be the subject of the description are commercially essential or merely ancillary.
- d*

#### THE EIGHTH QUESTION

105. By the eighth question, to be examined in sixth place, the national court asks essentially whether the directive or the Paris Convention prevents a trade mark registration authority from registering a mark for certain goods or services subject to the condition that they do not possess a particular characteristic.
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106. The national court explains in that regard that the question seeks to ascertain whether 'Postkantoor' could be registered, for example, for services such as direct-mail campaigns or the issue of postage stamps 'provided they are not connected with a post office'.
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#### *Observations submitted to the court*

107. KPN submits that the question is not regulated by the directive and thus does not fall within the court's jurisdiction. In the alternative, it maintains that such limitations are permissible and that exclusions may be accepted or even required when the application is filed.
- g*

108. The BTMO contends that under the directive, although procedural issues are a matter for the member states, the conditions for obtaining and continuing to hold a trade mark are, in general, identical in all of them. Those conditions include the obligation to draw up the registration in accordance with internationally accepted standards, in particular the classification provided
- h* for in the Nice Agreement.

109. Under the Nice Agreement there is no provision for registration of the absence of a particular characteristic which cannot be objectively defined as a sub-category of a list of goods or services.

110. The Commission argues, first, that the court has no jurisdiction to adjudicate on the compatibility of a provision of national law with the Paris Convention. Second, relying on Regulation 40/94, it submits that art 3(1)(c) of the directive does not prevent marks which are descriptive of certain goods or services from being refused in relation to some of the goods or services listed in the application for registration, a practice which is also followed by the Office for Harmonisation in the Internal Market Trade Marks and Designs (OHIM).
- i*

*The court's reply*

111. The Nice Agreement divides goods and services into classes in order to facilitate the registration of trade marks. Each class brings together various goods or services.

112. Although an undertaking may apply for registration of a mark in respect of all the goods or services falling within such a class, nothing in the directive prohibits it from seeking registration solely in respect of only some of those goods or services.

113. Likewise, when registration of a mark is sought in respect of an entire class within the Nice Agreement, the competent authority may, pursuant to art 13 of the directive, register the mark only in respect of some of the goods or services belonging to that class, if, for example, the mark is devoid of any distinctive character in relation to other goods or services mentioned in the application.

114. By contrast, where registration is applied for in respect of particular goods or services, it cannot be permitted that the competent authority registers the mark only in so far as the goods or services concerned do not possess a particular characteristic.

115. Such a practice would lead to legal uncertainty as to the extent of the protection afforded by the mark. Third parties—particularly competitors—would not, as a general rule, be aware that for given goods or services the protection conferred by the mark did not extend to those products or services having a particular characteristic, and they might thus be led to refrain from using the signs or indications of which the mark consists and which are descriptive of that characteristic for the purpose of describing their own goods.

116. Since the directive precludes such a practice, there is no need to examine the request for an interpretation of the Paris Convention.

117. In those circumstances, the answer to the eighth question must be that the directive prevents a trade mark registration authority from registering a mark for certain goods or services on condition that they do not possess a particular characteristic.

*THE SEVENTH QUESTION*

118. By the seventh question, which must be considered last, the national court asks whether the practice of a trade mark registration authority which concentrates solely on refusing to register 'manifestly inadmissible' marks is precluded by art 3 of the directive.

*Observations submitted to the court*

119. In KPN's submission, by providing in art 3(1) that marks can either not be registered or can be declared invalid once registered, the directive expressly allows the member states to register marks liable subsequently to be declared invalid. It follows that the member states are free to provide that, at the stage of registration, only 'manifestly inadmissible' marks are to be refused. It is also open to them to determine which marks are to be regarded as 'manifestly inadmissible' and which are not to be regarded as such. Putting this test into practice may entail registering a mark even where there is reasonable doubt as to whether it has sufficient distinctive character. However, in invalidity proceedings in respect of a registered mark, the criteria set out in arts 1 to 3 of the directive must be strictly adhered to.

120. The BTMO and the Commission argue, by contrast, that since the directive entered into force the Benelux states are no longer able to rely either

*a* on their governments' common commentary or on the earlier case law of the Benelux Court of Justice, which is rendered inoperative by the directive, but must rely on the wording, the purpose and the scope of art 3 of the directive. That provision does not draw any distinction between inadmissible applications and 'manifestly inadmissible' applications.

*b* *The court's reply*

121. It is clear from the last paragraph of point I.6 of the preamble to the Protocol of 2 December 1992 amending the UBL that 'the appraisal policy of the [BTMO] ... must be a cautious and restrained one, which takes account of all commercial concerns and is focused on rectifying or refusing manifestly inadmissible applications' and that 'the examination must remain within the boundaries laid down in Benelux case law, in particular that of the Benelux Court of Justice'.

*c* 122. In that regard, it is appropriate to observe that although the third recital in the preamble to the directive states that the full-scale approximation of the trade mark laws of the member states does not appear necessary at present, the seventh recital makes clear that the conditions for obtaining and continuing to hold a registered trade mark are, in general, identical in all the member states and that, to that end, the grounds for refusal of registration concerning the trade mark itself are listed exhaustively in the directive.

*d* 123. In addition, the scheme of the directive is founded on review prior to registration, even though it also makes provision for ex post facto review. The examination of the grounds for refusal listed in art 3 of the directive in particular, which takes place when registration is applied for, must be thorough and full in order to ensure that trade marks are not improperly registered (see to that effect the *Libertel* case (para 59)).

*e* 124. Therefore, the competent authority within a member state must refuse to register any mark caught by one of the grounds for refusal laid down by the directive, in particular in art 3.

*f* 125. Article 3 does not distinguish between marks which cannot be registered and those which 'manifestly' cannot be registered. Consequently, the competent authority cannot register marks caught by one of the grounds for refusal listed in that article on the ground that the marks are not 'manifestly inadmissible'.

*g* 126. The answer to the seventh question must therefore be that the practice of a trade mark registration authority which concentrates solely on refusing to register 'manifestly inadmissible' marks is incompatible with art 3 of the directive.

*h* *COSTS*

127. The costs incurred by the Commission, which has submitted observations to the court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

*i* On those grounds, the Court of Justice (Sixth Chamber), in answer to the questions referred to it by the *Gerechtshof te 's-Gravenhage* by judgment of 3 June 1999, hereby rules:

(1) Article 3 of First Council Directive (EEC) 89/104 (to approximate the laws of the member states relating to trade marks) is to be interpreted as meaning that a trade mark registration authority must have regard, in addition



to the mark as filed, to all the relevant facts and circumstances. It must have regard to all the relevant facts and circumstances before adopting a final decision on an application to register a trade mark. A court asked to review a decision on an application to register a trade mark must also have regard to all the relevant facts and circumstances, subject to the limits on the exercise of its powers as defined by the relevant national legislation. a

(2) The fact that a trade mark has been registered in a member state in respect of certain goods or services has no bearing on the examination by the trade mark registration authority of another member state of an application for registration of a similar mark in respect of goods or services similar to those in respect of which the first mark was registered. b

(3) Article 3(1)(c) of Directive 89/104 precludes registration of a trade mark which consists exclusively of signs or indications which may serve, in trade, to designate characteristics of the goods or services in respect of which registration is sought, and that is the case even when there are more usual signs or indications for designating the same characteristics and regardless of the number of competitors who may have an interest in using the signs or indications of which the mark consists. Where the applicable national law provides that the exclusive right conferred by registration, by a competent authority in an area in which a number of officially recognised languages coexist, of a word mark expressed in one of those languages extends automatically to its translation in the other languages, the authority must ascertain as regards each of those translations whether the mark actually consists exclusively of signs or indications which may serve, in trade, to designate characteristics of those goods or services. c

(4) Article 3(1) of Directive 89/104 must be interpreted as meaning that a mark which is descriptive of the characteristics of certain goods or services but not of those of other goods or services for the purposes of art 3(1)(c) of Directive 89/104 cannot be regarded as necessarily having distinctive character in relation to those other goods or services for the purposes of sub-para (b) of the provision. It is of no relevance that a mark is descriptive of the characteristics of certain goods or services under art 3(1)(c) of Directive 89/104 when it comes to assessing whether the same mark has distinctive character in relation to other goods or services for the purposes of art 3(1)(b) of the directive. d

(5) Article 3(1)(c) of Directive 89/104 must be interpreted as meaning that a mark consisting of a word composed of elements, each of which is descriptive of characteristics of the goods or services in respect of which registration is sought, is itself descriptive of the characteristics of those goods or services for the purposes of that provision, unless there is a perceptible difference between the word and the mere sum of its parts: that assumes either that because of the unusual nature of the combination in relation to the goods or services the word creates an impression which is sufficiently far removed from that produced by the mere combination of meanings lent by the elements of which it is composed, with the result that the word is more than the sum of its parts, or that the word has become part of everyday language and has acquired its own meaning, with the result that it is now independent of its components. e

In the latter case, it is necessary to ascertain whether a word which has acquired its own meaning is not itself descriptive for the purposes of the same provision. For the purposes of determining whether art 3(1)(c) of Directive 89/104 applies to such a mark, it is irrelevant whether or not there are synonyms capable of designating the same characteristics of the goods or f

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*a* services mentioned in the application for registration or that the characteristics of the goods or services which may be the subject of the description are commercially essential or merely ancillary.

(6) Directive 89/104 prevents a trade mark registration authority from registering a mark for certain goods or services on condition that they do not possess a particular characteristic.

*b* (7) The practice of a trade mark registration authority which concentrates solely on refusing to register 'manifestly inadmissible' marks is incompatible with art 3 of Directive 89/104.

Müller-Fauré v Onderlinge  
Waarborgmaatschappij OZ  
Zorgverzekeringen UA  
  
van Riet v Onderlinge  
Waarborgmaatschappij ZAO  
Zorgverzekeringen  
(Case C-385/99)

COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

JUDGES RODRÍGUEZ IGLESIAS (PRESIDENT), WATHELET (RAPPORTEUR), SCHINTGEN,  
CWA TIMMERMANS (PRESIDENTS OF CHAMBERS), EDWARD, LA PERGOLA, JANN,  
MACKEN, COLNERIC, VON BAHR AND CUNHA RODRIGUES  
ADVOCATE GENERAL RUIZ-JARABO COLOMER

10 SEPTEMBER, 22 OCTOBER 2002, 13 MAY 2003

*European Community – Freedom of movement – Services – Medical care – Sickness insurance – System providing benefits in kind – Local sickness funds concluding agreements with treatment providers – Reimbursement of medical expenses incurred in respect of treatment by provider in another member state with which no agreement concluded conditional on prior authorisation – Whether requirement as to prior authorisation compatible with Community provisions on freedom to provide services – Articles 49, 50 EC (formerly EC Treaty, arts 59, 60).*

In the Netherlands, a system of sickness insurance prescribed by legislation provided for the grant of benefits in kind. Persons coming within the scope of the scheme were entitled to free medical treatment and, where entitlement to a benefit was sought, an insured person was to apply to a treatment provider with whom the local sickness fund had concluded an agreement. Where an insured person sought treatment from a provider established outside the Netherlands that had not concluded an agreement with the relevant sickness fund, prior authorisation had to be obtained. Such prior authorisation was granted by the sickness fund where the treatment was medically necessary and where it could not be provided in the Netherlands without undue delay. Two sets of proceedings had come before the national court in the main proceedings concerning patients who had obtained treatment outside of the Netherlands without prior authorisation and whose subsequent requests for reimbursement for that treatment had been refused. The first patient had undergone dental treatment while on holiday in Germany, without recourse to any hospital facilities. The second patient had sought authorisation for an arthroscopy to be performed in Belgium, where that examination could be carried out much sooner than it could in the Netherlands. However, before that request had been rejected, the examination had already been carried out in Belgium, as had treatment, which had been provided partly in hospital and partly elsewhere. The national court decided to stay the proceedings and refer to the Court of Justice of the European Communities questions for



- a preliminary ruling pursuant to art 234 EC (formerly art 177 of the EC Treaty) concerning whether the freedom to provide services, guaranteed by arts 49 and 50 EC<sup>a</sup> (formerly arts 59 and 60 of the EC Treaty), precluded the making of reimbursement of medical expenses incurred in respect of treatment dispensed in another member state by a treatment provider with which no agreement had been concluded subject to prior authorisation of the sickness insurance fund.

**Held** – Legislation which made the assumption of the costs of medical treatment received by an insured person in another member state from a person or establishment with whom the insured person's sickness fund had not concluded an agreement conditional upon prior authorisation by the sickness fund, to be granted where such action was necessary for the insured person's health care, constituted a barrier to the freedom to provide services for the purposes of arts 49 and 50 EC, both for insured persons and for treatment providers. However, that barrier might be justified by the objective of maintaining a high quality, balanced medical and hospital service open to all, in so far as it contributed to the attainment of a high level of health protection. Further, although aims of purely economic nature could not justify a barrier to the fundamental principle of freedom to provide services, in so far as it might have consequences for the overall level of public-health protection, the risk of seriously undermining the financial balance of the social security system might also constitute per se an overriding reason in the general interest capable of justifying a barrier of that kind (see judgment paras 40, 44, 45, 67, 72, 73, 109, below).

- (i) Such legislation was not precluded by 49 and 50 EC in so far as it related to the assumption of the costs of hospital medical services, provided that prior authorisation was refused only where treatment which was the same or equally effective for the patient might be obtained without undue delay in an establishment which had concluded an agreement with the fund. For such services, a scheme requiring prior administrative authorisation was justified by way of derogation from the fundamental freedom to provide services on the basis that it was both necessary and reasonable to ensure that there was sufficient and permanent access to a balanced range of high-quality hospital treatment in the state concerned, and because it assisted in meeting a desire to control costs and to prevent wastage of financial, technical and human resources. However, such a scheme had to be based on objective, non-discriminatory criteria which were known in advance, in such a way as to circumscribe the exercise of the national authorities' discretion, so that it was not used arbitrarily. Further, such a scheme had likewise to be based on a procedural system that was easily accessible and capable of ensuring that a request for authorisation would be dealt with objectively and impartially within a reasonable time, and refusals to grant authorisation had also to be capable of being challenged in judicial or quasi-judicial proceedings. A condition as to the necessity of the treatment would be justified provided that that condition was construed to the effect that authorisation to receive treatment in another member state might be refused on that ground only if treatment which was the same or equally effective for the patient might be obtained without undue delay from an establishment with which the insured person's sickness fund had an agreement. In determining whether that proviso was satisfied, the national

a Articles 49 and 50 EC, so far as material, are set out at opinion para 15, below

authorities were to have regard to all the circumstances of each specific case and were to take due account not only of the patient's medical condition at the time when authorisation was sought and, where appropriate, the degree of pain or the nature of the patient's disability, which might, for example, make it impossible or extremely difficult to carry out a professional activity, but also of his or her medical history (see judgment paras 78–81, 85, 89, 90, 109, below). a

(ii) Such legislation was precluded by arts 49 and 50 EC in so far as it related to the assumption of the costs of non-hospital medical services. There was nothing to indicate that removal of the system of prior authorisation for non-hospital medical services would give rise to patients travelling to other members states in such large numbers, despite linguistic barriers, geographic distance, the cost of staying abroad and lack of information about the kind of care provided there, that the financial balance of the Netherlands social security system would be jeopardised. Care was generally provided near to the place where the patient resided, in a cultural environment that was familiar to him and which allowed him to build up a relationship of trust with the doctor treating him. Disregarding emergencies, the most obvious cases of patients travelling abroad were in border areas or where specific conditions were to be treated. It was specifically in those areas or in respect of those conditions that the Netherlands sickness funds had tended to set up a system of agreements with foreign doctors. In any event, it remained for the member states alone to determine the extent of the sickness cover available to insured persons and, where an insured person received treatment in another member state without prior authorisation, reimbursement of the cost of that treatment might only be claimed within the limits of cover provided by the sickness insurance scheme in the member state of affiliation. Furthermore, removal of the requirement as to prior authorisation would not undermine the essential characteristic of the national sickness insurance scheme, because achievement of the fundamental freedoms guaranteed by the Treaty inevitably required member states to make some adjustments to the national systems of social security such that it did not follow that sovereign powers would be undermined in that field, and because a medical service did not cease to be a provision of services simply because it was paid for by a national health service or by a system providing benefits in kind. In that latter regard, a medical service provided in one member state and paid for by the patient did not cease to fall within the scope of the freedom to provide service merely because reimbursement of the costs of the treatment involved was applied for under another member state's sickness insurance legislation. It was the requirement for prior authorisation that constituted the barrier to a patient's ability to go to the medical service provider of his or her choice in another member state. Thus, there was no need to draw a distinction between whether the patient paid the costs incurred and subsequently applied for reimbursement, or whether the sickness fund of the national budget paid the provider directly (see judgment paras 95, 96, 98, 102, 103, 108, 109, below). b  
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*Geraets-Smits v Stichting Ziektenfonds VGZ, Peerbooms v Stichting CZ Groep Zorgverzekeringen* Case C-157/99 [2003] All ER (EC) 481 followed. i

## Notes

For the principles of law applicable to sickness insurance, see 25 *Halsbury's Laws* (4th edn) (2003 reissue) para 590.

For EC Treaty, arts 49, 50 EC (formerly arts 59, 60), see 50 *Halsbury's Statutes* (4th edn) Current Statutes Service (issue 88) 370.

**a Cases cited**

*Asociación Profesional de Empresas Navieras de Líneas Regulares (Analir) v Administración General del Estado* Case C-205/99 [2001] ECR I-1271, ECJ.

*Bachmann v Belgian State* Case C-204/90 [1994] STC 855, [1992] ECR I-249, ECJ.

*Bestuur van het Algemeen Ziekenfonds Drenthe-Platteland v Pierik* Case 182/78 [1979] ECR 1977, ECJ.

**b**

*Coonan v Insurance Officer* Case 110/79 [1980] ECR 1445, ECJ.

*Decker v Caisse de Maladie des Employés Privés* Case C-120/95 [1998] All ER (EC) 673, [1998] ECR I-1831, ECJ.

*Duphar BV v Netherlands* Case 238/82 [1984] ECR 523, ECJ.

*EC Commission v Germany* Case 205/84 [1986] ECR 3755, ECJ.

**c**

*EC Commission v Italy* Case C-180/89 [1991] ECR I-709, ECJ.

*EC Commission v Netherlands* Case C-353/89 [1991] ECR I-4069, ECJ.

*European Commission v France* Case C-381/93 [1994] ECR I-5145, ECJ.

*Geraets-Smits v Stichting Ziekenfonds VGZ, Peerbooms v Stichting CZ Groep Zorgverzekeringen* Case C-157/99 [2003] All ER (EC) 481, [2002] QB 409, [2002] 2 WLR 154, [2001] ECR I-5473, ECJ.

**d**

*Gül v Regierungspräsident Düsseldorf* Case 131/85 [1986] ECR 1573, ECJ.

*Kohll v Union des Caisses de Maladie* Case C-158/96 [1998] All ER (EC) 673, [1998] ECR I-1931, ECJ.

*Luisi v Ministero del Tesoro* Joined cases 286/82 and 26/83 [1984] ECR 377, ECJ.

*Ministerio Fiscal v Bordessa, Ministerio Fiscal v Mellado* Joined cases C-358/93 and C-416/93 [1995] All ER (EC) 385, sub nom *Criminal Proceedings against*

**e**

*Bordessa* [1995] ECR I-361, ECJ.

*Paraschi v Landesversicherungsanstalt Württemberg* Case C-349/87 [1991] ECR I-4501, ECJ.

*Ramrath v Ministre de la Justice* Case C-106/91 [1992] ECR I-3351, ECJ.

*Sanz de Lera (Criminal proceedings against)* Joined cases C-163/94, C-165/94 and C-250/94 [1995] ECR I-4821, ECJ.

**f**

*Sodemare SA v Regione Lombardia* Case C-70/95 [1997] ECR I-3395, ECJ.

*Stichting Collectieve Antennevoorziening Gouda v Commissariaat voor de Media* Case C-288/89 [1991] ECR I-4007, ECJ.

*Stöber v Bundesanstalt für Arbeit* Joined cases C-4/95 and 5/95 [1997] ECR I-511, ECJ.

**g**

*Svensson v Ministre du Logement et de l'Urbanisme* Case C-484/93 [1995] ECR I-3955, ECJ.

*Syndesmos ton en Elladi Touristikon kai Taxidiotikon Grafeion v Ergasias* Case C-398/95 [1997] ECR I-3091, ECJ.

**h Reference**

By order of 6 October 1999, the Centrale Raad van Beroep (Higher Social Security Court), Netherlands, referred, under art 234 EC (formerly art 177 of the EC Treaty), to the Court of Justice of the European Communities for a preliminary ruling three questions (set out at judgment para 32, below) on the interpretation of art 59 of the EC Treaty (now, after amendment, art 49 EC)

**i**

and art 60 of the EC Treaty (now art 50 EC). Those questions were raised in two sets of proceedings between Ms VG Müller-Fauré and Onderlinge Waarborgmaatschappij OZ Zorgverzekeringen UA (mutual sickness insurance fund; the Zwijsrecht Fund), established in Zwijsrecht, Netherlands, and between Ms EEM van Riet and Onderlinge Waarborgmaatschappij ZAO Zorgverzekeringen (the Amsterdam Fund), established in Amsterdam,



Netherlands, concerning the reimbursement of medical costs incurred in Germany and Belgium respectively. Written observations were submitted on behalf of: Ms Müller-Fauré, by J Blom, Advocaat; Onderlinge Waarborgmaatschappij OZ Zorgverzekeringen UA, by JK de Pree, Advocaat; the Netherlands government, by MA Fierstra, acting as agent; the Belgian government, by P Rietjens, acting as agent; the Danish government, by J Molde, acting as agent; the German government, by W-D Plessing and B Muttelsee-Schön, acting as agents; the Spanish government, by N Díaz Abad, acting as agent; the Irish government, by MA Buckley, acting as a, and N Hyland BL; the Italian government, by U Leanza, acting as agent, and IM Braguglia, Avvocato dello Stato; the Swedish government, by A Kruse, acting as agent; the United Kingdom government, by R Magrill, acting as agent, and S Moore, Barrister; the Icelandic government, by E Gunnarsson, HS Kristjánsson and V Hauksdóttir, acting as agents; the Norwegian government, by H Seland, acting as agent; the Commission of the European Communities, by P Hillenkamp and HMH Speyart, acting as agents. Additional written observations were submitted at the court's request on behalf of: Ms van Riet, by AAJ van Riet; Onderlinge Waarborgmaatschappij OZ Zorgverzekeringen UA, by JK de Pree; Onderlinge Waarborgmaatschappij ZAO Zorgverzekeringen, by HHB Limberger, acting as agent; the Netherlands government, by HG Sevenster, acting as agent; the Spanish government, by N Díaz Abad; the Irish government, by DJ O'Hagan, acting as agent; the Swedish government, by A Kruse; the United Kingdom government, by D Wyatt QC, acting as agent, and S Moore; the Norwegian government, by H Seland; the Commission, by HMH Speyart. Oral observations were made on behalf of: Onderlinge Waarborgmaatschappij OZ Zorgverzekeringen UA, represented by JK de Pree; Onderlinge Waarborgmaatschappij ZAO Zorgverzekeringen, represented by R Out, acting as agent; the Netherlands government, represented by HG Sevenster; the Danish government, represented by J Molde; the Spanish government, represented by N Díaz Abad; the Irish government, represented by A Collins BL; the Finnish government, represented by T Pynnä, acting as agent; the United Kingdom government, represented by D Lloyd-Jones QC, and the Commission, represented by H Michard, acting as agent, and HMH Speyart. The language of the case was Dutch. The facts are set out in the opinion of the Advocate General.

22 October 2002. **The Advocate General (D Ruiz-Jarabo Colomer)** delivered the following opinion<sup>1</sup>.

1. By the three questions which it has referred under art 234 EC (formerly art 177 of the EC Treaty), the Centrale Raad van Beroep, Netherlands, seeks to ascertain, essentially, whether arts 59 of the EC Treaty (now, after amendment, art 49 EC) and 60 of the EC Treaty (now art 50 EC) preclude legislation enacted by a member state in the area of compulsory sickness insurance providing only benefits in kind which makes reimbursement of medical expenses in respect of treatment, where it is necessary, dispensed in another member state by a medical practitioner or hospital with whom or which no agreement has been concluded subject to prior authorisation of the sickness insurance fund.

1 Original language: Spanish.

a I—THE FACTS OF THE TWO DISPUTES IN THE MAIN PROCEEDINGS

A—*The proceedings relating to Ms Müller-Fauré*

b 2. Ms Müller-Fauré was dissatisfied with Netherlands dental surgeons, so she took advantage of a holiday in Germany to visit the dentist without having obtained the authorisation of her sickness insurance fund. Between 20 October and 18 November 1994, six crowns and a precision implant in the upper jaw were inserted. Her treatment included fillings, radiography and anaesthesia. On returning to the Netherlands, she applied to her sickness insurance fund, the mutual insurance company Onderlinge Waarborgmaatschappij OZ Zorgverzekeringen UA, (hereinafter OZ Zorgverzekeringen), seeking reimbursement of the costs of the treatment, which amounted to DEM 7,444.59 (€3,806.35). Since most of the treatment carried out in Germany is not covered by the compulsory sickness insurance and are therefore not eligible for reimbursement, the dispute concerns, in actual fact NLG 465.05 (€211.03). On the basis of the opinion of its advisory dental surgeon, the fund rejected the application in May 1995.

d 3. The Appeals Committee of the Board responsible for supervision and administration of the sickness insurance funds (Commissie voor beroepszaken van de Ziekenfondsradaad) considered, in February 1996, that the decision to reject the application was correct. It took the view that the compulsory sickness insurance fund is characterised by the provision of benefits in kind, which means that insured persons are entitled to receive treatment. It is only in exceptional cases that they may apply for reimbursement, but in the case of e Ms Müller-Fauré that was not possible since the treatment was not urgent for the purpose of art 22 of Council Regulation (EEC) 1408/71<sup>2</sup>. Moreover, in order to obtain the treatment she sought, the patient had no need to resort to a dental surgeon who had no contractual arrangements with OZ Zorgverzekeringen.

f 4. The court before which proceedings were brought at first instance upheld that view and considered that the extent of the treatment performed and the fact that it spanned a period of several weeks clearly indicated that it was not urgent.

B—*The proceedings relating to Ms van Riet*

g 5. On 5 April 1993, Ms van Riet's doctor requested, on behalf of his patient, that the medical adviser of her sickness insurance company Onderlinge Waarborgmaatschappij ZAO Zorgverzekeringen (ZAO Zorgverzekeringen) should authorise her to have an arthroscopy, chargeable to ZAO, in Belgium, where it could be performed much sooner than in the Netherlands. That request was rejected by letters of 24 June and 5 July 1993 on the ground h that such treatment could be provided in the Netherlands.

Without waiting for the response, Ms van Riet had the arthroscopy and an ulnar reduction performed in a sports medicine clinic in Belgium. The insurance company refused to reimburse the cost, which amounted to BEF 93,792 (€2,325.04)

i 6. On 23 September 1994, the Appeals Committee of the Board responsible for supervision of the management and administration of the sickness

2 On the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community (OJ English Sp Edn 1971 (II) p 416), as worded in Council Regulation (EEC) 2001/83 (amending and updating Regulation 1408/71 and Regulation 574/72) (OJ 1983 L230 p 6).

insurance funds upheld the decision to refuse reimbursement of the cost of the treatment. It found that the necessary and appropriate medical treatment was available in the Netherlands, within reasonable time, so that no emergency treatment for the purpose of art 22 of Regulation 1408/71 was involved. a

The Rechtbank declared the appellant's appeal unfounded on the ground that her complaint did not call to be treated in Belgium. b

## II—THE QUESTIONS REFERRED TO THE COURT

7. In the order for reference, the Centrale Raad van Beroep states that the compulsory sickness insurance covers practically all of the medical care provided to Ms van Riet in Belgium. That statement is true only in respect of a limited portion of the dental work carried out on Ms Müller-Fauré in Germany, since the remainder is not eligible for reimbursement. c

According to the case law of the Centrale Raad van Beroep, the insured person must have obtained authorisation from the sickness insurance fund before treatment commences. The cost of the medical care provided abroad cannot be reimbursed unless, for particular reasons, refusal of the sickness insurance fund infringes a general principle of law. That was not the case with respect either to Ms Müller-Fauré, who took the opportunity to visit the dentist while she was on holiday, or to Ms van Riet, who did not wait until the fund replied to her request when there was no medical or other reason why she could not wait until her application was dealt with. d

Furthermore, even if Ms Müller-Fauré had sought authorisation and Ms van Riet had awaited a response, the insurance funds would not have granted authorisation, since it is not evident that their treatment abroad was necessary. The lack of confidence in national medical practitioners is not sufficient reason, nor is the waiting time in the Netherlands for the arthroscopy unacceptably long. e

8. Finally, the Centrale Raad van Beroep wonders whether the contested decisions infringe arts 49 and 50 EC. It therefore stayed proceedings in the two cases and referred the following three questions to the Court of Justice of the European Communities for a preliminary ruling: f

'(1) Are Articles 59 and 60 of the EC Treaty (now Articles 49 and 50 EC) to be interpreted as meaning that in principle a provision such as Article 9(4) of the Ziekenfondswet [Law on Health Insurance], read in conjunction with Article 1 of the Regeling hulp in het buitenland ziekenfondsverzekering [Regulation on health care abroad under the sickness insurance rules], is incompatible therewith in so far as it stipulates that in order to assert his entitlement to benefits a person insured with a health insurance fund requires the prior authorisation of that fund to seek treatment from a person or establishment outside the Netherlands with whom or which the health insurance fund has not concluded an agreement? g

(2) If so, do the objectives of the Netherlands system of benefits in kind referred to above [to ensure balanced medical and hospital services open to all, the survival of the system of benefits in kind and control of the financial equilibrium by supervising the costs] constitute an overriding reason in the general interest capable of justifying a restriction on the fundamental principle of freedom to provide services? h

(3) Does the question whether the treatment as a whole or only a proportion thereof involved in-patient care affect the answers to these questions?' i



**a** III—NATIONAL LEGAL FRAMEWORK REGARDING COMPULSORY SICKNESS INSURANCE<sup>3</sup>

9. In the Netherlands, workers and persons regarded as such whose income does not exceed a certain amount are covered by compulsory insurance under the Law on Sickness Funds which covers ordinary health care.

**b** 10. Under art 8 of that Law, such funds are under an obligation to ensure that insured persons can exercise their right to obtain services. It is a system which provides only for health-care benefits in kind, so that beneficiaries are not entitled to the reimbursement of sickness costs which they may incur, but to the provision of free treatment<sup>4</sup>.

**c** 11. Under art 3 of the Royal Decree on sickness insurance benefits in kind (Verstrekingenbesluit Ziekenfondsverzekering) of 4 January 1966, as amended by the Royal Decree of 16 January 1997, health care is to include, inter alia, assistance by a general medical practitioner and a specialist 'to such extent as is regarded as normal within professional circles'. The decisive factor for present purposes is what the medical profession in the Netherlands regards as normal. In general, treatment is not recognised as normal where it is not provided or recommended because it has not been sufficiently endorsed by international or national scientific research. What matters is the extent to which a particular treatment is described as the appropriate professional procedure since, if it has a valid scientific basis, it is defined as a benefit within the meaning of the Law on Sickness Funds<sup>5</sup>.

**d** As regards dental care, the benefits to which insured persons are entitled are governed by art 7(2). In 1994, the government decided to abolish almost in its entirety entitlement of persons over 18 years of age to dental treatment under the compulsory sickness insurance system<sup>6</sup>. It appears that, for the time being, only an annual screening check-up and any necessary radiography are covered.

**e** 12. Article 9 of the Law on Sickness Funds governs claims for entitlement to care and provides, so far as is relevant:

**f** '1. ... an insured person wishing to claim entitlement to a benefit shall apply to a person or an establishment with whom or with which the sickness fund with which he is registered has entered into an agreement for that purpose ...

**g** 2. The insured person may choose from among the persons and establishments mentioned in paragraph 1, subject to the provisions of paragraph 5 and the provisions regarding conveyance by ambulance ...

4. A sickness fund may, by way of derogation from paragraphs 1 and 2 hereof, authorise an insured person, for the purpose of claiming

**h** 3 After giving a very brief description of the Netherlands compulsory sickness insurance scheme, the Centrale Raad van Beroep refers, for further information, to para II.1 of the order of the Arrondissementsrechtbank te Roermond referring a number of questions for a preliminary ruling in *Geraets-Smits v Stichting Ziekenfonds VGZ, Peerbooms v Stichting CZ Groep Zorgverzekeringen* Case C-157/99 [2003] All ER (EC) 481, [2001] ECR I-5473 in which judgment was delivered on 12 July 2001. For my part, I have taken, so far as relevant, the account of Netherlands legislation which I set out in chapter I of the opinion which I delivered in that case on 18 May 2000.

**i** 4 During the hearing before the Court of Justice, both sickness funds laid great emphasis on the fact that the legislation does not confer on insured persons any right to reimbursement of medical costs which they may incur.

5 In *Geraets-Smits* case, the court laid down how that requirement was to be interpreted where an insured person applies for authorisation to obtain medical treatment in another member state at a hospital with which no agreement has been concluded.

6 A year later, the government reintroduced partial financing for dentures because certain elderly persons could not afford them.

entitlement to a benefit, to apply to another person or establishment in the Netherlands where this is necessary for his health care. The Minister may determine the cases and circumstances in which an insured person may be granted authorisation, in claiming entitlement to a benefit, to apply to a person or an establishment outside the Netherlands.’ a

13. The requirement of obtaining such authorisation is contained in art 1 of the regulation on health care abroad under the sickness insurance rules of 30 June 1988<sup>7</sup>, which provides: b

‘A sickness fund may authorise an insured person claiming entitlement to a benefit to apply to a person or establishment outside the Netherlands in those cases in which the sickness insurance fund determines that such action is necessary for the health care of the insured person.’ c

No special conditions have been laid down for insured persons who wish to be treated by medical practitioners or health-care institutions established abroad with whom or which their funds have not entered into an agreement for the provision of health care, so that they must obtain prior authorisation from their sickness fund in exactly the same way as they have to in order to be treated by a medical practitioner or health-care institution established in the Netherlands with whom or which the fund has not concluded a health-care agreement.’<sup>8</sup> d

14. In order to offer benefits in kind to insured persons, sickness funds must, under art 44(1) of the Law on Sickness Funds, conclude agreements with persons and establishments offering one or more forms of care. Article 44(3) thereof defines the content of such agreements, which are to include the nature and extent of the obligations and rights of the parties, the quality and effectiveness of the care, the cost and supervision of compliance with the terms of the agreement. The insurance fund may terminate the agreement if the person or establishment concerned fails to comply with its terms. e

#### IV—THE PROVISIONS OF THE TREATY ON FREEDOM TO PROVIDE SERVICES f

15. Article 49 EC provides:

‘Within the framework of the provisions set out below, restrictions on freedom to provide services within the Community shall be prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended.’ g

Under art 50 EC:

‘Services shall be considered to be “services” within the meaning of this Treaty where they are normally provided for remuneration, insofar as they are not governed by the provisions relating to freedom of movement for goods, capital and persons. h

“Services” shall in particular include ...

(d) activities of the professions.’ i

#### V—PROCEDURE BEFORE THE COURT

16. In the initial stages of these proceedings, written observations were submitted, within the period for the purpose by art 20 of the EC Statute of the

<sup>7</sup> Staatscourant 1988, No 123.

<sup>8</sup> The agent for the Netherlands government confirmed that point at the hearing.

*a* Court of Justice, by Ms Müller-Fauré, OZ Zorgverzekeringen, the governments of Belgium, Denmark, Germany, Spain, Ireland, Italy, the Netherlands, Sweden, the United Kingdom, Iceland and Norway and by the Commission of the European Communities.

*b* 17. On 12 July 2001, the day on which judgment was delivered in *Geraets-Smits*' case, the Registry of the Court of Justice wrote to the Centrale Raad van Beroep asking it whether, in the light of the answers given in that case, it wished to continue with its reference for a preliminary ruling. After hearing the views of the parties in both cases, the latter replied, on 25 October 2001, that it did not wish to withdraw its questions.

*c* 18. After declaring the written procedure in the present case closed in February 2000, the court decided in March 2002 to request the parties to the main proceedings, the governments of the member states, the Council, the Commission and any other interested parties to comment in writing on the conclusions to be drawn from the judgment in *Geraets-Smits*' case, in view of the views expressed by the Centrale Raad van Beroep in its letter of 25 October 2001.

*d* Ms van Riet, OZ Zorgverzekeringen, ZAO Zorgverzekeringen, the governments of Ireland, the Netherlands, Sweden, the United Kingdom and Norway and the Commission took the opportunity to do so. Notification to the Spanish government not having been sent to its address for service, it was allowed to submit its observations after the time limit, which it did on 1 August 2002.

*e* 19. The representatives of Onderlinge Waarborgmaatschappij OZ Zorgverzekeringen UA and of Onderlinge Waarborgmaatschappij ZAO Zorgverzekeringen and the agents for Denmark, Spain, Ireland, Finland, Sweden, the United Kingdom and the Commission presented oral argument at the hearing on 10 September 2002.

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#### VI—THE OBSERVATIONS OF THE PARTIES TO THESE PROCEEDINGS

20. The views of those parties which have submitted observations, other than those of the appellants in the two sets of main proceedings, Belgium and the Commission, are largely the same except in a number of distinct aspects which I shall discuss below.

*g* 21. Ms Müller-Fauré takes the view that the requirement of prior authorisation is contrary to arts 49 and 50 EC and cannot be justified on the ground that the same services may be obtained in the Netherlands and Germany and that the costs and quality are the same. Ms van Riet states that, in order to confirm, by means of an arthroscopy, the diagnosis that an ulnar reduction was necessary, she would have to wait between 10 and 14 weeks. She would then have to wait a further six to eight months for her operation. In order to avoid that inconvenience, she attended a clinic in Belgium, where she waited only four weeks for the exploratory examination and one week for the operation, and the total cost came to less than two-thirds of what it would have been in the Netherlands.

*i* 22. OZ Zorgverzekeringen maintains that the requirement of prior authorisation before seeking the services of a non-contracted provider, whether in the Netherlands or abroad, is an inherent part of the system of benefits in kind. Should it be deemed a barrier to freedom to provide services, it would still be justified by the need to guarantee affordable, high-quality health care and by the equality of insured persons in respect of entitlement to



benefits. It is not necessary to make a distinction as to whether it is a medical practitioner or a hospital providing those services. a

23. The Belgian government submits that the authorisation requirement is contrary to arts 49 and 50 EC. Moreover, a finding that it is not necessary to seek treatment abroad because a medical practitioner with whom an agreement has been concluded is able to provide it within the country amounts to discrimination. The special nature of the system of sickness insurance, that is the fact that it only provides benefits in kind, is not an overriding reason in the general interest capable of justifying a barrier of that kind. b

24. The views of the other 11 member states may be classified into two groups. The first group, which comprises Denmark, Germany, Ireland, Sweden, United Kingdom, Norway and Iceland, is of the view that public health-care benefits provided free-of-charge to insured persons are not services within the meaning of art 50 EC, either because they lack the element of remuneration<sup>9</sup> or because those concerned, the doctor and the patient, cannot influence either the content or the price of the benefit. c

Those belonging to the second group, composed of Spain, Finland, Italy and the Netherlands, defend the view that the judgment in *Kohll v Union des Caisses de Maladie*<sup>10</sup>, which concerned a sickness insurance system which reimburses part of the cost of treatment, cannot be applied to those which provide only benefits in kind, and there is no need, in that regard, to distinguish between care provided by a medical practitioner and that provided in a hospital. d

Whether it is considered that those are services or that *Kohll's* case also applies to a sickness insurance system such as that of the Netherlands, all the above states, without exception, submit that the requirement of prior authorisation is not contrary to arts 49 and 50 EC because it is justified. e

25. In the first observations submitted by the Commission, it maintained that hospital and medical benefits are services within the meaning of the Treaty, including in those member states which operate a public health system<sup>11</sup> which is totally separate on the one hand from medical practitioners who practise their profession privately and privately-funded hospitals on the other. Under the sickness insurance system of the Netherlands, the benefits in kind, the agreements and the requirement of prior authorisation are indissociable parts of a single scheme. However, to make the grant of authorisation subject to the condition that the patient requires a benefit which a contracted establishment cannot provide without undue delay constitutes direct discrimination on the basis of place of establishment inasmuch as it favours non-contracted Netherlands service-providers to the detriment of those based in the other member states. f

The Commission claims that neither protection of the quality of health-care nor keeping costs under control by the sickness funds is sufficient reason to justify the barrier to the freedom to provide services which prior authorisation g

<sup>9</sup> A view which I share, as I made clear in the opinion I delivered in *Geraets-Smits* case. See, in particular, paras 35 to 49 in which I examine in detail the characteristics of the Netherlands compulsory sickness insurance scheme and I state that the health-care benefits in kind which it provides to insured persons lack the element of remuneration and are not therefore services within the meaning of art 50 EC. i

<sup>10</sup> Case C-158/96 [1998] All ER (EC) 673, [1998] ECR I-1931.

<sup>11</sup> The Commission acknowledges that, in some member states, there exist public health-care systems in which health-care providers are not members of a liberal profession, whose remuneration is not for medical care and hospitals do not pursue a commercial activity. At the hearing it gave as examples Denmark, Spain, Ireland and the United Kingdom.

- a constitutes. It differentiates, in the context of hospital care, between care provided on admission from those provided as outpatient care and assimilates the latter to the care dispensed by medical practitioners in their surgeries. It concludes that it is very unlikely that the phenomenon of patients travelling to other member states in search of non-hospital treatment will become sufficiently significant to affect seriously a national social security system
- b providing benefits in kind.

26. In the document submitted at the request of the court following delivery of the judgment in *Geraets-Smits*' case, the Commission acknowledges that there are certain dental services the particular nature of which could cause them to be caught by the overriding reasons examined in the above-mentioned
- c judgment concerning treatment at hospital, so that it urges the court to clarify its position in that regard.

VII—THE CASE LAW OF THE COURT OF JUSTICE ON FREEDOM TO PROVIDE SERVICES IN THE CONTEXT OF PRIOR AUTHORISATION REQUIRED BY THE SICKNESS INSURANCE FUND TO RECEIVE TREATMENT IN ANOTHER MEMBER STATE

- d A—Surgery visit to a medical practitioner and the prior authorisation requirement in a sickness insurance system which reimburses cost of treatment

27. On 28 April 1998, the Court of Justice delivered its judgment in *Kohll*'s case<sup>12</sup>. The questions had been referred by the Cour de Cassation (Court of Cassation), Luxembourg, in the course of proceedings brought by Mr Kohll
- e against the decision of his sickness fund refusing to give authorisation for his daughter to be treated by an orthodontist in Germany, on the ground that the treatment was not urgent and could be provided in Luxembourg.

28. With regard to the application of the freedom to provide services to treatment provided by an orthodontist established in another member state, outwith any hospital infrastructure, the court stated that, since the service was
- f provided for remuneration, it was a service within the meaning of art 50 EC.

29. As to restrictive effects, while the Luxembourg rules did not deprive insured persons of the possibility of approaching a provider of services established in another member state, they did make reimbursement of the costs subject to prior authorisation, while reimbursement of those incurred in the state of insurance was not subject to the same requirement. It therefore
- g decided that such rules deterred insured persons from approaching providers of medical services established in another member state and therefore constituted for them and their patients a barrier to freedom to provide services<sup>13</sup>.

30. Several grounds were put forward by way of justification for the rules in question, namely maintenance of the financial balance of the social security
- h system and protection of public health, which included the need to guarantee the quality of medical services and the aim of providing a balanced medical and hospital service open to everyone.

31. With regard to the first ground, since the Luxembourg social security institution took on the same financial burden whether an insured person

i 12 Cited in footnote 10, above. The court on the same day also delivered *Decker v Caisse de Maladie des Employés Privés* Case C-120/95 [1998] All ER (EC) 673, [1998] ECR I-1831, on which I will not comment because the facts of the case concerned the purchase of spectacles and thus fell within the scope of the free movement of goods. See my opinion of 18 May 2000 in *Geraets-Smits*' case for the views of the numerous authors who have commented on those two judgments.

13 See *Luisi v Ministero del Tesoro* Joined cases 286/82 and 26/83 [1984] ECR 377 (para 16) and *Bachmann v Belgian State* Case C-204/90 [1994] STC 855, [1992] ECR I-249 (para 31).

approached a Luxembourg orthodontist or one established in another member state, the court took the view that reimbursement of the costs of dental treatment provided in other member states at the rate applied in the state of insurance had no significant effect on the financing of the social security system.

32. As regards the protection of public health, according to paras 45 and 46 of *Kohll's* case, while member states may fix limits to freedom to provide services on grounds of public health, that right does not permit them to exclude the public health sector, as a sector of economic activity, from the scope of the fundamental principle of freedom of movement<sup>14</sup>. In any event, as the conditions for taking up and pursuing the profession of doctor and dentist have been the subject of several co-ordinating and harmonising directives<sup>15</sup>, doctors and dentists established in other member states must be afforded all guarantees equivalent to those accorded to doctors and dentists established on national territory, for the purposes of freedom to provide services, so that rules such as those applicable in Luxembourg were not justified on grounds of public health in order to protect the quality of medical services provided in other member states.

Next, it was accepted in the judgment that the objective of maintaining a balanced medical and hospital service open to all, while intrinsically linked to the method of financing the social security system, may also fall within the derogations on grounds of public health provided for in art 46 EC (formerly art 56 of the EC Treaty), since it contributes to the attainment of a high level of health protection. In that regard, that article permits member states to restrict the freedom to provide medical and hospital services in so far as the maintenance of a treatment facility or medical service on national territory is essential for the public health and even the survival of the population.

Since it was not shown that the Luxembourg rules were necessary in order to attain those two objectives, the court held that they were not justified on grounds of public health.

*B—Treatment provided in a hospital and the prior authorisation requirement in a sickness insurance system which provides exclusively benefits in kind*

33. On 12 July 2001, the court delivered the judgment in *Geraets-Smits' case*<sup>16</sup>, in which it was called upon to consider, at the request of a Netherlands court, the Arrondissementsrechtbank ter Roermond, the same provision as is in issue in the present case, namely art 9(4) of the Law on Sickness Funds, read in conjunction with art 1 of the regulation on health care abroad under the compulsory sickness insurance rules.

34. In one of the two cases before the Rechtbank, the sickness insurance fund had refused to reimburse Ms Smits, who was suffering from Parkinson's disease, the cost of specific, multidisciplinary treatment she had undergone,

14 See *Gül v Regierungspräsident Düsseldorf* Case 131/85 [1986] ECR 1573 (para 17).

15 The court cites Council Directive (EEC) 78/686 (concerning the mutual recognition of diplomas, certificates and other evidence of formal qualifications of practitioners of dentistry, including measures to facilitate the effective exercise of the right of establishment and freedom to provide services) (OJ 1978 L233 p 1); Council Directive (EEC) 78/687 (concerning the co-ordination of provisions laid down by law, regulation or administrative action in respect of the activities of dental practitioners) (OJ 1978 L233 p 10); and Council Directive (EEC) 93/16 (to facilitate the free movement of doctors and the mutual recognition of their diplomas, certificates and other evidence of formal qualifications) (OJ 1993 L165 p 1).

16 Cited in footnote 3, above.



a without authorisation, in a clinic in Germany. The reasons for the refusal consisted in the fact that the specific clinical method was not normal treatment within professional circles and was therefore not one of the benefits covered and that satisfactory and adequate treatment was available in the Netherlands at an establishment with which there were contractual arrangements, so that the treatment undergone in Germany was not necessary.

b In the other case, the sickness insurance fund refused Mr Peerbooms, who had fallen into a coma following a road accident, reimbursement for the treatment undergone in a clinic in Austria, consisting in special intensive therapy using neurostimulation, a technique which, in the Netherlands, is used only experimentally at two medical centres on patients under the age of 25 years, which Mr Peerbooms was not. The refusal was based, first, on the fact  
c that, owing to the experimental nature of therapy using neurostimulation and the absence of scientific evidence of its effectiveness, that type of treatment was not regarded as normal within professional circles, so that it was not a treatment which was covered. Second, on the consideration that, since satisfactory and adequate treatment was available without undue delay in the  
d Netherlands at an establishment with which the sickness insurance fund had contractual arrangements, the treatment undergone in Austria was not necessary.

35. The court did not accept the view of the majority of the member states which argued that sickness insurance systems providing exclusively benefits in kind did not fall within the scope of arts 49 and 50 EC. It ruled that not even  
e the fact that medical treatment provided at a hospital was financed directly by the sickness insurance funds on the basis of agreements and pre-set scales of fees could remove such treatment from the sphere of services.

36. Next, it held that the Netherlands rules deter insured persons from applying to providers of medical services established in a member state other than that in which they are insured and thus constitute, both for insured  
f persons and service providers, a barrier to freedom to provide services.

37. In paras 76 et seq, the judgment examines the prior authorisation requirement to which the Netherlands legislation subjects the assumption of the costs of treatment provided in another member state by a non-contracted hospital and finds the measure both necessary and reasonable for a number of  
g reasons. First, because the number of hospitals, their geographical distribution, the mode of their organisation and the equipment with which they are provided, and even the nature of the medical services which they are able to offer, are all matters for which planning must be possible. Secondly, because such planning, in a contract-based system such as that of the Netherlands, seeks to achieve the aim of ensuring that there is sufficient and permanent  
h access to a balanced range of high-quality hospital treatment within the state and to control costs and to prevent any wastage which would be all the more damaging inasmuch as the hospital sector generates considerable costs and must satisfy increasing needs, while the financial resources which may be made available for health care are not unlimited, whatever the mode of funding  
i applied<sup>17</sup>.

<sup>17</sup> Bonomo 'Programmazione della spesa sanitaria e libertà di cura: un delicato dilemma', *Il Foro Amministrativo*, 2001, pp 1870 to 1880, in particular, p 1880: 'Equilibrio finanziario e programmazione della spesa sanitaria sembrano dunque prevalere sulla libertà di prestare servizi all'interno del territorio comunitario, e, quindi sulla libertà di scelta del luogo di cura.'

## VIII—EXAMINATION OF THE QUESTIONS REFERRED TO THE COURT

38. As has been pointed out above, the court found in *Kohll*'s case that, in the case of treatment carried out by a medical practitioner at his surgery, chargeable to a reimbursement sickness insurance, the barrier to freedom to provide services which the prior authorisation from the sickness fund constitutes was not justified. However, in the judgment in *Geraets-Smits*' case, which concerned treatment provided in a hospital, chargeable to a system of benefits in kind, the court found, without drawing a distinction between whether the system was one of reimbursement or provided only benefits in kind, that a restriction on one of the fundamental freedoms under the Treaty could be justified by overriding reasons in the general interest.

At this stage, it still remains to be ascertained whether such prior authorisation is permissible where what a person insured under a system of benefits in kind seeks is medical attention which does not require admission into hospital<sup>18</sup>.

39. The Centrale Raad van Beroep itself came to that conclusion in the letter it sent to the Court of Justice in which, first, it pointed out that *Geraets-Smits*' case, which concerned principally treatment offered after admission to hospital, did not enable it to reply to the questions arising in the case brought by Ms Müller-Fauré, where treatment had been dispensed in the specialist's surgery. However, although Ms van Riet had shown herself in favour of maintaining the reference, the Netherlands court acknowledges that, in the light of the above-mentioned judgment, there is no need to answer the questions but it nevertheless requests the Court of Justice to clarify the concept of without undue delay employed in para 103.

## A—Questions (1) and (2)

40. Those questions are practically identical to those referred by the Arrondissementsrechtbank te Roermond in *Geraets-Smits*' case, namely questions (1)(a) and (2). It is, none the less, appropriate to reformulate them in view of the fact that the court has already dealt with the requirement of prior authorisation where care is provided in hospital.

Thus, the national court must be understood to be now seeking to ascertain whether arts 49 and 50 EC preclude rules of a member state setting up a system of benefits in kind requiring insured persons to obtain prior authorisation from their fund before travelling to another member state if they wish to be seen by a medical practitioner with whom the fund does not have contractual arrangements, bearing in mind that authorisation is granted only if treatment is necessary for the insured person, which implies that appropriate treatment which may be provided without undue delay by a contracted medical practitioner is not available within the country.

41. The court has already held, in *Geraets-Smits*' case, that the requirement that insured persons obtain authorisation from the sickness fund in order to exercise their entitlement to benefits, at a hospital in another member state, constituted a barrier to freedom to provide services. I am of the view that the restriction on the insured person is of the same order of magnitude where what is involved is a consultation with a medical practitioner.

<sup>18</sup> Steyger 'National Health Care Systems Under Fire (but not too heavily)' (2002) 29(1) LIEI 97–107, in particular p 99: 'Since the *Kohll* and *Decker* cases concerned a system of reimbursement, the question remained whether the same approach should be applied to national health security schemes which offered benefits in kind.'

a 42. Indeed, art 49 EC precludes the application of any national rules which have the effect of making the provision of services between member states more difficult than the provision of services purely within one member state<sup>19</sup>. Although the Netherlands legislation at issue does not deprive insured persons of the possibility of using a provider of services established in another member state, in practice it makes assumption by the fund of the cost of the benefit subject to prior authorisation, which is moreover refused where the above-mentioned requirement is not satisfied.

b As was shown with regard to care provided in hospitals in para 67 et seq in *Geraets-Smits*' case, since only few medical practitioners established in other member states are contracted to Netherlands sickness funds, in the majority of cases the assumption of the cost of consulting a medical practitioner established in another member state is subject to prior authorisation, which would be refused if the above-mentioned requirement is not satisfied. On the other hand, a visit to a contracted doctor established within the territory and responsible for dispensing most of the health care to insured persons under the Netherlands Law on sickness funds is not only free of charge to the patient, it is also not subject to prior authorisation.

c 43. Therefore, as the court held in the aforementioned judgment, the Netherlands rule at issue is not only a deterrent to insured persons, it also prevents them applying to medical practitioners established in the other member state, so that it constitutes, for both the former and the latter, a barrier to freedom to provide services<sup>20</sup>.

d 44. The court has already acknowledged, with regard to the provision of cross-border medical care, that there exists a number of overriding reasons in the general interest which, where they are fulfilled, are capable of justifying restrictions on the freedom to provide services irrespective of whether it is provided as outpatient care under a system of sickness insurance which reimburses part of the benefits<sup>21</sup> or provided in hospital under a system of benefits in kind<sup>22</sup>.

e An analysis of the case law reveals three reasons: one consists in avoiding the risk of seriously undermining the financial balance of the social security system; another is the objective of maintaining a balanced medical and hospital service open to all, which may also fall within the derogations on grounds of public health under art 46 EC, in so far as it contributes to the attainment of a high level of health protection; and the final reason is maintenance of a treatment facility or medical service on national territory, which is essential for the public health and even the survival of the population.

f 45. It is therefore necessary to determine whether the barrier to freedom to provide health services which is constituted by the requirement, set by the Netherlands compulsory sickness insurance funds, to obtain prior authorisation before consulting a non-contracted medical practitioner is justified by any of those three reasons bearing in mind that it is settled case law that national rules must not exceed what is objectively necessary for achieving the objective pursued and that such a result must not be achievable by less

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19 See *European Commission v France* Case C-381/93 [1994] ECR I-5145 (para 17), *Kohll's case* (para 33), cited in footnote 10, above, and *Geraets-Smits' case* (para 61), cited in footnote 3, above.

20 See *Kohll's case* and *Geraets-Smits' case*, paras 35 and 69, respectively.

21 See para 37 et seq in the judgment in *Kohll's case*.

22 See paras 72 to 75 in *Geraets-Smits' case*.



restrictive means<sup>23</sup>. Furthermore, discriminatory rules can only be justified on the general-interest grounds referred to in art 46 EC, to which art 55 EC (formerly art 66 of the EC Treaty) refers, and which do not include economic aims<sup>24</sup>.

46. As I said in the opinion I submitted in *Geraets-Smits*' case, the Netherlands compulsory sickness system is characterised, first, by the fact that treatment is free for insured persons who, in order to obtain the health-care benefits they require, must use one of the medical practitioners or health-care institutions with whom or which their fund has concluded an agreement so that, if they decide to use non-contracted providers, they are required to pay any costs they incur, without entitlement to reimbursement; and, secondly, by the fact that sickness funds, which have a statutory duty to obtain for insured persons appropriate treatment, operate by concluding with health-care institutions and independent medical practitioners agreements in which they determine in advance the extent and quality of the benefits to be provided, and the financial contribution the fund will make, which, for medical practitioners, consists in the payment of a fixed flat-rate amount, and, for each hospital, in the payment of an attendance charge, which is intended to finance the institution rather than to cover the real cost of hospital accommodation on each occasion.

The national court which has made the reference to the court acknowledges that the system of benefits in kind, organised by the Netherlands sickness funds by means of agreements, serves to safeguard the quality of care for insured persons and to control costs.

47. As pointed out in para 76 of *Geraets-Smits*' case, unlike the services provided by practitioners in their surgeries or at the patient's home, those provided in a hospital take place within an infrastructure with, undoubtedly, certain very distinct characteristics, since the number of hospitals, their geographical distribution, the mode of their organisation and the equipment with which they are provided, and the nature of the medical services which they are able to offer, must all be planned for.

I am nevertheless of the opinion that, with regard to a system of sickness insurance which is structurally organised to provide only benefits in kind, whether by providing itself with its own hospitals and contracted staff or, as in the Netherlands, by concluding agreements with medical practitioners and hospitals, the distinction between care provided by medical practitioners in their surgeries and those provided in hospital is blurred.

48. In the Netherlands, there are approximately 30 sickness funds, with defined territorial scope. Persons entitled to compulsory insurance must register with the fund operating in the municipal district in which they reside. The number of agreements which they regularly conclude with general practitioners and with medical practitioners with various specialisms varies according to the need for health care calculated by the area in which they operate and the number of patients registered in a given period.

<sup>23</sup> See *EC Commission v Germany* Case 205/84 [1986] ECR 3755 (paras 27, 29), *EC Commission v Italy* Case C-180/89 [1991] ECR I-709 (paras 17, 18), *Ramrath v Ministre de la Justice* Case C-106/91 [1992] ECR I-3351 (paras 30, 31) and *Geraets-Smits*' case (para 75).

<sup>24</sup> See *Stichting Collectieve Antennevoorziening Gouda v Commissariaat voor de Media* Case C-288/89 [1991] ECR I-4007 (para 11), *EC Commission v Netherlands* Case C-353/89 [1991] ECR I-4069 (para 15), *Svensson v Ministre du Logement et de l'Urbanisme* Case C-484/93 [1995] ECR I-3955 (para 15) and *Syndesmos ton en Elladi Touristikou kai Taxiidiotikon Grafeion v Ergasias* Case C-398/95 [1997] ECR I-3091 (para 23).

a 49. Furthermore, the charges which funds agree each year with medical practitioners, which differ according to the specialism concerned, largely depend on the number of patients registered with them. The charges are calculated by means of an arithmetical formula whereby one amount<sup>25</sup>, representing average income, is added to another, representing the average cost of running a practice<sup>26</sup>, the sum of which is divided by a factor representing the workload (on the basis, for example, of 2,350 patients a year, in the case of a general practitioner). In respect of 2000, that calculation produced the result that a general practitioner received from the sickness insurance fund with which he had concluded an agreement the amount of NLG 133, known as a subscription charge<sup>27</sup>, for every insured person who chose to be treated at his surgery, irrespective of the number of patients he actually saw, and regardless of the fact that some may have needed to be seen more often than others and some may not have needed to be seen at all at any time during the year<sup>28</sup>. It would appear that contracted dentists also receive from the sickness fund payment at a flat rate per patient<sup>29</sup>.

d Provision is thus made in advance for the financing of all the health care patients may need in the course of a year, as out-patients for general practitioners, specialists and dentists, in order to ensure that the funds do not in principle have to bear any additional expenditure. In those circumstances, the use by insured persons of non-contracted providers can have a significant impact on the funding of the system, since it represents an additional financial burden for the fund in every case, and consequently risks seriously undermining the financial balance of the system.

e 50. The fact is that, if there are only a few patients every year who follow the course of action taken by Ms Müller-Fauré, it is difficult to prove that reimbursing their costs has a significant impact on the management of the budget of the sickness funds.

f Indeed, the Commission argues that there is no question of a risk of seriously undermining the financial balance of the social security system inasmuch as, because of the language barrier or difficulties in travelling, in the final analysis the number of patients going to other member states to see a doctor are very few<sup>30</sup>.

g 51. I cannot agree. The Commission knows very well that there is a relatively large number of doctors benefiting from freedom of establishment in order to practise in member states other than their own. If a patient visits such a doctor

25 This includes salary, holiday pay, insurance, bonuses, premia and pension plans. Salaries are based on civil service salary scales and are reviewed annually.

h 26 There are guidelines for calculating the cost of running each profession's establishments. Account is taken of the costs of accommodation, transport, assistant staff, telephone, area covered, instruments and so forth. They are adjusted in accordance with new requirements, such as, for example, installing computers in surgeries.

27 That charge amounts to NLG 157 per insured person over 64 years of age.

28 The system of remunerations for contracted practitioners who provide their services within the context of the compulsory sickness insurance system is markedly different from the system governing private practice, where there is no system of subscription charges, there being a charge for each visit instead.

i 29 See chapter 5 of the publication produced by the Ministerie van Volksgezondheid, Welzijn en Sport-NL, May 2001, entitled 'Health Care, Health Policies and Health Care reforms in the Netherlands': 'General practitioners and dentists receive capitation payments for their sickness fund insured, but usually fee for services from their private insured clients.'

30 At the hearing, the Netherlands government informed the court that, even all the disadvantages listed by the Commission and despite the mandatory nature of the prior authorisation requirement, some 14,000 insured persons received treatment abroad in 2001.

who speaks the patient's language, there is no longer a language barrier. Likewise, language borders in Europe are far from being coterminous with the territorial limits of the states and, across broad border areas, people often use the language of the neighbouring country. I would point out as examples Belgium and the Netherlands, Luxembourg and Germany, Italy and Austria, Sweden and Finland, Spain and Portugal, or countries which share a language, such as Ireland and the United Kingdom or Austria and Germany. a

Neither is distance a deterrent factor, in particular, in view of the progress in communications within Europe, the trend in second-home ownership in another member state and the ease and frequency with which a sizeable proportion of the population travels to other countries on holiday. b

52. There is another reason why I believe there would be a relatively high number of patients who, if they could be certain of being reimbursed, would choose to travel to another member state in order to see a specialist. They would be those who, having the means to afford it, would not wish to wait a relatively long time before being seen by a doctor. The patient seeks, with legitimate eagerness, to do everything in his power to look after himself. Let us bear in mind that, as far back as the eighteenth century, Molière was aware of that human tendency since Argan, the main character in his comedy *Le malade imaginaire*, sought to marry his daughter Angélique, irrespective of her wishes, to a doctor in order to ensure for himself treatment for any complaint from which he might ail<sup>31</sup>. c

53. It must be borne in mind, when maintaining the financial balance of the system, that the functioning of a system of benefits in kind is characterised also by the important role played by general practitioners, who are responsible for providing patients with primary care, referring them, where necessary, to the relevant specialist, whom patients cannot consult directly. If insured persons were able to sidestep that prior stage and go on their own initiative to a specialist in another member state, while the sickness fund remained obliged to reimburse them, a large part would be lost of the efficiency brought to the system by that method of controlling unnecessary use of medical services, in particular in preventing specialists' waiting rooms being filled with patients who prescribe such a consultation for themselves without even knowing which specialist should deal with their complaint. Thus, that aspect of the general practitioner's work, intended to contain costs and monitor the proper matching of means to needs, fulfils, within the system of contracted services, a function similar to that of the prior authorisation from the fund prior to consulting a non-contracted practitioner. d

54. Furthermore, so far as concerns the desire to maintain a broad range of medical care which is balanced and open to all, it is clear that the interest of practitioners in concluding agreements with the sickness funds is in direct relation to the number of patients which they might be allocated and in respect of whom they collect charges every year. If insured persons, instead of going to contracted practitioners, were to go to non-contracted doctors, whether within the country or abroad, the funds would be unable to guarantee a number of insured persons per doctor. There would be a risk that many such practitioners would lose interest in undertaking to make themselves available e

<sup>31</sup> See Molière *Le malade imaginaire* in particular act I, scene 5 (ed Larousse) (1998) p 61. It is interesting to note that, in scene 10 of act III, Toinette, the servant, pretends to her employer to be a doctor and, foreshadowing the question of cross-border medical care, claims to be an itinerant doctor, going from town to town, from province to province, from kingdom to kingdom, p 167. f



- a to a definite extent and guarantee the quality and price of their services by concluding agreements with the funds which manage the compulsory sickness insurance, preferring instead to treat private patients, who would certainly be fewer but from whom they receive higher fees. Thus, despite the efforts of the funds to make plans for the provision of health care, staffing and funding, it would not be possible to guarantee insured persons stable and open access to medical practitioners, including a wide range of specialists, at affordable cost, so that the continuity of the system of benefits in kind, in its present form, would be seriously jeopardised. It must be borne in mind that, as the court has consistently held, Community law does not detract from the powers of the member states to organise their social security systems<sup>32</sup>, so that in the absence of harmonisation at Community level, it is for national legislation to determine the conditions for entitlement to benefits<sup>33</sup>.
- b
- c

55. It is true that social security systems of benefits in kind are burdened with the problem of waiting lists, arising from the ever-widening discrepancy between supply and demand in health care, both with regard to admission to hospital and to seeing a doctor<sup>34</sup>. Faced with that situation, prior authorisation from funds before seeking treatment from non-contracted sources is a mechanism which enables them to establish priorities for various forms of treatment, manage the available resources and ensure, in practice, health care in accordance with the needs which may arise at any time. If patients on doctors' waiting lists had free access to the non-contracted services market and were entitled to reimbursement, it would destroy the fundamental principle of equality, between insured persons, of access to health care to the detriment of those who, because they lack the means or because they trust in the fairness of the system, await their turn, with the result that the essence of a system of sickness insurance of benefits in kind would be lost, becoming a de facto reimbursement system.
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- e

- f In that context, the fact that it turns out that the cost of the actual treatment which an insured persons such as Ms van Riet has obtained in another member state was less than that which the fund would have had to pay in the state of membership is irrelevant, since the adverse consequences of such a course of action for the system cannot be assessed on the basis of just one isolated case<sup>35</sup>.

56. Likewise, where patients travel regularly and systematically to other member states in search of medical treatment, the risk arises, in particular, for smaller countries, that funds stop managing to maintain an acceptable level of professional competence in the treatment of rare or very complex conditions.
- g

57. Moreover, by being indissociably linked to the system of sickness benefits in kind, prior authorisation is an ideal means for allowing insured persons to

h 32 See *Duphar BV v Netherlands* Case 238/82 [1984] ECR 523 (para 16), *Sodemare SA v Regione Lombardia* Case C-70/95 [1997] ECR I-3395 (para 27), *Kohll's case* (para 17), cited in footnote 10, above, and *Geraets-Smits' case* (para 44), cited in footnote 3, above.

33 See *Stöber v Bundesanstalt für Arbeit* Joined cases C-4/95 and 5/95 [1997] ECR I-511 (para 36), *Kohll's case* (para 18) and *Geraets-Smits' case* (para 45).

34 This is not a problem which affects only sickness insurance systems providing benefits in kind: one need only note the number of days patients are made to wait in Luxembourg, a state which provides only for reimbursement of part of the costs of treatment incurred by insured persons, before seeing a general practitioner or the number of weeks before managing to see a specialist.

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35 Dubouis 'La libre circulation des patients hospitaliers, une liberté sous conditions' (2001) 37(4) *Revue de droit sanitaire et social* (RDSS), 721 to 726, in particular p 726: '... on peut se demander s'il est pleinement légitime d'accorder au patient qui se déplace le droit de choisir entre le régime de son État d'origine et celui de l'État dans lequel il se fait soigner les éléments qui lui sont les plus favorables.'

know, sufficiently in advance, whether the treatment they seek is covered, enabling the fund to keep control over costs and the use of resources. a

If Ms Müller-Fauré had sought prior authorisation, she would have learnt that, of the services which she was going to seek from the dentist in Germany, only an infinitesimal part was covered by her social security system in the Netherlands. At the same time, the fund could have determined whether the state of the patient's dentition required treatment from a non-contracted dentist or whether it was preferable that the patient should see a contracted dentist, bearing in mind that covered dental treatment is provided on the basis of capitation payments. b

58. Belgium, where the sickness insurance reimburses part of the costs of treatment, objects to prior authorisation of funds, ruled out under *Kohll's* case, being justified where systems of benefits in kind are concerned, inasmuch as the freedom to provide services cannot depend on the special nature of the social security system. c

I understand that point of view but I do not share it. I am aware of the difficulty of reconciling that fundamental freedom under the Treaty with the idiosyncrasies of the sickness insurance systems of 15 countries, most of which grant benefits in kind. However, it must be borne in mind that the member states have never had the intention of harmonising their laws in this field and have confined themselves to co-ordinating them by means of Regulation 1408/71 in order to achieve the objectives required under art 42 EC (formerly art 51 of the EC Treaty). Although it is true that, when organising their social security systems, the member states must comply with Community law<sup>36</sup>, that obligation cannot require them to abandon the principles and philosophy which has traditionally governed their sickness insurance, nor require them to undergo restructuring on a scale such as to enable them to reimburse those of their insured persons who choose to go to the doctor in another member state<sup>37</sup>. d

59. Finally, the necessity of the treatment which the patient proposes to follow, by going to a non-contracted provider, as a condition for the granting of prior authorisation by the sickness insurance fund, was examined in detail in paras 103 to 107 of the judgment in *Geraets-Smits' case*. In my opinion, the same reasoning applies in the present case, and should be declared justified in accordance with art 49 EC, provided that the condition is construed to the effect that authorisation may be refused on that ground only if the same or equally effective treatment for the patient can be obtained without undue delay from a medical practitioner with which the insured person's sickness insurance fund has contractual arrangements<sup>38</sup>. e

<sup>36</sup> See *Kohll's case* and *Geraets-Smits' case*, paras 19 and 46, respectively. f

<sup>37</sup> We have yet to see how insured persons would react since, instead of enjoying free health care, they would have to pay for it in advance and wait for a time before being reimbursed part of the actual cost. g

<sup>38</sup> That is the view taken in respect of hospital treatment by the Arrondissementsrechtbank te Rotterdam, which had referred the question in that case, when it ruled on the merits of the main proceedings, on 3 October 2001, just two-and-a-half months after receiving the court's answer. It dismissed Ms Geraets-Smits' application on the ground that it had not been proven either clinically or scientifically that the specific, multidisciplinary treatment provided in Germany was any better than the care available in the Netherlands and because the patient could have been seen in her own country at a hospital having contractual arrangements with her sickness fund. Mr Peerboom's application suffered the same fate, the court having found that the special intensive therapy by means of neurostimulation cannot be regarded as normal within professional circles, inasmuch as it has not been sufficiently researched or recognised by international medical science. In coming to h

a Interpreted thus, such a condition results, in the context of prior authorisation, in an adequate, balanced and permanent supply of high-quality outpatient treatment being maintained within the national territory and provides financial stability to the sickness insurance system.

b 60. Just as with treatment in hospital, were many persons insured under a system of benefits in kind decide to travel to other member states to see a medical practitioner, when there is sufficient supply in the country under contractual arrangements providing adequate identical or equivalent services, the outflow of patients would put at risk the very principle of having contractual arrangements, all the planning and rationalisation carried out by the funds, the balance in the supply of medical care and the management of resources in accordance with priorities<sup>39</sup>.

c However, once it is clear that the benefits covered by the national insurance system cannot be provided by a contracted practitioner, it is not acceptable that national practitioners not having any contractual arrangements with the insured person's sickness insurance fund be given priority over doctors established in other member states since, once such benefits are ex hypothesi d provided outside the planning framework established by national legislation, such priority would exceed what is necessary for meeting the overriding requirements capable of justifying a barrier to the principle of freedom to provide services.

e 61. I am fully aware that the interpretation which I am proposing not only runs counter to the view of states whose sickness insurance systems reimburse part of the costs incurred by insured persons, the only one of which to have submitted its views being Belgium, but also has the drawback that it challenges the views of extreme supporters of the liberalisation of health services in the member states. It does, however, at least have the advantage of offering a clear and unambiguous solution to the problem raised, avoiding dilemmas such as f that faced by the Commission, which acknowledges that the special nature of certain dental services would justify invoking the general-interest reasons considered in *Geraets-Smits*' case.

g In answer to the question I put to it in that respect, the Commission explained that it meant very expensive dental treatment which required the services of highly specialised practitioners, since the availability of such services requires planning. It further acknowledged that there are no absolute means of differentiating between hospital and outpatient care: where a patient is admitted, the authorisation requirement is justified, whereas if the service is provided at a surgery, that requirement must be considered on a case-by-case basis.

h I am not alone in thinking that the Commission's proposal, however adequate it may appear in the light of the principle of proportionality, would

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i that conclusion, the court relied on an expert opinion of 1994 on stimulation programmes, the report by a committee of the Health Authority and a pilot study. See the judgments in the 'National Decisions' database of the court, reference QP/03935-P1-A and QP/03935-P1-B.

39 Dubouis, cited at footnote 35, above, p 726 states, with regard to health care provided in hospitals: 'Il reste que les incidences pratiques à moyen ou long terme de cette jurisprudence paraissent difficiles à évaluer. Ne risque-t-elle pas d'induire un afflux excessif de candidats à l'admission dans les établissements "en pointe", d'aggraver les difficultés des systèmes de soins moins performants? Il apparaît souhaitable que nos systèmes hospitaliers s'ouvrent aux vents de l'Europe. Pour autant, on ne saurait oublier combien ils diffèrent les uns des autres, combien chacun est complexe et repose sur des fragiles équilibres, financiers notamment.'



not work in practice<sup>40</sup> since, first, it would introduce an element of uncertainty *a* for the users of the system contrary to the principle of legal certainty and, secondly, if prior authorisation is justifiable on the ground that insurance funds need to plan for the supply of medical services, I think it is obvious that the most expensive or complex services should not be the only services which must be planned for. <sup>41</sup> That is not to take account of the fact that the funds ought to consider beforehand, in respect of each outpatient service, whether it is such as *b* to require prior authorisation, thus introducing an additional obstacle into the procedure for obtaining health care.

62. In view of all the foregoing considerations, I am of opinion that arts 49 and 50 EC do not preclude legislation of a member state, setting up a social security system which provides for sickness benefits in kind, requiring insured persons to obtain prior authorisation from their sickness insurance fund in *c* order to travel to another member state, if they wish to be treated by a non-contracted practitioner, and making the grant of such authorisation subject to the condition that the treatment is necessary for the person concerned, provided it is understood that it can be refused only if the same or *d* equally effective treatment can be obtained without undue delay from a practitioner having a contractual arrangement with the insured person's sickness insurance fund.

#### *B—The third question*

63. The judgment in *Geraets-Smits*' case already analysed exhaustively the requirement of prior authorisation to obtain, in another member state, services *e* provided in hospitals. There is therefore no need to answer the third question referred to the court which sought to ascertain whether in order to answer the two preceding questions, it was necessary to make a distinction according to whether the care was provided, in whole or in part, at hospital.

#### *C—The clarification sought by the Centrale Raad van Beroep regarding the meaning of without undue delay used in para 103 in the judgment in Geraets-Smits' case* *f*

64. In the letter of 25 October 2001, the national court asked the Court of Justice the meaning of that expression, which it did not find clear, in the following terms:

'Is the term "without undue delay" [tijdig] in paragraph 103 of the *g* judgment in *Smits and Peerbooms* to be interpreted as meaning that there can be no question of any undue delay if medical treatment is not urgent or necessary on medical grounds, irrespective of the length of the waiting time for such treatment?'

65. In that regard, I agree with the Commission, which pointed out that *h* the term derives from Netherlands law, specifically from the order by which the Arrondissementsrechtbank te Roermond made its reference in *Geraets-Smits*' case. The word 'tijdig' appears in the last line of the penultimate paragraph of chapter II(1) of the order.

*i*  
<sup>40</sup> The member states which attended the hearing, in exercise of their right of reply, showed themselves to be against that possibility.

<sup>41</sup> The possibility is not restricted to dental treatment. There are services such as scanning or magnetic resonance imaging, which are usually provided by radiologists, which do not require admission to hospital and the availability of which is limited and undoubtedly requires planning by the bodies which manage the sickness insurance fund.

a It is a condition linked to one of the two requirements laid down by the sickness funds when granting prior authorisation, namely that the planned treatment is necessary for the patient.

b 66. Furthermore, in *Geraets-Smits*' case the court explained, in para 104, the way in which to determine whether equally effective treatment could be obtained without undue delay from an establishment having contractual arrangements with the insured person's fund, stating that the national authorities are required to have regard to all the circumstances of each specific case, not only of the patient's medical condition at the time when authorisation is sought but also of his past record.

c As may be seen, the court made no mention of grounds other than medical. 67. I am of the opinion that it must be explained to the national court that determination of the condition as to 'without undue delay' (*tijdig*) must be carried out from a strictly medical point of view, irrespective of the length of the waiting time for the treatment sought.

#### IX—CONCLUSION

d 68. In view of the foregoing, I propose that the Court of Justice's reply to the questions referred to it by the Centrale Raad van Beroep should be as follows:

e (1) Articles 49 and 50 EC do not preclude legislation of a member state, setting up a social security system which provides for sickness benefits in kind, requiring insured persons to obtain prior authorisation from their sickness insurance fund in order to travel to another member state, if they wish to be treated by a non-contracted practitioner, and making the grant of such authorisation subject to the condition that the treatment is necessary for the person concerned, provided it is understood that it can be refused only if the same or equally effective treatment can be obtained without undue delay from a practitioner having a contractual arrangement with the insured person's sickness insurance fund.

f (2) Determination of the condition as to 'without undue delay' (*tijdig*) must be carried out from a strictly medical point of view, irrespective of the length of the waiting time for the treatment sought.

13 May 2003. **The COURT OF JUSTICE** delivered the following judgment.

g 1. By order of 6 October 1999, received at the Court of Justice of the European Communities on 11 October 1999, the Centrale Raad van Beroep (Higher Social Security Court) referred to the Court of Justice for a preliminary ruling under art 234 EC (formerly art 177 of the EC Treaty) three questions on the interpretation of art 59 of the EC Treaty (now, after amendment, art 49 EC) and art 60 of the EC Treaty (now art 50 EC).

h 2. Those questions have been raised in two sets of proceedings between Ms Müller-Fauré and Onderlinge Waarborgmaatschappij OZ Zorgverzekeringen UA (mutual sickness insurance fund; the Zwijndrecht Fund), established in Zwijndrecht, Netherlands, and between Ms van Riet and Onderlinge Waarborgmaatschappij ZAO Zorgverzekeringen (the Amsterdam Fund), established in Amsterdam, Netherlands, concerning the reimbursement of medical costs incurred in Germany and Belgium respectively.

#### NATIONAL LEGAL FRAMEWORK

i 3. In the Netherlands, the sickness insurance scheme is based inter alia on the Ziekenfondswet (Law on Sickness Funds) of 15 October 1964 (Staatsblad 1964, No 392), which has been subsequently amended (the ZFW), and on the

Algemene Wet Bijzondere Ziektekosten (Law on general insurance for special sickness costs) of 14 December 1967 (Staatsblad 1967, No 617), which has also been subsequently amended, (the AWBZ). Both the ZFW and the AWBZ establish a system of benefits in kind under which an insured person is entitled not to reimbursement of costs incurred for medical treatment but to free treatment. Both laws are based on a system of agreements between sickness funds and providers of health care. a

4. Under arts 2 to 4 of the ZFW, workers whose annual income does not exceed an amount determined by that law, persons treated as such and persons in receipt of social benefits, as well as dependent members of their families living with them in the same household, are compulsorily and automatically insured under that law. b

5. Article 5(1) of the ZFW provides that any person coming within its scope who wishes to claim entitlement under that law must be affiliated to a sickness fund operating in the municipality in which he resides. c

6. Article 8 of the ZFW provides:

‘1. An insured person shall be entitled to benefits in the form of necessary medical care, provided that he is not entitled to such care under the Algemene Wet Bijzondere Ziektekosten ... Sickness funds shall ensure that any insured person registered with them is able to rely on that right. d

2. The nature, content and extent of the benefits shall be defined by or pursuant to a Royal Decree, it being understood that they shall in any event include medical assistance, the extent of which remains to be defined, and also the care and treatment provided in categories of institutions to be defined. Furthermore, the grant of a benefit may be conditional on a financial contribution by the insured person; this contribution need not be the same for all insured persons ...’ e

7. The Verstrekkingsbesluit Ziekenfondsverzekering (Decree on sickness insurance benefits in kind) of 4 January 1966, (Staatsblad 1966, No 3), which has been subsequently amended (the Verstrekkingsbesluit), implements art 8(2) of the ZFW. f

8. The Verstrekkingsbesluit thus determines entitlement to benefits and the extent of such benefits for various categories of care, including in particular the categories ‘medical and surgical assistance’ and ‘in-patient hospital care’.

9. The principal features of the system of agreements put in place by the ZFW are as follows. g

10. Article 44(1) of the ZFW provides that the sickness funds are to ‘enter into agreements with persons and establishments offering one or more forms of care, as referred to in the Royal Decree adopted to implement Article 8’.

11. Article 44(3) of the ZFW provides that such agreements are to include as a minimum provisions concerning the nature and extent of the parties’ mutual obligations and rights, the categories of care to be provided, the quality and effectiveness of the care provided, supervision of compliance with the terms of the agreement, including supervision of the benefits provided or to be provided and the accuracy of the amounts charged for those benefits, and also an obligation to communicate the information necessary for that supervision. h

12. The sickness funds are free to enter into agreements with any care provider, subject to a twofold reservation. First, under art 47 of the ZFW, every sickness fund ‘is required to enter into an agreement ... with any establishment in the region in which it operates or which the population of that region regularly attends’. Second, agreements can be entered into only with i



- a establishments which are duly authorised to provide the care in question or with persons lawfully authorised to do so.

13. Article 8a of the ZFW provides:

‘1. An establishment providing services such as those referred to in Article 8 must be authorised to do so.

- b 2. A Royal Decree may provide that an establishment belonging to a category to be defined by Royal Decree is to be regarded as authorised for the purposes of this Law ...’

14. Under art 8c(a) of the ZFW approval of an establishment operating a hospital facility must be refused if that establishment does not meet the requirements of the *Wet ziekenhuisvoorzieningen* (Law on hospital facilities) on distribution and needs. That law, its implementing directives (in particular the directive based on art 3 of the law, *Nederlandse Staatscourant* 1987, No 248) and also the district plans determine in greater detail national needs in relation to various categories of hospitals and their distribution between the various health regions within the Netherlands.

- d 15. As regards the specific exercise of the right to benefits, art 9 of the ZFW provides:

‘1. Save as provided for in the Royal Decree referred to in Article 8, an insured person wishing to claim entitlement to a benefit shall apply to a person or an establishment with whom or with which the sickness fund with which he is registered has entered into an agreement for that purpose, subject to the provisions of paragraph 4.

- e 2. The insured person may choose from among the persons and establishments mentioned in paragraph 1, subject to the provisions of paragraph 5 and the provisions regarding conveyance by ambulance, as laid down in the *Wet ambulancevervoer* ((Law on conveyance by ambulance), *Staatsblad* 1971, No 369).

f 3. [repealed]

4. A sickness fund may, by way of derogation from paragraphs 1 and 2 hereof, authorise an insured person, for the purpose of claiming entitlement to a benefit, to apply to another person or establishment in the Netherlands where this is necessary for his health care. The Minister may determine the cases and circumstances in which an insured person may be granted authorisation, in claiming entitlement to a benefit, to apply to a person or an establishment outside the Netherlands.’

- g 16. The minister exercised the powers conferred on him by the final sentence of art 9(4) of the ZFW in adopting the *Regeling hulp in het buitenland ziekenfondsverzekering* (Regulation on care provided abroad under the sickness insurance rules) of 30 June 1988, (*Nederlandse Staatscourant* 1988, No 123; the *Rhbz*). Article 1 of the *Rhbz* provides:

‘A sickness fund may authorise an insured person claiming entitlement to a benefit to apply to a person or establishment outside the Netherlands in those cases in which the sickness fund has determined that such action is necessary for the health care of the insured person.’

i 17. In the event of an insured person obtaining authorisation to apply to a provider established outside the Netherlands, the cost of any treatment is wholly assumed by the sickness fund to which the person is affiliated.

18. The Centrale Raad van Beroep explains that, according to its established case law, applications for authorisation to undergo medical treatment abroad funded under the ZFW must be submitted to the insured person's sickness fund and the latter must, except in exceptional circumstances such as an emergency, have given its prior agreement to the provision of treatment, failing which it will not be possible to obtain reimbursement of the cost of the treatment.

19. Furthermore, as regards the condition laid down in art 9(4) of the ZFW and art 1 of the Rhbz that the insured's treatment abroad must be medically necessary, it appears from the documents before the court that the fund takes account, in practice, of the methods of treatment available in the Netherlands and ascertains whether appropriate treatment can be provided there without undue delay.

#### THE MAIN PROCEEDINGS

##### *The Müller-Fauré case*

20. While on holiday in Germany, Ms Müller-Fauré underwent dental treatment involving the fitting of six crowns and a fixed prosthesis on the upper jaw. The treatment was provided between 20 October and 18 November 1994 without recourse to any hospital facilities.

21. When she returned from her holiday, she applied to the Zwijndrecht Fund for reimbursement of the costs of the treatment, which amounted to a total of DEM 7,444.59. By letter of 12 May 1995 the fund refused reimbursement on the basis of the opinion of its advisory dental officer.

22. Ms Müller-Fauré sought the opinion of the Ziekenfondsraad, which is responsible for supervising the management and administration of sickness funds and which, on 16 February 1996, confirmed the Zwijndrecht Fund's decision on the ground that insured persons are entitled only to treatment itself and not to reimbursement of any related costs, except in exceptional circumstances which did not exist in this case.

23. Ms Müller-Fauré then brought an action before the Arrondissementsrechtbank te Rotterdam (District Court, Rotterdam), Netherlands. By judgment of 21 August 1997, that court upheld the fund's decision, having also found that the case entailed no exceptional circumstances such as to justify reimbursement of the costs, given, in particular, the scale of the treatment and the fact that it extended over several weeks.

24. The Centrale Raad van Beroep points out that in any event only a limited part of the treatment received by Ms Müller-Fauré is covered by the Verstrekkingenbesluit and is therefore eligible for reimbursement. Furthermore, it finds that Ms Müller-Fauré voluntarily sought treatment from a dentist established in Germany while she was on holiday there because she lacked confidence in dental practitioners in the Netherlands. Such circumstances cannot, according to the case law of the court concerned, provide grounds under the national legislation for reimbursement in respect of medical treatment undergone abroad without authorisation from the insured person's fund.

##### *The van Riet case*

25. Ms van Riet had been suffering from pain in her right wrist since 1985. On 5 April 1993, the doctor treating her requested that the Amsterdam Fund's medical adviser should grant authorisation for his patient to have an arthroscopy performed in Deurne hospital, Belgium, where that examination

a could be carried out much sooner than in the Netherlands. The fund rejected that request by letters of 24 June and 5 July 1993 on the ground that the test could also be performed in the Netherlands.

26. In the meantime, Ms van Riet had already had the arthroscopy carried out at Deurne hospital in May 1993 and, following that examination, the decision was taken to carry out an ulnar reduction to relieve the patient's pain. b Care before and after the treatment, and the treatment itself, were provided in Belgium, partly in hospital and partly elsewhere. The Amsterdam Fund refused to reimburse the cost of the care, which amounted to a total of BEF 93,782. That decision was confirmed by the Ziekenfondsraad on the ground that there was no emergency nor any medical necessity such as to justify Ms van Riet receiving treatment in Belgium, since appropriate treatment was available in c the Netherlands within a reasonable period. The competent Arrondissementsrechtbank rejected as unfounded Ms van Riet's action against the decision for the same reasons as the Amsterdam Fund.

27. The Centrale Raad van Beroep, before which the applicant in the main proceedings brought an appeal, states that, although it is not disputed that d most of the treatment given to Ms van Riet is indeed covered by the Verstrekkingenbesluit, the treatment was provided in Belgium without prior authorisation and without it being established that Ms van Riet could not reasonably wait, for medical or other reasons, until the Amsterdam Fund had taken a decision on her application. Furthermore, in that court's view, the time which Ms van Riet would have had to wait for the arthroscopy in the e Netherlands was not unreasonable. The documents before the court show that the waiting time was about six months.

28. The referring court submits that, in this instance, the conditions for application of art 22(1)(a) of Council Regulation (EEC) 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community) f (OJ English Sp Edn 1972 (II) p 416), as amended and updated by Council Regulation (EC) 118/97 (OJ 1997 L28 p 1), were not met, since neither Ms Müller-Fauré's nor Ms van Riet's state of health necessitated immediate treatment during a stay in the territory of another member state. Furthermore, nor has it been established, in conformity with art 22(1)(c) and (2), second g paragraph, of that regulation that the treatment concerned could not, account being taken of the state of health of the applicants in the main actions, be given in the Netherlands within the time 'normally necessary', a fact which would have obliged the sickness funds to authorise treatment in another member state.

29. The national court none the less raises a question as to the compatibility h of the decisions refusing reimbursement with arts 59 and 60 of the Treaty in the light of the judgment in *Kohll v Union des Caisses de Maladie* Case C-158/96 [1998] All ER (EC) 673, [1998] ECR I-1931. It notes that the national provisions at issue do not of themselves prevent insured persons from applying to a service provider established in another member state but impose a precondition that the sickness insurance fund of which the insured persons are i members must have entered into an agreement with that provider, something which, as a rule, is not the case. In the absence of such an agreement, reimbursement of costs incurred in another member state is subject to prior authorisation, which is not granted unless 'it is necessary for [the insured person's] health care', which in general is the case only where the contracted care providers cannot offer all the appropriate care. The obligation to obtain



prior authorisation therefore works to the advantage of contracted medical care providers—which are virtually always from the Netherlands—and to the detriment of care providers from other member states. The referring court adds that the administrative powers of the Netherlands authorities do not extend to care providers established in other member states, which may hinder the conclusion of agreements with those providers. a

30. If it were found that the authorisation required by art 9(4) of the ZFW impedes the freedom to provide services, the Centrale Raad van Beroep seeks to ascertain whether the requirement is justified. b

31. In that connection, the referring court draws attention to the characteristics of the Netherlands sickness insurance scheme. In essence, unlike 'reimbursement' schemes, the scheme guarantees that benefits in kind will be provided. In the submission of the defendants in the main actions, the financial balance of the scheme could be jeopardised if it were possible for insured persons to obtain reimbursement, without prior authorisation, of the costs of care provided in another member state. The national court refers in that regard to national measures taken to control the costs of hospital care, in particular the rules laid down in the *Wet ziekenhuisvoorzieningen* concerning the planning and geographical distribution of care, and those in the ZFW limiting reimbursement to care provided by authorised hospitals. c  
d

#### THE QUESTIONS REFERRED FOR A PRELIMINARY RULING

32. Those were the circumstances in which the Centrale Raad van Beroep decided to stay proceedings and refer the following questions to the Court of Justice for a preliminary ruling: e

'(1) Are Articles 59 and 60 of the EC Treaty ... to be interpreted as meaning that in principle a provision such as Article 9(4) of the *Ziekenfondswet*, read in conjunction with Article 1 of the *Regeling hulp in het buitenland ziekenfondsverzekering*, is incompatible therewith in so far as it stipulates that in order to assert his entitlement to benefits a person insured with a sickness insurance fund requires the prior authorisation of that fund to seek treatment from a person or establishment outside the Netherlands with whom or which the sickness insurance fund has not concluded an agreement? f

(2) If so, do the objectives of the Netherlands system of benefits in kind referred to above constitute an overriding reason in the general interest capable of justifying a restriction on the fundamental principle of freedom to provide services? g

(3) Does the question whether the treatment as a whole or only a proportion thereof involved hospital care affect the answers to these questions? h

33. By letter of 12 July 2001, the Court Registry asked the referring court whether it wished to maintain its reference for a preliminary ruling in the light of the judgment delivered on that date in *Geraets-Smits v Stichting Ziekenfonds VGZ, Peerbooms v Stichting CZ Groep Zorgverzekeringen* Case C-157/99 [2003] All ER (EC) 481, [2001] ECR I-5473. i

34. By letter of 25 October 2001, the referring court informed the court that it was maintaining the reference since *Geraets-Smits'* case did not specifically deal with the attributes of the Netherlands sickness insurance scheme, which is a benefits-in-kind scheme based on agreements. It also asked the court to explain the import of para 103 of the judgment, which states:

- a '... the condition concerning the necessity of the treatment, laid down by the rules at issue in the main proceedings, can be justified under art 59 of the Treaty, provided that the condition is construed to the effect that authorisation to receive treatment in another member state may be refused on that ground only if the same or equally effective treatment [for the patient] can be obtained without undue delay from an establishment with which the insured person's sickness insurance fund has contractual arrangements.'
- b

35. More specifically, the referring court asks the court what is meant by 'without undue delay' and, in particular, whether that condition must be assessed on a strictly medical basis, regardless of the waiting time for the treatment sought.

c

36. By letter of 6 March 2002, the Court Registry requested the parties to the main actions, the member states and the Commission of the European Communities to submit any observations which they might have on the conclusions to be drawn from the judgment in *Geraets-Smits*' case in the light of the questions raised by the Centrale Raad van Beroep.

d

#### THE FIRST QUESTION

37. By its first question, the national court is essentially asking whether arts 59 and 60 of the Treaty are to be interpreted as precluding legislation of a member state, such as the legislation at issue in the main proceedings, which makes assumption of the costs of care provided in another member state, by a person or an establishment with whom or which the insured person's sickness fund has not concluded an agreement, conditional upon prior authorisation by the fund.

e

38. It should be borne in mind, as a preliminary point, that it is settled case law that medical activities fall within the scope of art 60 of the Treaty, there being no need to distinguish in that regard between care provided in a hospital environment and care provided outside such an environment (see, most recently, *Geraets-Smits*' case (para 53)).

f

39. The court also found, in paras 54 and 55 of *Geraets-Smits*' case, that the fact that the applicable rules are social security rules and, more specifically, provide, as regards sickness insurance, for benefits in kind rather than reimbursement does not mean that the medical treatment in question falls outside the scope of the freedom to provide services guaranteed by the EC Treaty. Indeed, in the disputes before the national court, the treatment provided in a member state other than that in which the persons concerned were insured resulted in direct payment by the patient to the doctor providing the service or the establishment in which the care was provided.

g

h

40. Since medical services fall within the ambit of freedom to provide services for the purposes of arts 59 and 60 of the Treaty, it is necessary to determine whether the legislation at issue in the main actions introduces restrictions on that freedom in making assumption of the costs of care provided in a member state other than that in which the insured person's sickness fund is established, by a person or establishment which has not concluded an agreement with that fund, conditional upon prior authorisation by the fund.

i

41. In that regard the court has already held, in para 62 of the judgment in *Geraets-Smits*' case, that while the ZFW does not deprive insured persons of the possibility of using a service provider established in a member state other than

that in which the sickness fund covering the insured is situated, it does nevertheless make reimbursement of the costs thus incurred subject to prior authorisation, which may be given, as the referring court points out, only where provision of the care at issue, irrespective of whether it involves a hospital, is a medical necessity. a

42. Since the requirement of medical necessity is in practice satisfied only where adequate treatment cannot be obtained without undue delay from a contracted doctor or hospital in the member state in which the person is insured, this requirement by its very nature is liable severely to limit the circumstances in which such authorisation will be issued (see *Geraets-Smits'* case (para 64)). b

43. Admittedly, it is open to the Netherlands sickness insurance funds to enter into agreements with hospital establishments outside the Netherlands. In such a case no prior authorisation would be required in order for the cost of treatment provided by such establishments to be assumed under the ZFW. However, with the exception of hospitals situated in regions adjoining the Netherlands, it seems unlikely that a significant number of hospitals in other member states would ever enter into agreements with those sickness insurance funds, given that their prospects of admitting patients insured by those funds remain uncertain and limited (see *Geraets-Smits'* case (paras 65, 66)). c d

44. The court has therefore already held that rules such as those at issue in the main proceedings deter, or even prevent, insured persons from applying to providers of medical services established in member states other than that of the insurance fund and constitute, both for insured persons and service providers, a barrier to freedom to provide services (see *Geraets-Smits'* case (para 69)). e

45. However, before coming to a decision on whether arts 59 and 60 of the Treaty preclude rules such as those at issue in the main actions, it is appropriate to determine whether those rules can be objectively justified, which is the subject of the second question. f

#### THE SECOND AND THIRD QUESTIONS

46. By its second and third questions, which it is appropriate to examine together, the referring court is asking whether legislation such as that at issue in the main proceedings, which has restrictive effects on freedom to provide services, can be justified by the actual particular features of the national sickness insurance scheme, which provides not for reimbursement of costs incurred but essentially for benefits in kind and is based on a system of agreements intended both to ensure the quality of the care and to control the costs thereof. It also wishes to know whether the fact that the treatment at issue is provided in whole or in part in a hospital environment has any effect in that regard. g h

#### *The arguments submitted to the court*

47. In the submission of the Netherlands government and the Zwijsdrecht Fund, the authorisation required by art 9(4) of the ZFW is an integral part of the Netherlands sickness insurance scheme. Sickness cover by way of benefits in kind, as provided by that scheme, necessitates the prior conclusion, between the fund and care providers, of agreements dealing with the volume, quality, effectiveness and costs of health care in order, first, to allow for needs-based planning and expenditure control and, second, to ensure that a high-quality i



a medical service is provided, that benefits are comparable and thus that insured persons are treated equally. A system of agreements of that kind is in the main advantageous to the insured.

48. In those circumstances, insured persons must apply to contracted care providers alone or, if they none the less wish to be treated by a non-contracted doctor or establishment established in the Netherlands or abroad, obtain prior authorisation from the sickness insurance scheme to which they belong.

b 49. The Netherlands government and the Zwijsdrecht Fund add that, if there were no requirement for prior authorisation, it would never be in the interest of care providers to participate in the system of agreements by becoming subject to contractual clauses dealing with the availability, volume, quality, effectiveness and cost of services, with the result that the authorities managing the sickness insurance scheme would be unable to make any needs-related plans by adjusting expenditure to needs and to ensure that a high-quality medical service was open to all. The system of agreements would thus lose its *raison d'être* as a means of managing health care, which would prejudice the sovereign power of the member states, recognised by the court's case law, to organise their social security systems. The Netherlands government explains in that connection that there are waiting lists because of the limited financial resources available for health-care cover and that this gives rise to a need to quantify the benefits to be provided and to make them subject to priorities which must be strictly observed.

e 50. Furthermore, the Netherlands sickness funds cannot be forced to conclude agreements with a greater number of care providers than is necessary to meet the needs of people living in the Netherlands. The Netherlands government points out that it is specifically to meet those needs that most of the agreements are entered into with care providers established in the Netherlands since demand from the insured is clearly greatest within the national territory.

f 51. Finally, as regards the way in which it is appropriate to determine whether 'the same or equally effective treatment can be obtained without undue delay', in the words of para 103 of *Geraets-Smits*' case, the Zwijsdrecht Fund submits that the mere fact of a person being on a waiting list does not mean that such treatment is not available. If it were to adopt a different interpretation, the court would significantly extend the conditions in which benefits are awarded, which are a matter of national competence. Moreover, it would cast uncertainty over all attempted planning and rationalisation in the health-care sector aimed at avoiding over-capacity, supply-side imbalance, wastage and loss.

h 52. The Netherlands government argues, in that regard, that it is quite apparent from para 103 of *Geraets-Smits*' case that the period within which medical treatment is necessary is to be determined by reference to the patient's medical condition and history. It is the national court's responsibility to ascertain whether the treatment is available within that period, which amounts to a factual assessment.

i 53. The Danish, German, Spanish, Irish, Italian, Swedish and United Kingdom governments, together with the Icelandic and Norwegian governments, generally endorse the foregoing observations.

54. In particular, the Spanish government maintains that any distinction between treatment provided by a practitioner and treatment provided in a hospital is unnecessary where a sickness insurance scheme provides exclusively benefits in kind. If an insured person is given health care or purchases a

medicinal product in a member state other than that in which his insurance fund is established, the duties and taxes paid by providers or suppliers are not paid into the budget of the member state of affiliation, which adversely affects one of the sources of financing of social security in that state. a

55. The Irish and United Kingdom governments submit that if insured persons were entitled to go to a member state other than that in which they are insured in order to receive treatment there, there would be adverse consequences for the setting of priorities for medical treatment and the management of waiting lists, which are significant aspects of the organisation of sickness insurance. In that regard, the United Kingdom government points out that the finite financial resources allocated to the National Health Service (the NHS) are managed by local health authorities which establish timetables based on clinical judgments and medically determined priorities for different treatments. Patients do not have the right to demand a certain timetable for their hospital treatment. It follows that if patients could shorten their waiting time by obtaining, without prior authorisation, medical treatment in other member states for which the competent fund was none the less obliged to assume the cost, the financial balance of the system would be threatened and the resources available for more urgent treatment would be severely depleted, thereby placing at risk its ability to provide adequate levels of health care. b c d

56. The United Kingdom government adds that if hospital services were to be liberalised, its own hospitals would be unable to predict either the loss of demand that would follow from recourse being had to hospital treatment in other member states or the increase in demand that would follow from persons insured in those other states being able to seek hospital treatment in the United Kingdom. Those effects of liberalisation would not necessarily offset each other and the impact would be different for every hospital in the United Kingdom. e

57. As regards the criteria by which it should be ascertained whether treatment which is the same or equally effective for the patient could be obtained without undue delay in the member state in which the person is insured, the United Kingdom government, like the Swedish government, refers to art 22(2), second paragraph, of Regulation 1408/71, in conjunction with art 22(1)(c), from which it is apparent that the person concerned may not be refused the authorisation required to go to the territory of another member state to receive there the treatment where, taking account of his current state of health and the probable course of the disease, he cannot be given the treatment within the time normally necessary in the member state of residence. There is also a reference to the way in which those provisions were interpreted in para 10 of the judgment in *Bestuur van het Algemeen Ziekenfonds Drenthe-Platteland v Pierik* Case 182/78 [1979] ECR 1977. f g

58. In that regard the United Kingdom government draws attention to the fact that in practice authorisation for treatment in another member state is generally given in the United Kingdom when there is a delay for treatment beyond the maximum waiting times. National waiting lists take account of the different needs of different categories of patients and permit the best possible allocation of hospital resources. The lists are flexible so that if a patient's condition suddenly deteriorates, he can be moved up the waiting list and treated more quickly. To compel the competent authorities to authorise treatment abroad in circumstances other than where there is a delay beyond the normal waiting time and to pass the cost on to the NHS would have damaging consequences for its management and financial viability. h i

a 59. In any event, the United Kingdom government points to the specific characteristics of the NHS and asks the court to uphold the principle that health care provided under such a national sickness insurance scheme does not fall within the scope of art 60 of the Treaty and that the NHS, which is a non-profit-making body, is not a service provider for the purposes of the Treaty.

b 60. The Danish government argues that there would be a risk of excessive consumption of medical services if patients had unrestricted access to free medical care in member states other than that in which the insured's sickness insurance fund is established and also a risk, in the event of numerous journeys abroad for medical purposes, of it not being possible to maintain the competence of doctors established in national territories at an adequate level as regards unusual and complex diseases.

c 61. The Belgian government submits that the specific nature of the Netherlands scheme, in providing not for reimbursement of costs incurred but for benefits in kind, does not amount per se to a general-interest reason justifying a restriction on freedom to provide services. It submits that it is appropriate to draw a distinction between services supplied elsewhere than in a hospital and those supplied in a hospital.

d 62. In the first case, there is no justification for any restriction on freedom to provide services, as can be seen from the judgment in *Kohll's* case. However, in the second case, there are sound reasons, linked to protecting the financial balance of the social security system and to maintaining a balanced medical and hospital service open to all, which justify requiring prior authorisation when services are to be provided in a hospital environment in a member state other than that in which the insured's sickness insurance fund is established. Furthermore, in the absence of prior authorisation, the member states with waiting lists for hospital treatment might have a tendency to send their nationals abroad for treatment instead of investing in their own infrastructure, thereby thwarting the other member states' attempted hospital-related planning.

e 63. The Commission distinguishes between care provided in a surgery, which it places on the same footing as out-patient treatment within a hospital environment, and hospital treatment as such. As regards the first category, the analysis in the judgments in *Decker v Caisse de Maladie des Employés Privés* Case C-120/95 [1998] All ER (EC) 673, [1998] ECR I-1831 and *Kohll's* case should be upheld, by regarding the requirement for prior authorisation as incompatible with Community law, except in the case of certain services, dental work in particular, which are extremely costly and specialised. As to the second category of care, provided in a hospital environment, reference should be made to the analysis in the judgment in *Geraets-Smits' case*, and whilst it should be recognised that the requirement for prior authorisation is justified by planning needs, refusal of authorisation should none the less be subject to the limits set by the court in that judgment.

f 64. As to the interpretation of the words 'without undue delay' employed in para 103 of the judgment in *Geraets-Smits' case*, the Commission submits that only the patient's medical condition should be taken into account, as is clear from para 104 of the judgment.

g 65. Finally, the Norwegian government argues that the conditions on which benefits are granted and the periods within which they can be given are a matter solely for national legislation. Community law cannot confer on patients the right to receive, in a member state other than that in which the



persons concerned are insured, health care to which they are not entitled in their own member state. Nor can it entitle them to receive treatment within a shorter time limit than that provided for by national legislation. If it did so, it would prejudice the member state's power to organise their social security systems and would go beyond the scope of the Treaty provisions on freedom to provide services. a

#### *Findings of the court*

66. It is clear from the documents before the court that the reasons put forward to justify the requirement for prior authorisation where sickness insurance is to cover benefits provided in a member state other than that in which the person concerned is insured, whether within a hospital environment or not, are linked (i) to the protection of public health inasmuch as the system of agreements is intended to ensure that there is a high-quality, balanced medical and hospital service open to all, (ii) to the financial balance of the social security system in that a system of that kind also permits the managing authorities to control expenditure by adjusting it to projected requirements, according to pre-established priorities, and (iii) to the essential characteristics of the sickness insurance scheme in the Netherlands, which provides benefits in kind. b

#### *The risk that the protection of public health may be adversely affected*

67. It is apparent from the court's case law that the objective of maintaining a high-quality, balanced medical and hospital service open to all, may fall within one of the derogations provided for in art 56 of the EC Treaty (now, after amendment, art 46 EC), in so far as it contributes to the attainment of a high level of health protection (see *Kohll's case* (para 50) and *Geraets-Smits' case* (para 73)). In particular, that Treaty provision permits member states to restrict the freedom to provide medical and hospital services in so far as the maintenance of treatment capacity or medical competence on national territory is essential for public health, and even the survival of the population (see *Kohll's case* (para 51) and *Geraets-Smits' case* (para 74)). c

68. However, it is settled case law that it is necessary, where justification is based on an exception laid down by the Treaty or indeed on an overriding general-interest reason, to ensure that the measures taken in that respect do not exceed what is objectively necessary for that purpose and that the same result cannot be achieved by less restrictive rules (see *EC Commission v Germany* Case 205/84 [1986] ECR 3755 (paras 27, 29), *EC Commission v Italy* Case C-180/89 [1991] ECR I-709 (paras 17, 18), *Ramrath v Ministre de la Justice* Case C-106/91 [1992] ECR I-3351 (paras 30, 31) and *Geraets-Smits' case* (para 75)). d

69. In this instance the arguments put forward to justify the requirement for prior authorisation seek to establish that, if it were open to patients to get treatment in a member state other than that in which they are insured, without prior authorisation to that effect, the competent state could no longer guarantee that in its territory there would be a high-quality, balanced medical and hospital service open to all and hence a high level of public health protection. e

70. As to the Danish government's argument that the actual competence of practitioners, working in surgeries or in a hospital environment, would be undermined because of numerous journeys abroad for medical purposes, the court finds that no specific evidence has been adduced in support of this argument. f

- a 71. The objective of maintaining a balanced medical and hospital service open to all is inextricably linked to the way in which the social security system is financed and to the control of expenditure, which are dealt with below.

*The risk of seriously undermining the financial balance of the social security system*

- b 72. It must be recalled, at the outset, that, according to the court's case law, aims of a purely economic nature cannot justify a barrier to the fundamental principle of freedom to provide services (see, to that effect, *Syndesmos ton en Elladi Touristikou kai Taxidiotikon Grafeion v Ergasias* Case C-398/95 [1997] ECR I-3091 (para 23) and *Kohll's case* (para 41)).

- c 73. However, in so far as, in particular, it could have consequences for the overall level of public-health protection, the risk of seriously undermining the financial balance of the social security system may also constitute per se an overriding general-interest reason capable of justifying a barrier of that kind (see *Kohll's case* (para 41) and *Geraets-Smits' case* (para 72)).

- d 74. It is self-evident that assuming the cost of one isolated case of treatment, carried out in a member state other than that in which a particular person is insured with a sickness fund, can never make any significant impact on the financing of the social security system. Thus an overall approach must necessarily be adopted in relation to the consequences of freedom to provide health-related services.

- e 75. In that regard, the distinction between hospital services and non-hospital services may sometimes prove difficult to draw. In particular, certain services provided in a hospital environment but also capable of being provided by a practitioner in his surgery or in a health centre could for that reason be placed on the same footing as non-hospital services. However, in the main actions, the fact that the care at issue is partly hospital treatment and partly non-hospital treatment has not given rise to disagreement between the parties to the main proceedings or on the part of the member states which have submitted observations under art 23 of the EC Statute of the Court of Justice or the Commission.

#### *Hospital services*

- g 76. As regards hospital services, such as those provided to Ms van Riet in Deurne hospital, the court, in paras 76 to 80 of the judgment in *Geraets-Smits' case*, made the following findings.

- h 77. It is well known that the number of hospitals, their geographical distribution, the way in which they are organised and the facilities with which they are provided, and even the nature of the medical services which they are able to offer, are all matters for which planning must be possible.

- h 78. As may be seen, in particular, from the system of agreements involved in the main actions this kind of planning generally meets a variety of concerns.

79. For one thing, it seeks to achieve the aim of ensuring that there is sufficient and permanent accessibility to a balanced range of high-quality hospital treatment in the state concerned.

- i 80. For another thing, it assists in meeting a desire to control costs and to prevent, as far as possible, any wastage of financial, technical and human resources. Such wastage would be all the more damaging because it is generally recognised that the hospital care sector generates considerable costs and must satisfy increasing needs, while the financial resources which may be made available for health care are not unlimited, whatever the mode of funding applied.

81. In those circumstances, a requirement that the assumption of costs, under a national social security system, of hospital treatment provided in a member state other than that of affiliation must be subject to prior authorisation appears to be a measure which is both necessary and reasonable. a

82. As regards specifically the system set up by the ZFW, the court clearly acknowledged that, if insured persons were at liberty, regardless of the circumstances, to use the services of hospitals with which their sickness insurance fund had no agreement, whether those hospitals were situated in the Netherlands or in another member state, all the planning which goes into the system of agreements in an effort to guarantee a rationalised, stable, balanced and accessible supply of hospital services would be jeopardised at a stroke (see *Geraets-Smits' case* (para 81)). b

83. Although Community law does not therefore in principle preclude a system of prior authorisation for this category of services, the conditions attached to the grant of such authorisation must none the less be justified in the light of the overriding considerations mentioned above and must satisfy the requirement of proportionality referred to in para 68 above. c

84. It likewise follows from settled case law that a scheme of prior administrative authorisation cannot legitimise discretionary decisions taken by the national authorities, which are liable to negate the effectiveness of provisions of Community law, in particular those relating to a fundamental freedom such as that at issue in the main proceedings (see *Ministerio Fiscal v Bordessa*, *Ministerio Fiscal v Mellado* Joined cases C-358/93 and C-416/93 [1995] All ER (EC) 385, [1995] ECR I-361 (para 25), *Criminal proceedings against Sanz de Lera* Joined cases C-163/94, C-165/94 and C-250/94 [1995] ECR I-4821 (paras 23–28) and *Asociación Profesional de Empresas Navieras de Líneas Regulares (Analir) v Administración General del Estado* Case C-205/99 [2001] ECR I-1271 (para 37)). d

85. Thus, in order for a prior administrative authorisation scheme to be justified even though it derogates from a fundamental freedom of that kind, it must be based on objective, non-discriminatory criteria which are known in advance, in such a way as to circumscribe the exercise of the national authorities' discretion, so that it is not used arbitrarily (see the *Analir* case (para 38)). Such a prior administrative authorisation scheme must likewise be based on a procedural system which is easily accessible and capable of ensuring that a request for authorisation will be dealt with objectively and impartially within a reasonable time and refusals to grant authorisation must also be capable of being challenged in judicial or quasi-judicial proceedings (see *Geraets-Smits' case* (para 90)). e

86. In the main actions, the disputes do not concern the actual cover provided by the Netherlands sickness insurance scheme for the medical and hospital treatment with which Ms Müller-Fauré and Ms van Riet were provided. In those actions, what is disputed is whether it was a medical necessity for them to have the treatment at issue in Germany and Belgium respectively, rather than in the Netherlands. In that regard, in paras 99 to 107 of *Geraets-Smits' case*, the court also ruled on that condition concerning the necessity of the proposed treatment, to which the grant of authorisation is subject. f

87. As the national court states, it follows from the wording of art 9(4) of the ZFW and art 1 of the Rhbz that in principle that condition applies irrespective of whether the request for authorisation relates to treatment in an g



a establishment located in the Netherlands with which the insured person's sickness insurance fund has no agreement or in an establishment located in another member state.

b 88. As regards hospital treatment carried out outside the Netherlands, the national court states that the condition concerning the necessity of the treatment is in practice interpreted as meaning that such treatment is not to be authorised unless it appears that appropriate treatment cannot be provided without undue delay in the Netherlands. The Netherlands government explains that if art 9(4) of the ZFW is read in conjunction with art 1 of the Rhbz, authorisation must be refused solely where the care required by the insured person's state of health is available from contracted care providers.

c 89. The condition concerning the necessity of the treatment, laid down by the legislation at issue in the main proceedings, can be justified under art 59 of the Treaty, provided that the condition is construed to the effect that authorisation to receive treatment in another member state may be refused on that ground only if treatment which is the same or equally effective for the patient can be obtained without undue delay from an establishment with  
d which the insured person's sickness insurance fund has an agreement (see *Geraets-Smits'* case (para 103)).

e 90. In order to determine whether treatment which is equally effective for the patient can be obtained without undue delay in an establishment having an agreement with the insured person's fund, the national authorities are required to have regard to all the circumstances of each specific case and to take due  
f account not only of the patient's medical condition at the time when authorisation is sought and, where appropriate, of the degree of pain or the nature of the patient's disability which might, for example, make it impossible or extremely difficult for him to carry out a professional activity, but also of his medical history (see, to that effect, *Geraets-Smits'* case (para 104)).

f 91. The court also stated, at paras 105 and 106 of *Geraets-Smits'* case, that:  
—thus construed, the condition concerning the necessity of treatment can allow an adequate, balanced and permanent supply of high-quality hospital treatment to be maintained on the national territory and the financial stability of the sickness insurance system to be assured;

g —were large numbers of insured persons to decide to be treated in other member states even when the hospitals having agreements with their sickness insurance funds offer adequate identical or equivalent treatment, the consequent outflow of patients would be liable to put at risk the very principle of having agreements with hospitals and, consequently, undermine all the planning and rationalisation carried out in this vital sector in an effort to avoid the phenomena of hospital over capacity, imbalance in the supply of hospital  
h medical care and logistical and financial wastage.

i 92. However, a refusal to grant prior authorisation which is based not on fear of wastage resulting from hospital overcapacity but solely on the ground that there are waiting lists on national territory for the hospital treatment concerned, without account being taken of the specific circumstances attaching to the patient's medical condition, cannot amount to a properly justified restriction on freedom to provide services. It is not clear from the arguments submitted to the court that such waiting times are necessary, apart from considerations of a purely economic nature which cannot as such justify a restriction on the fundamental principle of freedom to provide services, for the purpose of safeguarding the protection of public health. On the contrary, a

waiting time which is too long or abnormal would be more likely to restrict access to balanced, high-quality hospital care. a

*Non-hospital services*

93. As regards non-hospital medical services such as those supplied to Ms Müller-Fauré and, in part, to Ms van Riet, no specific evidence has been produced to the court, not even by the Zwijndrecht and Amsterdam Funds or the Netherlands government, to support the assertion that, were insured persons at liberty to go without prior authorisation to member states other than those in which their sickness funds are established in order to obtain those services from a non-contracted provider, that would be likely seriously to undermine the financial balance of the Netherlands social security system. b

94. It is true that removal of the condition that there should be a system of agreements in respect of services supplied abroad adversely affects the ways in which health-care expenditure may be controlled in the member state of affiliation. c

95. However, the documents before the court do not indicate that removal of the requirement for prior authorisation for that type of care would give rise to patients travelling to other countries in such large numbers, despite linguistic barriers, geographic distance, the cost of staying abroad and lack of information about the kind of care provided there, that the financial balance of the Netherlands social security system would be seriously upset and that, as a result, the overall level of public-health protection would be jeopardised—which might constitute proper justification for a barrier to the fundamental principle of freedom to provide services. d

96. Furthermore, care is generally provided near to the place where the patient resides, in a cultural environment which is familiar to him and which allows him to build up a relationship of trust with the doctor treating him. If emergencies are disregarded, the most obvious cases of patients travelling abroad are in border areas or where specific conditions are to be treated. Furthermore, it is specifically in those areas or in respect of those conditions that the Netherlands sickness funds tend to set up a system of agreements with foreign doctors, as the observations submitted to the court reveal. e

97. Those various factors seem likely to limit any financial impact on the Netherlands social security system of removal of the requirement for prior authorisation in respect of care provided in foreign practitioners' surgeries. f

98. In any event, it should be borne in mind that it is for the member states alone to determine the extent of the sickness cover available to insured persons, so that, when the insured go without prior authorisation to a member state other than that in which their sickness fund is established to receive treatment there, they can claim reimbursement of the cost of the treatment given to them only within the limits of the cover provided by the sickness insurance scheme in the member state of affiliation. g

*The argument based on the essential characteristics of the Netherlands sickness insurance scheme*

99. The Zwijndrecht Fund and the Netherlands, Spanish and Norwegian governments have drawn attention to the fact that member states are free to set up the social security system of their choice. In this instance, in the absence of prior authorisation, insured persons could apply freely to non-contracted care providers with the result that the existence of the Netherlands system of benefits in kind, the operation of which is in essence dependent upon the h

- a system of agreements, would be jeopardised. Furthermore, the Netherlands authorities would be obliged to introduce mechanisms for reimbursement into their method of organising access to health care since, instead of receiving free health services on national territory, the insured would have to advance the sums needed to pay for the services received and wait for some time before being reimbursed. Thus, member states would be obliged to abandon the principles and underlying logic of their sickness insurance schemes.

100. In that regard it follows from settled case law that Community law does not detract from the power of the member states to organise their social security systems (see, in particular, *Duphar BV v Netherlands* Case 238/82 [1984] ECR 523 (para 16) and *Sodemare SA v Regione Lombardia* Case C-70/95 [1997] ECR I-3395 (para 27)). Therefore, in the absence of harmonisation at Community level, it is for the legislation of each member state to determine the conditions on which social security benefits are granted (see, in particular, *Coonan v Insurance Officer* Case 110/79 [1980] ECR 1445 (para 12), *Paraschi v Landesversicherungsanstalt Württemberg* Case C-349/87 [1991] ECR I-4501 (para 15) and *Stöber v Bundesanstalt für Arbeit* Joined cases C-4/95 and 5/95 [1997] ECR I-511 (para 36)). However, it is nevertheless the case that the member states must comply with Community law when exercising that power (see *Decker's case* (para 23) and *Kohll's case* (para 19)).

101. Two preliminary observations must be made on this point.

102. First, achievement of the fundamental freedoms guaranteed by the Treaty inevitably requires member states to make some adjustments to their national systems of social security. It does not follow that this would undermine their sovereign powers in this field. It is sufficient in this regard to look to the adjustments which they have had to make to their social security legislation in order to comply with Regulation 1408/71, in particular with the conditions laid down in art 69 thereof regarding the payment of unemployment benefit to workers residing in the territory of other member states when no national system provided for the grant of such benefits to unemployed persons registered with an employment agency in another member state.

103. Second, as has already been made clear in para 39, above, a medical service does not cease to be a provision of services because it is paid for by a national health service or by a system providing benefits in kind. The court has, in particular, held that a medical service provided in one member state and paid for by the patient cannot cease to fall within the scope of the freedom to provide services guaranteed by the Treaty merely because reimbursement of the costs of the treatment involved is applied for under another member state's sickness insurance legislation which is essentially of the type which provides for benefits in kind (see *Geraets-Smits' case* (para 55)). The requirement for prior authorisation where a person is subsequently to be reimbursed for the costs of that treatment is precisely what constitutes, as has already been stated in para 44, above, the barrier to freedom to provide services, that is to say, to a patient's ability to go to the medical service provider of his choice in a member state other than that of affiliation. There is thus no need, from the perspective of freedom to provide services, to draw a distinction by reference to whether the patient pays the costs incurred and subsequently applies for reimbursement thereof or whether the sickness fund or the national budget pays the provider directly.

104. It is in the light of those observations that it is appropriate to determine whether removal of the requirement for sickness insurance funds to grant



prior authorisation for non-hospital health care provided in a member state other than that of affiliation, is such as to call in question the essential characteristics of the system of access to health care in the Netherlands. a

105. First, when applying Regulation 1408/71, those member states which have established a system providing benefits in kind, or even a national health service, must provide mechanisms for ex post facto reimbursement in respect of care provided in a member state other than the competent state. That is the case, for example, where it has not been possible to complete the formalities during the relevant person's stay in that state (see art 34 of Council Regulation (EEC) 574/72 (fixing the procedure for implementing Regulation 1408/71) (OJ English Sp Edn 1972 (I) p 159)) or where the competent state has authorised access to treatment abroad in accordance with art 22(1)(c) of Regulation 1408/71. b  
c

106. Second, as has already been stated in para 98 above, insured persons who go without prior authorisation to a member state other than the one in which their sickness fund is established to receive treatment there can claim reimbursement of the cost of the treatment received only within the limits of the cover provided by the sickness insurance scheme of the member state of affiliation. Thus, in the present case, it is apparent from the documents before the court that, in relation to the €3,806.35 paid by Ms Müller-Fauré to a provider established in Germany, the *Zwijndrecht* Fund would in any event, given the extent of the insurance cover provided by the fund, contribute only up to a maximum amount of €221.03. Likewise, the conditions on which benefits are granted, in so far as they are neither discriminatory nor an obstacle to freedom of movement of persons, remain enforceable where treatment is provided in a member state other than that of affiliation. That is particularly so in the case of the requirement that a general practitioner should be consulted prior to consulting a specialist. d  
e

107. Third, nothing precludes a competent member state with a benefits in kind system from fixing the amounts of reimbursement which patients who have received care in another member state can claim, provided that those amounts are based on objective, non-discriminatory and transparent criteria. f

108. Consequently, the evidence and arguments submitted to the court do not show that removal of the requirement that sickness insurance funds grant prior authorisation to their insured to enable them to receive health care, in particular other than in a hospital, provided in a member state other than that of affiliation would undermine the essential characteristics of the Netherlands sickness insurance scheme. g

109. In the light of all the foregoing considerations, the answer to the questions must be that:

Articles 59 and 60 of the Treaty must be interpreted as not precluding legislation of a member state, such as that at issue in the main proceedings, which (i) makes the assumption of the costs of hospital care provided in a member state other than that in which the insured person's sickness fund is established, by a provider with which that fund has not concluded an agreement, conditional upon prior authorisation by the fund and (ii) makes the grant of that authorisation subject to the condition that such action is necessary for the insured person's health care. However, authorisation may be refused on that ground only if treatment which is the same or equally effective for the patient can be obtained without undue delay in an establishment which has concluded an agreement with the fund; h  
i

- a* —by contrast, arts 59 and 60 of the Treaty do preclude the same legislation in so far as it makes the assumption of the costs of non-hospital care provided in another member state by a person or establishment with whom or which the insured person's sickness fund has not concluded an agreement conditional upon prior authorisation by the fund, even when the national legislation concerned sets up a system of benefits in kind under which insured persons are entitled not to reimbursement of costs incurred for medical treatment, but to the treatment itself which is provided free of charge.
- b*

## COSTS

- c* 110. The costs incurred by the Netherlands, Belgian, Danish, German, Spanish, Irish, Italian, Finnish, Swedish, United Kingdom, Icelandic and Norwegian governments and by the Commission, which have submitted observations to the court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the actions pending before the national court, the decision on costs is a matter for that court.

- d* On those grounds, the Court of Justice, in answer to the questions referred to it by the Centrale Raad van Beroep by order of 6 October 1999, hereby rules:

- e* Article 59 of the EC Treaty (now, after amendment, art 49 EC) and art 60 of the EC Treaty (now art 50 EC) must be interpreted as not precluding legislation of a member state, such as that at issue in the main proceedings, which (i) makes the assumption of the costs of hospital care provided in a member state other than that in which the insured person's sickness fund is established, by a provider with which that fund has not concluded an agreement, conditional upon prior authorisation by the fund and (ii) makes the grant of that authorisation subject to the condition that such action is necessary for the insured person's health care. However, authorisation may be refused on that ground only if treatment which is the same or equally effective for the patient can be obtained without undue delay in an establishment which has concluded an agreement with the fund;
- f*

- g* —by contrast, arts 59 and 60 of the Treaty do preclude the same legislation in so far as it makes the assumption of the costs of non-hospital care provided in another member state by a person or establishment with whom or which the insured person's sickness fund has not concluded an agreement conditional upon prior authorisation by the fund, even when the national legislation concerned sets up a system of benefits in kind under which insured persons are entitled not to reimbursement of costs incurred for medical treatment, but to the treatment itself which is provided free of charge.

# Paranova Läkemedel AB and others v Läkemedelsverket

(Case C-15/01)

## Re Paranova Oy

(Case C-113/01)

COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES (SIXTH CHAMBER)

JUDGES PUISOCHET (PRESIDENT OF CHAMBER), GULMANN (RAPPORTEUR),  
MACKEN, COLNERIC AND CUNHA RODRIGUES  
ADVOCATE GENERAL JACOBS

10 OCTOBER, 12 DECEMBER 2002, 8 MAY 2003

*European Community – Freedom of movement – Goods – Medicinal products – Marketing authorisation – Parallel imports – Marketing authorisation withdrawn at holder's request – Whether automatic cessation of parallel import licence granted for same medicinal product precluded by principle of free movement of goods – Articles 28, 30 EC (EC Treaty, arts 30, 36).*

The competent Swedish authorities withdrew a marketing authorisation for a medicinal product in capsule form used to treat conditions caused by stomach acid. That withdrawal had been made at the request of the holder of the authorisation on the basis that it intended to sell a new variant of the product in tablet form. The two versions of the product were therapeutic equivalents, but each product contained a different active ingredient, which in the tablet form of the product dissolved more easily in water and was more stable, and was thus easier to manufacture than was the product in capsule form. The competent national authorities also decided that that marketing authorisations for parallel imports of the capsule form of the product (which continued to be sold in other member states under the marketing authorisations granted therein) would expire at the same time, since the two forms of the product had to be considered as being distinct medicinal products, and since the product in the capsule form would otherwise be put on the market without having met the requisite safety requirements. Proceedings arose concerning that decision and, in due course, the national court decided to stay the proceedings and refer to the Court of Justice of the European Communities certain questions for preliminary pursuant to art 234 EC (formerly art 177 of the EC Treaty) concerning whether it was compatible with arts 28<sup>a</sup> and 30 EC<sup>b</sup> (formerly arts 30 and 36 of the EC Treaty) to revoke a marketing authorisation for a medicinal product imported as a parallel import on the ground that the

<sup>a</sup> Article 28 EC, so far as material, provides: 'Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States.'

<sup>b</sup> Article 30 EC, so far as material, provides: 'The provisions of Articles 28 ... shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds ... the protection of health and life of humans ... Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.'



- a* marketing authorisation for the directly imported product had been revoked at the request of the holder of the authorisation for reasons unconnected with the safety of the medicinal product.

- Held** – Articles 28 and 30 EC precluded the automatic cessation of a parallel import licence granted for a medicinal product after the marketing authorisation for the directly imported product had been withdrawn at the request of its holder, unless there was in fact a risk to the health of humans as a result of the continued existence of that medicinal product on the market of the importing member state. It had to be observed that the withdrawal of a marketing authorisation of reference did not mean in itself that the efficacy and non-toxicity of the old version of a product was called into question.
- c* Although the competent authorities of the member state of importation had to adopt the measures necessary to verify the quality, efficacy and non-toxicity of the old version of the product, that objective might be attained by measures having a less restrictive effect on the import of medicinal products than the automatic cessation of the validity of the parallel import licence. In that regard, pharmacovigilance might ordinarily be guaranteed for medicinal products that were the subject of parallel imports through cooperation with the national authorities of the other member states by means of access to documents and data produced by the manufacturer, relating the old version of the product in the member state in which the version was marketed on the basis of a marketing authorisation. However, reasons relating to the protection of public health which might justify the automatic withdrawal of a parallel licence were not precluded and might arise from the coexistence of two versions of the same medicinal product on the market of the importing state (see judgment paras 26–28, 32, below).

- f* *Ferring Arzneimittel GmbH v Eurim Pharm Arzneimittel GmbH* Case C-172/00 [2002] ECR I-6891 applied.

### Notes

For the elimination of quantitative restrictions between member states, see 12(2) *Halsbury's Laws* (4th edn reissue) para 20.

- g* For the EC Treaty, arts 28 and 30 (formerly arts 30 and 36), see 50 *Halsbury's Statutes* (4th edn) Current Statute Service (issue 88) 363.

### Cases cited

- de Peijper (Criminal proceedings against)* Case 104/75 [1976] ECR 613, ECJ.
- Ferring Arzneimittel GmbH v Eurim Pharm Arzneimittel GmbH* Case C-172/00 [2002] ECR I-6891, ECJ.
- h* *R v Medicines Control Agency, ex p Rhône-Poulenc Rorer Ltd* Case C-94/98 [2000] All ER (EC) 46, [1999] ECR I-8789, ECJ.
- R v Medicines Control Agency, ex p Smith & Nephew Pharmaceuticals Ltd* Case C-201/94 (1996) 34 BMLR 141, [1996] ECR I-5819, ECJ.

### Reference

*Paranova Läkemedel AB and ors v Läkemedelsverket*  
(Case C-15/01)

By order of 21 December 2000, the Regeringsrätten (Supreme Administrative Court, Sweden) referred to the Court of Justice of the European Communities for a preliminary ruling under art 234 EC (formerly art 177 of the EC Treaty)

two questions (set out in first judgment para 19, below) on the interpretation of arts 28 and 30 EC (formerly arts 30, 36 of the EC Treaty). Those questions were raised in proceedings brought by Paranova Läkemedel AB, Farmagon A/S, Medartuum AB, Net Pharma KG AB, Orifarm AB, Trans Euro Medical AB, Cross Pharma AB and MedImport Scandinavia AB (Paranova and others) against the Läkemedelsverket (Swedish Medical Products Agency) concerning the consequences of the withdrawal of a marketing authorisation on the parallel import into Sweden by Paranova and others of a medicinal product. Written observations were submitted on behalf of: Paranova Läkemedel AB, Farmagon A/S, Medartuum AB, Net Pharma KG AB, Orifarm AB, Trans Euro Medical AB, Cross Pharma AB and MedImport Scandinavia AB by U Rutgersson Langenius, Advokat; the Läkemedelsverket by A Åslundh-Nilsson and B Lindström, acting as agents; the Swedish government by A Kruse, acting as agent; the Danish government by J Molde, acting as agent; the Netherlands government by HG Sevenster, acting as agent; the Norwegian government by T Nordby, acting as agent; and the Commission of the European Communities by L Ström, acting as agent. Oral observations were made on behalf of: Paranova Läkemedel AB, Farmagon A/S, Medartuum AB, Net Pharma KG AB, Orifarm AB, Trans Euro Medical AB, Cross Pharma AB and MedImport Scandinavia AB, represented by C Bus, Advokat; the Läkemedelsverket and of the Swedish government, represented by A Kruse; the Danish government, represented by J Molde; the Netherlands government, represented by J van Bakel, acting as agent; the Norwegian government, represented by T Nordby; and the Commission, represented by L Ström. The language of the case was Swedish. The facts are set out in the opinion of the Advocate General.

*Re Paranova Oy*  
(Case C-113/01)

By order of 8 March 2001, the Högsta förvaltningsdomstolen (Supreme Administrative Court, Finland) referred to the Court of Justice of the European Communities for a preliminary ruling under art 234 EC (formerly art 177 of the EC Treaty) three questions (set out in second judgment para 20, below) on the interpretation of arts 28 and 30 EC (formerly arts 30, 36 of the EC Treaty). Those questions were raised in proceedings between Paranova Oy (Paranova) and the Läkemedelsverket (Finnish Medical Products Agency) concerning the consequences of the withdrawal of a marketing authorisation on the parallel import into Finland by Paranova of a medicinal product. Written observations submitted on behalf of: the Finnish government by E Bygglin, acting as agent; the Danish government by J Molde, acting as agent; the Netherlands government by HG Sevenster, acting as agent; the Norwegian government by T Nordby, acting as agent; the Commission of the European Communities by L Ström, acting as agent. Oral observations were made on behalf of: the Finnish government, represented by E Bygglin; the Danish government, represented by J Molde; the Netherlands government, represented by J Bakel, acting as agent; the Norwegian government, represented by T Nordby; and the Commission, represented by L Ström. The language of the case was Swedish. The facts are set out in the opinion of the Advocate General.

**a** 12 December 2002. **The Advocate General (FG Jacobs)** delivered the following joint opinion in *Paranova Läkemedel AB v Läkemedelsverket* Case C-15/01 and *Re Paranova Oy* Case C-113/01<sup>1</sup>.

**b** 1. These cases raise a number of questions concerning the consequences for a parallel importer of medicinal products benefiting from a marketing authorisation in the member state of import where that authorisation is withdrawn at the request of the company holding it.

2. *Paranova Läkemedel AB v Läkemedelsverket* Case C-15/01 is a reference from the Swedish Regeringsrätten (Supreme Administrative Court); *Re Paranova Oy* Case C-113/01 is a reference from the Finnish Högsta Förvaltningsdomstolen (Supreme Administrative Court).

**c** THE COMMUNITY LEGAL CONTEXT

3. The marketing of medicinal products in the Community was at the material time<sup>2</sup> principally governed by Council Directive (EEC) 65/65 (on the approximation of provisions laid down by law, regulation or administrative action relating to medicinal products)<sup>3</sup>.

**d** 4. Article 3 of Directive 65/65 provides that no medicinal product may be placed on the market of a member state unless a marketing authorisation has been issued by the competent authorities of that member state or an authorisation has been granted in accordance with Council Regulation (EEC) 2309/93<sup>4</sup>.

**e** 5. Article 4 of Directive 65/65 defines in detail the procedure, documents and information necessary for the issue of a marketing authorisation by the competent authority of a member state.

6. It is clear from the case law of the court that parallel imports of medicinal products are not covered by Directive 65/65. That case law was recently summarised by the Court of Justice of the European Communities in *Ferring Arzneimittel GmbH v Eurim Pharm Arzneimittel GmbH*<sup>5</sup> as follows:

**f** 'According to the principles laid down in Directive 65/65, no medicinal product may be placed on the market for the first time in a Member State unless a marketing authorisation has been issued in accordance with the directive by the competent authority of that State. Applications for marketing authorisations for a medicinal product submitted by the person responsible for placing it on the market must contain the information and be accompanied by the documents listed in Article 4 of the directive, even where the medicinal product concerned is already the subject of an authorisation issued by the competent authority of another Member State'

**g**

**h** 1 Original language: English.

2 The legislation has with effect from 18 December 2001 been codified and consolidated in EP and Council Directive (EC) 2001/83 (on the Community code relating to medicinal products for human use) (OJ 2001 L311 p 67). However, the relevant provisions have not been amended in their substance.

3 OJ English Sp Edn 1965–1966 p 20, as amended in particular by Council Directive (EEC) 87/21 (OJ 1987 L15 p 36), Council Directive (EEC) 89/341 (OJ 1989 L142 p 11) and Council Directive (EEC) 93/39 (OJ 1993 L214 p 22).

**i** 4 Laying down Community procedures for the authorisation and supervision of medicinal products for human and veterinary use and establishing a European Agency for the Evaluation of Medicinal Products (OJ 1993 L214 p 1). Community-wide marketing authorisations are not at issue in the present cases.

5 Case C-172/00 [2002] ECR I-6891 (paras 19–22), judgment delivered on 10 September 2002; see also the extremely helpful discussion of the Community regulation of parallel imports of medicinal products in the opinion in that case of Advocate General Geelhoed delivered on 7 February 2002.



[*R v Medicines Control Agency, ex p Rhône-Poulenc Rorer Ltd* Case C-94/98 [2000] All ER (EC) 46, [1999] ECR I-8789 (para 23)]. a

However, those principles are subject to exceptions resulting, on the one hand, from the directive itself and, on the other, from the rules of the EC Treaty relating to the free movement of goods.

Those rules, as interpreted by the court, mean in particular that an operator who has bought a medicinal product lawfully marketed in one Member State under a marketing authorisation issued in that State can import that medicinal product into another Member State where it already has a marketing authorisation without having to obtain such an authorisation in accordance with Directive 65/65, and without having to provide information about the verification, prescribed by the directive, of efficacy and non-toxicity of the medicinal product. It is not necessary for the protection of public health to subject parallel importers to such requirements, as the competent authorities of the Member State of importation already have all the information necessary to carry out that verification (see in particular [*Criminal proceedings against de Peijper* Case 104/75 [1976] ECR 613 (paras 21, 36), and *R v Medicines Control Agency, ex p Smith & Nephew Pharmaceuticals Ltd* Case C-201/94 (1996) 34 BMLR 141, [1996] ECR I-5819 (para 22)]). b  
c  
d

In such a case the parallel import is authorised in the State of importation by reference to the marketing authorisation issued in accordance with Directive 65/65 ("marketing authorisation of reference").' e

7. Although, as appears from the case law cited above, member states may not require parallel importers of medicinal products to obtain a full marketing authorisation within the meaning of Directive 65/65, they frequently provide for a simplified authorisation procedure for parallel imports. The Commission of the European Communities recognised that practice in its guidelines<sup>6</sup> published in 1982, subject to limitations designed to ensure that the inevitable restrictions on imports flowing from any monitoring system are justified for the purpose of protecting the health and life of humans pursuant to art 30 EC (formerly art 36 of the EC Treaty). Thus for example the Commission envisages that the parallel importer may be required to supply the competent authorities of the member state of import with information enabling them to check that the medicinal product to be imported is in fact covered by the marketing authorisation of reference relied on by the parallel importer. f  
g

8. In the context of such a system, many member states—including, it appears from the orders for reference, Sweden and Finland—issue separate authorisations to parallel importers. For convenience, I shall refer to such an authorisation as a 'licence' or 'parallel import licence', as distinct from the 'marketing authorisation' within the meaning of Directive 65/65 for the reference product. h

9. Finally, Ch Va of Second Council Directive (EEC) 75/319<sup>7</sup> requires the member states to set up a pharmacovigilance system which, among other things, imposes obligations on the holder of a marketing authorisation relating i

<sup>6</sup> Commission communication on parallel imports of proprietary medicinal products for which marketing authorisations have already been granted (OJ 1982 C115 p 5).

<sup>7</sup> On the approximation of provisions laid down by law, regulation or administrative action relating to medicinal products (OJ 1975 L147 p 13), as amended in particular by Directive 93/39, cited in footnote 3, above. Chapter Va of Directive 75/319 was amended with effect from 30 June 2000 by Commission Directive (EC) 2000/38 (OJ 2000 L139 p 28).

*a* to the registration and notification of all adverse reactions to those medicinal products on humans. To that end reports must be submitted to the competent authorities at regular intervals and must be accompanied by a scientific evaluation.

THE PROCEEDINGS BEFORE THE NATIONAL COURTS

*b* 10. Both cases concern the medicinal product Losec. Losec, reportedly the world's largest-selling pharmaceutical, is used to treat and prevent peptic ulcers and reflux oesophagitis (heartburn). It contains omeprazole, a substance called a proton-pump inhibitor which works by blocking a particular mechanism in the stomach called the proton pump which controls acid production, thereby reducing the amount of stomach acid produced.

*c* 11. Losec was initially marketed in capsules. Case C-15/01 (the Swedish case) concerns Sweden, where the marketing authorisation for Losec capsules was held by Hässle Läkemedel AB (Hässle) whilst Paranova Läkemedel AB and several other pharmaceutical companies (Paranova AB) held the licence for capsules imported as a parallel import. Case C-113/01 (the Finnish case) *d* concerns Finland, where the marketing authorisation for Losec capsules was held by Suomen Astra Oy (Astra) whilst Paranova Oy held the licence for capsules imported as a parallel import. I shall refer to the parallel importers collectively as Paranova.

*e* 12. Subsequently Hässle and Astra (the manufacturers) each gave notice to the relevant national medical products agency (the competent authority for the purpose of Directive 65/65, in each case called the Läkemedelsverket) that it was withdrawing Losec capsules from the market and at the same time surrendering or seeking revocation of the marketing authorisation for those products.

*f* 13. The reason for the manufacturers' actions was that they intended to sell a new variant of Losec called Losec MUPS tablets. The capsules however were to continue to be sold in other member states under authorisations granted there. It appears to be accepted that Losec MUPS tablets and Losec capsules are what are known as therapeutic equivalents—that is to say, they contain the same active ingredient (omeprazole)—and are bioequivalent in that that ingredient is absorbed by the body at the same rate and to the same extent when taken orally. They differ however according to the Läkemedelsverket in *g* pharmaceutical form (capsule as opposed to tablet) and form of the active ingredient (magnesium salt of omeprazole acid as opposed to omeprazole acid).

*h* 14. The Läkemedelsverket gave notice to Paranova that the manufacturers' marketing authorisations for the capsules were no longer valid and that as a consequence and in accordance with the relevant national regulations Paranova's parallel import licences were also no longer valid.

*i* 15. Paranova sought annulment of the decisions of the Läkemedelsverket on the ground that, inter alia, they were incompatible with arts 28 and 30 EC (formerly arts 30, 36 of the EC Treaty). The application was made in the Swedish case to the Länsrätten (County Administrative Court), Uppsala, with an appeal to the Kammarrätten (Administrative Court of Appeal), Stockholm, and thence to the referring court and in the Finnish case directly to the referring court.

16. The Läkemedelsverket is in each case of the view that the fact that there is no marketing authorisation for the capsules in the member state of importation (Sweden or Finland) means that capsules cannot lawfully be

imported by parallel trade from another member state since in such circumstances it would be unable properly to comply with its duty of pharmacovigilance. a

17. The referring courts have accordingly referred the following questions for a preliminary ruling.

18. In the Swedish case:

(1) Is it compatible with Articles 28 and 30 EC to revoke a marketing authorisation for a medicinal product imported as a parallel import on the ground that the marketing authorisation for the directly imported medicinal product has been revoked at the request of the holder of the authorisation for reasons unconnected with the safety of the medicinal product? Does the answer depend on what specific reasons have given rise to that request or on whether the holder of the authorisation or companies belonging to the same group in other Member States continue to sell the medicinal product to which the parallel imports relate on the basis of marketing authorisations granted there? b

(2) If the parallel importers rely on a new marketing authorisation for a directly imported medicinal product rather than on the old marketing authorisation, is authorisation for the continued marketing of the medicinal product imported as a parallel import precluded by the fact that that medicinal product and the directly imported medicinal product which is covered by the new marketing authorisation are different in the sense that the medicinal product imported as a parallel import is sold in the form of a capsule containing a certain acid (omeprazole) while the directly imported medicinal product is sold in the form of a tablet containing a magnesium salt of the acid? c

19. In the Finnish case:

(1) Is it compatible with Articles 28 and 30 EC for a national agency to decide that a marketing authorisation for a medicinal product imported as a parallel import automatically comes to an end if the original marketing authorisation for the medicinal product has been withdrawn at the holder's request for reasons unconnected with the effectiveness or the safety of the medicinal product and despite the fact that the product has a valid marketing authorisation in the Member State from which the parallel imports come? d

(2) If Community law imposes restrictions or conditions on the right of a national agency to decide that a marketing authorisation for parallel imports comes to an end in the situation referred to in Question (1), what importance should be accorded to the facts that e

20. f

(a) the holder of the original marketing authorisation has obtained a new marketing authorisation for a medicinal product designed to replace the original medicinal product but that new product is not in the same pharmaceutical form (tablets instead of capsules) and the active ingredient is not exactly the same (magnesium Omeprazole instead of Omeprazole); on the other hand, the national agency considers that the medicinal products are bioequivalent and that they have the same therapeutic effect; g

(b) subsequent control of the effectiveness and safety of the medicinal product is possibly made more difficult by the fact that the marketing authorisation for the original medicinal product has been withdrawn; h

i



a (c) the medicinal product imported as a parallel import has been widely used over many years in Member States and it is improbable that its continued sale presents a danger to public health?

b (3) If, in the situation referred to in Question (1), Articles 28 and 30 EC allow it to be found that the marketing authorisation granted for a parallel import has expired, may it be decided that the marketing authorisation for the parallel import expired immediately the original marketing authorisation was withdrawn, without allowing the parallel importer any time to adapt his activity? Do any of the circumstances referred to in Question (2) affect the question whether it may be decided that the marketing authorisation for a parallel import expires immediately?

#### c THE RECENT CASE LAW OF THE COURT

d 21. The court delivered its judgment in the *Ferring* case<sup>8</sup> after the orders for reference had been made in the present cases. In that case the court was asked to rule on the lawfulness of national legislation under which the withdrawal of the marketing authorisation of reference for a medicinal product on application by the holder thereof meant that the parallel import licence for that product automatically ceased to be valid. It was accepted that—as in the present cases—the holder of the marketing authorisation of reference sought withdrawal of that authorisation not for reasons connected with public health but because it intended to market a new version of the product.

e 22. The court started from the premiss that the cessation of the validity of a parallel import licence following the withdrawal of the marketing authorisation of reference constituted a restriction on the free movement of goods contrary to art 28 EC unless justified by reasons relating to the protection of public health in accordance with art 30 EC. It stated that the principle of proportionality, which was the basis of the last sentence of art 30 EC, required that the power of the member states to prohibit imports of products from other member states be restricted to what was necessary in order to achieve legitimately pursued aims concerning the protection of health. National legislation or practice could not therefore benefit from the derogation laid down in art 30 EC when the health and life of humans could be protected equally effectively by measures less restrictive of intra-Community trade<sup>9</sup>.

g 23. The court continued by stating that where a marketing authorisation of reference was withdrawn at the request of its holder for reasons other than the protection of public health there did not appear to be any grounds justifying the automatic cessation of the validity of the parallel import licence. First, the withdrawal of a marketing authorisation of reference did not mean in itself h that the quality, efficacy and non-toxicity of the old version—which continued to be lawfully marketed in the member state of exportation under the marketing authorisation issued in that state—was called into question. Second, pharmacovigilance satisfying Directive 75/319<sup>10</sup> could ordinarily be guaranteed for medicinal products that were the subject of parallel imports through i co-operation with the national authorities of the other member states by means of access to the documents and data produced by the manufacturer or

<sup>8</sup> Cited in footnote 5, above.

<sup>9</sup> Paragraphs 33 and 34 of the judgment.

<sup>10</sup> Cited in footnote 7, above.

other companies in the same group relating to the old version in the member states in which that version was still marketed on the basis of a marketing authorisation still in force<sup>11</sup>.

24. The court accordingly concluded that national legislation under which the withdrawal of the marketing authorisation of reference for a medicinal product on application by the holder thereof meant that a parallel import licence for that product automatically ceased to be valid did not comply with art 28 EC<sup>12</sup>.

25. The court had acknowledged that it was conceivable that there could be reasons relating to the protection of public health which required that a parallel import licence for medicinal products be necessarily linked to a marketing authorisation of reference. In particular, a demonstrated risk to public health arising from the co-existence of two versions of the same medicinal product on the market in a member state could justify restrictions on the importation of the old version of the medicinal product in consequence of the withdrawal of the marketing authorisation of reference by the holder thereof in relation to that market<sup>13</sup>.

#### OBSERVATIONS OF THE PARTIES

26. Written observations have been submitted in the Swedish case by Paranova AB, the Danish, Netherlands, Norwegian and Swedish governments and the Commission and in the Finnish case by the Danish, Finnish, Netherlands and Norwegian governments and the Commission. Paranova, all the aforementioned governments and the Commission were represented at the hearing, which was common to both cases.

27. The written observations were in all cases submitted before the court delivered its judgment in the *Ferring* case and to that extent, as was acknowledged at the hearing by, in particular, the Danish and Netherlands governments and the Commission, have in effect been overtaken by events as may be seen below.

#### THE FIRST QUESTION REFERRED

28. By their respective first questions, the referring courts in the present cases ask essentially whether it is compatible with arts 28 and 30 EC for a licence for a medicinal product imported as a parallel import to be revoked on the sole ground that the marketing authorisation of reference has been withdrawn at the holder's request for reasons unconnected with the safety of the product.

29. In my view, that question has now been answered in the negative by the judgment of the court in the *Ferring* case for the reasons summarised above<sup>14</sup>.

30. In the Swedish case the referring court asks in addition whether the answer to that question depends on what specific reasons have given rise to the request by the holder of the marketing authorisation of reference for the withdrawal of that authorisation.

31. As explained above<sup>15</sup>, revocation of the parallel import licence constitutes a restriction on the free movement of goods contrary to art 28 EC; as such it

11 See paras 35–38 of the judgment, citing the judgment in *Ex p Rhône-Poulenc Rorer Ltd* (para 46), cited in para 6, above.

12 See para 40 and operative part of the judgment.

13 See paras 39, 43 and 46 and operative part of the judgment.

14 See paras 21–23.

15 See para 21, above.

a will be lawful only if it can be justified in accordance with art 30 EC, which provides that measures may be justified on grounds of, inter alia, 'the protection of health and life of humans'. The Swedish referring court's question is explicitly based on the premiss that the reasons for the withdrawal of the marketing authorisation of reference are unconnected with the safety of the product. In those circumstances, the answer to the first question cannot therefore depend on what those other reasons—presumably dictated by commercial considerations—may be.

b 32. The Swedish referring court also asks whether the answer to the first question depends on whether the holder of the marketing authorisation of reference (or companies belonging to the same group) continues to sell the product which is the subject of parallel imports—namely the capsules—in other member states on the basis of marketing authorisations granted there.

c 33. It is not entirely clear what has prompted the Swedish referring court to raise that point. In one sense, it seems irrelevant, since the phenomenon of parallel import pre-supposes that the imported product is on the market in at least one member state other than the state of import; that product will moreover frequently have been placed on the other market by the holder of the marketing authorisation of reference or a company belonging to the same group. The Swedish court may however be asking whether the situation there described will make the pharmacovigilance duties of the competent authority of the state of import easier to discharge where a parallel import licence survives revocation of the marketing authorisation of reference.

d 34. The court stated in *Ex p Rhône-Poulenc Rorer* (para 46)<sup>16</sup> that with regard to pharmacovigilance it was—

e 'possible to compel the holder of the marketing authorisation in the member state of importation, who belongs to the group of companies which is in possession of the marketing authorisations for the old version in the other member states, to supply the necessary information ...'

f It is clear from the context<sup>17</sup> that the court was responding to the argument that the pharmacovigilance system would not work where a marketing authorisation of reference was revoked since the obligation on the holder of that authorisation to submit information regularly as required by Directive 75/319 would also lapse, so that the competent authorities in the state of import could not be sure that the use of the old product imported in parallel was still safe according to the latest scientific data. The court must therefore have meant in the passage cited above that it was possible to compel the holder of the marketing authorisation for the new version of the product in the member state of import, who belongs to the group of companies which is in possession of the marketing authorisations for the old version in the other member states (including ex hypothesi the state of export), to supply the necessary information relating to the old version.

g 35. Even where the situation described by the Swedish court does not obtain, however, it will in my view be only in exceptional circumstances that the competent authority of the state of import will be able to rely on difficulty in discharging its pharmacovigilance duties as a justification for withdrawing the

16 Cited in para 6, above.

17 See in particular paras 33 and 38 of the judgment.



parallel import licence. I set out my reasons for that view in paras 39 to 45, below, in the context of the second question referred by the Finnish court which directly raises this issue. a

#### THE SECOND QUESTION REFERRED IN THE FINNISH CASE

36. The referring court in the Finnish case also asks in effect whether it is relevant that (a) the holder of the marketing authorisation of reference has obtained a new marketing authorisation for a replacement product which, albeit in a different pharmaceutical form and with a slightly different active ingredient, is regarded as bioequivalent and as having the same therapeutic effect; (b) subsequent control of the effectiveness and safety of the product may be more difficult because the marketing authorisation of reference has been withdrawn; and (c) the imported product has been widely used over many years so that it is unlikely to present a danger to public health. b  
c

37. It appears from the order for reference that Paranova Oy raised those points before the referring court in the context of its argument that a prohibition on imports based on health reasons in accordance with art 30 EC must respect the principle of proportionality. Paranova Oy argued that that assessment must be made with regard to the circumstances of the case in question. It stressed that the fact that the products were, in principle, identical and that they were well known, both to national agencies in charge of evaluation of medicinal products in the European Union and to doctors and patients, had to be taken into account and that Losec capsules, having been available on the world market for some time and being one of the most widely sold medicines, had been used by such a significantly large number of people and for such a significant period of time that national agencies in charge of evaluation of medication in the European Union had been able to develop a very clear opinion of how they worked and their effects. d  
e

38. Under (a), the Finnish referring court asks whether it is relevant that the holder of the marketing authorisation of reference has obtained a new marketing authorisation for a replacement product which, albeit in a different pharmaceutical form and with a slightly different active ingredient, is regarded as bioequivalent and as having the same therapeutic effect. In my view, that factor is not relevant given the conclusion of the court in the *Ferring* case, since in any event the competent authority of the member state of import is not entitled to revoke the parallel import licence unless there is a demonstrated risk to public health. f  
g

39. Under (b), the Finnish referring court mentions possible problems with pharmacovigilance. It is concerned in particular that subsequent control of the effectiveness and safety of the product may be more difficult after revocation of the marketing authorisation of reference. h

40. The court made it clear in the *Ferring* case that if it can be demonstrated that there is in fact a risk to public health arising from the coexistence on the market of the member state of import of the two versions of the medicinal product at issue (in the present case, the capsules and the tablets), such a risk may justify restrictions on the importation of the old version<sup>18</sup>. That statement was restricted to the specific alleged health risk referred to in the questions referred in that case. It is however clearly of broader application. If therefore it can be demonstrated that there is in fact a risk to public health arising from the i

<sup>18</sup> Paragraph 43 of the judgment.

a continued marketing of the imported capsules in Finland after withdrawal of the marketing authorisation of reference, restrictions on import may be justified.

b 41. However, the court added in the *Ferring* case that the question of the existence and the reality of the risk is a matter which is primarily for the competent authorities of the member state of import to determine, and the mere assertion by the holder of the marketing authorisation for the new and old versions that there is such a risk is not sufficient to justify prohibition of the importation of the old version<sup>19</sup>. The determination by the competent authority of the existence and reality of the risk must in my view be substantiated: the mere assertion by the competent authority concerned that, c for example, it would not be possible to carry out the necessary safety checks if parallel imports of the capsules continued after revocation of the marketing authorisation of reference would not be sufficient if the authority could not demonstrate that that concern was justified.

d 42. In that context, it is worth repeating the points made by the court in the *Ferring* case. First, it gave weight to the fact that the old version of the medicinal product continued to be lawfully marketed in the member state of exportation under the marketing authorisation issued in that state. Second, it noted that, although adequate monitoring of the old version remained necessary in the state of import, pharmacovigilance satisfying Directive 75/319 e could ordinarily be guaranteed through co-operation with the national authorities of the other member states by means of access to the documents and data produced by the manufacturer or other companies in the same group, relating to the old version in the member states in which that version was still marketed on the basis of a marketing authorisation still in force<sup>20</sup>. It may be added that, as discussed above<sup>21</sup>, it is clear from the case law of the court that the manufacturer in that situation may be compelled to supply the necessary information<sup>22</sup>.

f 43. At the time of the events giving rise to the main proceedings in the present cases<sup>23</sup>, Ch Va of Directive 75/319<sup>24</sup> as amended in particular by Directive 93/39<sup>25</sup> imposed a series of obligations concerning pharmacovigilance. In particular, art 29a required member states to establish a pharmacovigilance system to be used to collect information useful in the surveillance of medicinal products, with particular reference to adverse reactions in human beings, and to evaluate such information scientifically. g Articles 29c and 29d required the person responsible for placing the medicinal product on the market to establish and maintain a system ensuring that information about all suspected adverse reactions reported to the company and to medical representatives was collected and collated at a single point within h the Community, to answer fully and promptly any request from the competent authorities for additional information necessary for the evaluation of the benefits and risks of a medicinal product and to record and promptly report to the competent authorities all suspected serious adverse reactions brought to its

i 19 Paragraph 44 of the judgment.

20 Paragraphs 36 and 38 of the judgment, citing the judgment in *Ex p Rhône-Poulenc Rorer Ltd* (para 46).

21 See para 33.

22 See *Ex p Rhône-Poulenc Rorer Ltd* (para 46), cited in para 6, above.

23 1998.

24 Cited in footnote 7, above.

25 Cited in footnote 3, above.

attention by health care professionals. Article 29f required the member states to ensure that reports of suspected serious adverse reactions were immediately brought to the attention of the European Agency for the Evaluation of Medicinal Products established by Regulation 2309/93<sup>26</sup> (the Agency).

44. With effect from 30 June 2000, those obligations have been further strengthened by Directive 2000/38<sup>27</sup>, which amended Ch Va of Directive 75/319. The marketing authorisation holder must now in addition provide to the competent authorities any other information relevant to the evaluation of the benefits and risks of a medicinal product, including appropriate information on post-authorisation safety studies<sup>28</sup>, maintain detailed records of all suspected adverse reactions occurring either in the Community or in a third country<sup>29</sup> and record and promptly report to the competent authority of the member state in whose territory the incident occurred all suspected serious adverse reactions of which he has or can reasonably be expected to have knowledge<sup>30</sup>. Furthermore, member states are to ensure that reports of suspected serious adverse reactions that have taken place on their territory are promptly made available to the Agency and the other member states<sup>31</sup>.

45. The Finnish government stated at the hearing that reliance on the pharmacovigilance requirements of Directive 75/319 was undermined by the fact that different member states used different languages: a report of a suspected serious adverse reaction which took place in Greece, for example, would be forwarded to the Finnish competent authority in Greek. I am not however convinced that that is as serious a problem as it may appear at first sight. The 'Note for Guidance on Procedure for Competent Authorities on the Undertaking of Pharmacovigilance Activities'<sup>32</sup> issued by the Agency requires that the terminologies used to code medicinal products, diseases and adverse drug reactions should ensure compatibility of reports between member states and in particular that reports entered into a database should be coded according to internationally approved terminologies or with mutually accepted terms enabling connections with internationally approved terminologies.

46. In my view the combined effect of the above-mentioned pharmacovigilance requirements is such that it would be only in exceptional cases that the competent authority of the member state into which a medicinal product was imported in circumstances such as those of the present case could prohibit such imports on the ground that it could not ensure pharmacovigilance.

47. Finally, the factor referred to by the Finnish referring court at (c)—namely the history of widespread use of the capsules—is essentially part of the same pharmacovigilance point: although there is no formal requirement that the competent authority of the member state of import take such a factor into account, it will inevitably mean that the recording and reporting system imposed by the legislation and summarised above<sup>33</sup> is unlikely to be triggered.

26 Cited in footnote 4, above.

27 Cited in footnote 7, above.

28 Article 29c(d).

29 Article 29d(1).

30 Article 29d(2) and (3).

31 Article 29f(2).

32 CPMP/PhVWP/175/95 issued in June 1995; see para 3.1.4.

33 See paras 42, 43, above.



- a 48. I accordingly conclude on the Finnish court's second question that, where a marketing authorisation of reference has been withdrawn for reasons unconnected with the safety of the product, restrictions on the continued import of medicinal products previously imported as parallel imports will be justified only if it can be demonstrated that there is in fact a risk to public health arising from the continued marketing of the imported capsules in the member state of import.
- b

THE SECOND QUESTION REFERRED IN THE SWEDISH CASE AND THE THIRD QUESTION REFERRED IN THE FINNISH CASE

- c 49. It is clear from the order for reference in the Swedish case and from the terms of the third question referred in the Finnish case that each of those questions arises only if the first question is answered in the affirmative, namely to the effect that it is compatible with arts 28 and 30 EC for the parallel import licence to be revoked on the ground that the marketing authorisation of reference has been withdrawn. Since in the light of the judgment of the court in the *Ferring* case I propose that the first question should be answered in the negative, the second question referred in the Swedish case and the third question referred in the Finnish case do not arise.
- d

CONCLUSION

- e 50. I am accordingly of the view that the questions referred by the Swedish Regeringsrätten and the Finnish Högsta Förvaltningsdomstolen should be answered as follows:

f It is not compatible with arts 28 and 30 EC for a licence for a medicinal product imported as a parallel import to be revoked on the sole ground that the marketing authorisation of reference has been withdrawn at the holder's request for reasons unconnected with the safety of the product unless there is a demonstrated risk to public health arising from the continued marketing of the imported product after withdrawal of that authorisation.

8 May 2003. The **COURT OF JUSTICE (Sixth Chamber)** delivered the following judgment in *Paranova Läkemedel AB v Läkemedelsverket* Case C-15/01.

- g 1. By order of 21 December 2000, received at the Court of Justice of the European Communities on 15 January 2001, the Regeringsrätten (Supreme Administrative Court, Sweden) referred to the Court of Justice for a preliminary ruling under art 234 EC (formerly art 177 of the EC Treaty) two questions on the interpretation of arts 28 and 30 EC (formerly arts 30, 36 of the EC Treaty).

- h 2. Those questions were raised in proceedings brought by Paranova Läkemedel AB, Farmagon A/S, Medartuum AB, Net Pharma KG AB, Orifarm AB, Trans Euro Medical AB, Cross Pharma AB and MedImport Scandinavia AB (Paranova and others) against the Läkemedelsverket (Swedish Medical Products Agency) concerning the consequences of the withdrawal of a marketing authorisation on the parallel import into Sweden by Paranova and others of a medicinal product.
- i

LEGAL FRAMEWORK

*Community law*

3. Under art 28 EC quantitative restrictions on imports and all measures having equivalent effect are prohibited between member states. However,

according to art 30 EC prohibitions or restrictions on import between member states which are justified on the ground, inter alia, of the protection of health of humans are authorised so long as they do not constitute a means of arbitrary discrimination or a disguised restriction on trade between member states. a

4. According to art 3 of Council Directive (EEC) 65/65 (on the approximation of provisions laid down by law, regulation or administrative action relating to proprietary medicinal products) (OJ English Sp Edn 1965-1966 (I) p 17), as amended by Council Directive (EEC) 93/39 (OJ 1993 L214 p 22) (Directive 65/65), no medicinal product may be placed on the market in a member state unless a marketing authorisation has been issued by the competent authority of that member state. b

5. Article 4 of Directive 65/65 defines the procedure, documents and information necessary for the issue of a marketing authorisation. c

6. Article 5 of Directive 65/65 states that the marketing authorisation is to be refused if after verification of the particulars and documents listed in art 4 it appears that the medicinal product is harmful in the normal conditions of use, or that its therapeutic efficacy is lacking or is insufficiently substantiated by the applicant, or that its qualitative and quantitative composition is not as declared. d

7. According to Ch Va of the Second Council Directive (EEC) 75/319 (on the approximation of provisions laid down by law, regulation or administrative action relating to proprietary medicinal products) (OJ 1975 L147 p 13), as amended by Directive 93/39, the member states are to set up a pharmacovigilance system which, amongst other things, imposes obligations on the holder of a marketing authorisation relating to the registration and notification of all adverse reactions to those medicinal products in humans. To that end reports must be submitted to the competent authorities at regular intervals and must be accompanied by a scientific evaluation. e

#### *National law* f

8. The Läkemedelslagen (Swedish Medicinal Products Law) (1992:859), the Läkemedelsförordningen (Medicinal Products Order) (1992:1752) and the regulations drawn up by the Läkemedelsverket (1994:22) contain provisions implementing Directive 65/65.

9. Under the regulations of the Läkemedelsverket a marketing authorisation from that agency is required in the case of parallel imports of medicinal products. The Läkemedelsverket investigates in order to establish whether the directly imported medicinal product and the medicinal product to be imported as a parallel import are the same. The withdrawal or suspension by the Swedish authorities or by those of the country of export of the marketing authorisation for the directly imported medicinal product entails the withdrawal or suspension of the authorisation for the parallel import into Sweden of the medicinal product. However, on application the Läkemedelsverket can authorise the continued validity of that authorisation if the marketing authorisation is withdrawn or suspended for economic reasons and not for reasons relating to the effects or the safety of the medicinal product concerned. g  
h  
i

#### THE MAIN PROCEEDINGS AND THE QUESTIONS REFERRED

10. Hässle Läkemedel AB (Hässle) held the marketing authorisation in Sweden for the medicinal product known as 'Losec enterokapslar' (Losec enteric capsules, hereinafter the capsules or the old version of the product),

a while Paranova and others held marketing authorisations for parallel imports (parallel import licences) of the capsules. The product is used to treat conditions caused by stomach acid.

b 11. The Läkemedelsverket decided, at Hässle's request, that the marketing authorisation granted to Hässle ceased to be valid on 1 January 1999. Hässle made its request for withdrawal of the marketing authorisation granted to it for the capsules because it intended to sell in Sweden a new variant of that product called 'Losec MUPS enterotabletter' (Losec MUPS enteric tablets, hereinafter the tablets) in place of the capsules.

12. The capsules continued to be sold in other member states, under the marketing authorisations granted in those states.

c 13. The two versions of Losec are therapeutic equivalents, that is to say that both versions contain the same dose of the active ingredient which is absorbed by the body at the same rate and to the same extent when taken orally.

d 14. The active ingredient of the capsules contains omeprazole acid. The tablets contain magnesium salt of omeprazole acid. The salt dissolves more easily in water and is more stable. It is thus easier to manufacture tablets than capsules.

e 15. On 1 September 1998 the Läkemedelsverket decided that the parallel import licences granted to Paranova and others would expire on the same date as the marketing authorisation which Mr Hässle held. On 25 September 1998 the date on which those authorisations expired was, however, postponed until 30 June 1999. The Läkemedelsverket gave as the reason for its decision the fact that the capsules and the tablets had to be considered as two distinct medicinal products, both because the production methods differed and because the active ingredient, that is to say, omeprazole acid, of the capsules, had been replaced by another active ingredient in the tablets, that is to say, magnesium salt of omeprazole acid. It pointed out that if the parallel import licence for the capsules did not expire, that product would be put on the market in Sweden without it being possible to meet the necessary safety requirements.

f 16. Paranova and others appealed to the Länsrätten i Uppsala Län (County Administrative Court for Uppsala, Sweden), against the decision of the Läkemedelsverket of 1 September 1998. The Länsrätten upheld that appeal by judgment of 7 December 1998.

g 17. The Läkemedelsverket appealed against that judgment to the Kammarrätten i Stockholm (Administrative Court of Appeal, Stockholm, Sweden), which, by judgment of 26 February 1999, upheld that appeal, and held that the two medicinal products at issue were not sufficiently similar to be covered by the same marketing authorisation.

h 18. Paranova and others have appealed against that judgment to the Regeringsrätten, which, in the order for reference, pointed out that although the application was made in the form of a dispute as to whether a marketing authorisation granted for directly imported tablets can be the basis for a right to sell the capsules imported as parallel imports, it must first be decided whether the fact that the marketing authorisation held by Hässle for the capsules was withdrawn at its request must automatically entail the withdrawal of the authorisation granted to the parallel importers.

i 19. It is against that background that the Regeringsrätten referred the following questions to the Court of Justice for a preliminary ruling:

(1) Is it compatible with Articles 28 EC and 30 EC to revoke a marketing authorisation for a medicinal product imported as a parallel import on the



ground that the marketing authorisation for the directly imported medicinal product has been revoked at the request of the holder of the authorisation for reasons unconnected with the safety of the medicinal product? Does the answer depend on what specific reasons have given rise to that request or on whether the holder of the authorisation or companies belonging to the same group in other Member States continue to sell the medicinal product to which the parallel imports relate on the basis of marketing authorisations granted there? a

(2) If the parallel importers rely on a new marketing authorisation for a directly imported medicinal product rather than on the old marketing authorisation, is authorisation for the continued marketing of the medicinal product imported as a parallel import precluded by the fact that that medicinal product and the directly imported medicinal product which is covered by the new marketing authorisation are different in the sense that the medicinal product imported as a parallel import is sold in the form of a capsule containing a certain acid (omeprazole) while the directly imported medicinal product is sold in the form of a tablet containing a magnesium salt of the acid? b

#### THE QUESTIONS REFERRED FOR A PRELIMINARY RULING

20. As a preliminary point it must be observed that:

- the parallel import licence for the capsules (the old version of the medicinal product) was issued by reference to the marketing authorisation granted by the national authorities for that same medicinal product; c
- that marketing authorisation was withdrawn at the request of its holder for reasons unconnected with the safety of the product; d
- that holder obtained a marketing authorisation for a new variant of that medicinal product; and e
- the old version of the medicinal product is still marketed legally in other member states under marketing authorisations which have not been revoked. f

21. In those circumstances, the question arises as to whether arts 28 and 30 EC preclude national legislation under which the withdrawal, at the request of its holder, of the marketing authorisation granted for the old version of a medicinal product of itself entails the withdrawal of the parallel import licence for that same product.

22. It must be noted at the outset that the cessation of the validity of a parallel import licence following the withdrawal of the marketing authorisation of reference constitutes a restriction on the free movement of goods contrary to art 28 EC (see *Ferring Arzneimittel GmbH v Eurim Pharm Arzneimittel GmbH* Case C-172/00 [2002] ECR I-6891 (para 33)). g

23. However, such a restriction may be justified by reasons relating to the protection of public health, in accordance with the provisions of art 30 EC (see the *Ferring* case (para 33)). h

24. It is for the national authorities responsible for the operation of the legislation governing the production and marketing of medicinal products—legislation which, as is made clear in the first recital of Directive 65/65, has as its primary objective the safeguarding of public health—to ensure that it is fully complied with. Nevertheless, the principle of proportionality, which is the basis of the last sentence of art 30 EC, requires that the power of the member states to prohibit imports of products from other member states be restricted to what is necessary in order to achieve the aims concerning the protection of health that are legitimately pursued. Thus, national legislation or i

a practice cannot benefit from the derogation laid down in art 30 EC when the health and life of humans can be protected equally effectively by measures less restrictive of intra-Community trade (see the *Ferring* case (para 34)).

25. No reason has been put before the court to justify why the mere fact that a marketing authorisation of reference was withdrawn at the request of its holder should entail the automatic withdrawal of the parallel import licence issued for the medicinal product in question (see, to that effect, the *Ferring* case (para 35)).

b 26. First, it must be observed that the withdrawal of a marketing authorisation of reference does not mean in itself that the quality, efficacy and non-toxicity of the old version is called into question. In that respect it must be noted that that version continues to be lawfully marketed in the member state of exportation under the marketing authorisation issued in that state (see the *Ferring* case (para 36)).

c 27. Next, although the competent authorities of the member state of importation can, and indeed must, adopt the measures necessary for the purpose of verifying the quality, efficacy and non-toxicity of the old version of the medicinal product, it does not appear that that objective cannot be attained by other measures having a less restrictive effect on the import of medicinal products than the automatic cessation of the validity of the parallel import licence in consequence of the withdrawal of the marketing authorisation of reference (see the *Ferring* case (para 37)).

d 28. Although adequate monitoring of the old version of the medicinal product remains necessary and may in certain cases mean that information is requested from the importer, it must be pointed out that pharmacovigilance satisfying the relevant requirements of Directive 75/319 as amended can ordinarily be guaranteed for medicinal products that are the subject of parallel imports, such as those in question in the main proceedings, through co-operation with the national authorities of the other member states by means of access to the documents and data produced by the manufacturer or other companies in the same group, relating to the old version in the member states in which that version is still marketed on the basis of a marketing authorisation still in force (see the *Ferring* case (para 38)).

e 29. In that connection, it must be observed that the 'Note for Guidance on Procedure for Competent Authorities on the Undertaking of Pharmacovigilance Activities' (CPMP/PhVWP/175/95), published in June 1995 by the European Agency for the Evaluation of Medicinal Products, requires, in its para 3.1.4, that the terminologies used to code medicinal products, adverse reactions to them and diseases should ensure compatibility of reports between member states and in particular ensure that reports entered into a database should be coded according to internationally approved terminologies or with mutually accepted terms allowing connections to be made with such terminologies.

f 30. Finally, it must also be observed that, while it cannot be ruled out that there are reasons relating to the protection of public health which require a parallel import licence for medicinal products to be linked to a marketing authorisation of reference, no such reasons are apparent from the observations put before the court.

g 31. If there are no reasons of a general nature which could explain why the withdrawal of the marketing authorisation of reference should entail that of the parallel import licence, that does not preclude the existence, in specific

circumstances, of reasons relating to the protection of public health which could justify the withdrawal of the parallel import licence. a

32. As the court has held, such reasons could arise, for example, where there is in fact a risk to public health arising from the coexistence of two versions of the same medicinal product on the market of the importing member state (see the *Ferring* case (para 43)).

33. In the light of those considerations the answer to the first part of the first question should be that arts 28 and 30 EC preclude national legislation under which the withdrawal, at the request of its holder, of the marketing authorisation of reference of itself entails the withdrawal of the parallel import licence granted for the medicinal product in question. However, those provisions do not preclude restrictions on parallel imports of the medicinal product in question if there is in fact a risk to the health of humans as a result of the continued existence of that medicinal product on the market of the importing member state. b  
c

34. In the light of that reply, there is no need to reply to the second part of the first question. Similarly, it is not necessary to consider the second question in which the referring court essentially seeks to know whether the parallel import licence can be linked to the new marketing authorisation granted for the tablets. d

#### COSTS

35. The costs incurred by the Swedish, Danish, Netherlands and Norwegian governments and by the Commission of the European Communities, which have submitted observations to the court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. e  
f

On those grounds, the Court of Justice (Sixth Chamber), in answer to the questions referred to it by the Regeringsträtten by order of 21 December 2000, hereby rules:

Articles 28 and 30 EC preclude national legislation under which the withdrawal, at the request of its holder, of the marketing authorisation of reference of itself entails the withdrawal of the parallel import licence granted for the medicinal product in question. However, those provisions do not preclude restrictions on parallel imports of the medicinal product in question if there is in fact a risk to the health of humans as a result of the continued existence of that medicinal product on the market of the importing member state. g  
h

8 May 2003. **The COURT OF JUSTICE (Sixth Chamber)** delivered the following judgment in *Re Paranova Oy* Case C-113/01.

1. By order of 8 March 2001, received at the Court of Justice of the European Communities on 14 March 2001, the Högsta förvaltningsdomstolen (Supreme Administrative Court, Finland) referred to the Court of Justice for a preliminary ruling under art 234 EC (formerly art 177 of the EC Treaty) three questions on the interpretation of arts 28 and 30 EC (formerly arts 30, 36 of the EC Treaty). i

2. Those questions were raised in proceedings between Paranova Oy (Paranova) and the Läkemedelsverket (Finnish Medical Products Agency)



- a concerning the consequences of the withdrawal of a marketing authorisation on the parallel import into Finland by Paranova of a medicinal product.

#### LEGAL FRAMEWORK

##### *Community law*

3. Under art 28 EC quantitative restrictions on imports and all measures  
b having equivalent effect are prohibited between member states. However, according to art 30 EC, prohibitions or restrictions on import between member states which are justified on the ground, inter alia, of the protection of health of humans are authorised so long as they do not constitute a means of arbitrary discrimination or a disguised restriction on trade between member states.
4. According to art 3 of Council Directive (EEC) 65/65 (on the  
c approximation of provisions laid down by law, regulation or administrative action relating to proprietary medicinal products) (OJ English Sp Edn 1965–1966 (I) p 17), as amended by Council Directive (EEC) 93/39 (OJ 1993 L214 p 22) (Directive 65/65), no medicinal product may be placed on the market in a member state unless a marketing authorisation has been issued by  
d the competent authority of that member state.

5. Article 4 of Directive 65/65 defines the procedure, documents and information necessary for the issue of a marketing authorisation.

6. Article 5 of Directive 65/65 states that the marketing authorisation is to be refused if after verification of the particulars and documents listed in art 4 it  
e appears that the medicinal product is harmful in the normal conditions of use, or that its therapeutic efficacy is lacking or is insufficiently substantiated by the applicant, or that its qualitative and quantitative composition is not as declared.

7. According to Ch Va of the Second Council Directive (EEC) 75/319 (on the approximation of provisions laid down by law, regulation or administrative action relating to proprietary medicinal products) (OJ 1975 L147 p 13), as  
f amended by Directive 93/39, the member states are to set up a pharmacovigilance system which, amongst other things, imposes obligations on the holder of a marketing authorisation relating to the registration and notification of all adverse reactions to those medicinal products in humans. To that end reports must be submitted to the competent authorities at regular intervals and must be accompanied by a scientific evaluation.

- g *National law*

8. Under art 101 of the Läkemedelslagen (Finnish Medicinal Products Law No 395/1987), the Läkemedelsverket may prohibit the importation, manufacture, distribution and sale or any other transfer for consumption of a medicinal product if the conditions for a marketing authorisation or for a  
h registration or the requirements or obligations that concern the manufacture or the importation of the medicinal product are no longer fulfilled or if there is reason to believe that such is the case.

9. Under Regulation 1/1997 of the Läkemedelsverket on the parallel importation of medicinal products, parallel imports are possible only of medicinal products which are already covered by a marketing authorisation  
i valid in Finland. Such products must also be covered by a marketing authorisation valid in the country of supply. That country must belong to the European Economic Area. When dealing with an application for the parallel import of a medicinal product, the Läkemedelsverket has to establish that the medicinal products are sufficiently similar to be considered to be identical products.

10. Under the first subparagraph of para 4.3 of that regulation, authorisation for parallel imports (a parallel import licence) is granted for five years. However, the validity of that licence depends on that of the marketing authorisations granted both in Finland and in the country of supply for the directly imported medicinal product and it remains in force only so long as those authorisations themselves remain valid. It is for the parallel importer to ensure that each consignment imported to Finland is covered by a marketing authorisation valid in that member state and in the country of supply. If the marketing authorisation expires in the country of supply, the parallel importer must inform the Läkemedelsverket immediately. a

#### THE MAIN PROCEEDINGS AND THE QUESTIONS REFERRED c

11. Suomen Astra Oy (Astra) held the marketing authorisation in Finland for the medicinal product known as 'Losec enterokapslar' (Losec enteric capsules, hereinafter the capsules or the old version of the product), while Paranova held a parallel import licence for the capsules. The product is used to treat conditions caused by stomach acid. b

12. By letter sent to the Läkemedelsverket on 28 September 1998, Astra sought revocation of the marketing authorisation granted to it for the capsules, explaining that it intended to sell in Finland a new variant of that product called 'Losec MUPS enterotabletter' (Losec MUPS enteric tablets, hereinafter the tablets) in place of the capsules. Subsequently, the Läkemedelsverket withdrew the marketing authorisation held by Astra for the capsules with effect from 30 September 1998. d

13. The capsules continued to be sold in other member states, under the marketing authorisations granted in those states. e

14. The two versions of Losec are therapeutic equivalents, that is to say that both versions contain the same dose of the active ingredient which is absorbed by the body at the same rate and to the same extent when taken orally. f

15. The active ingredient of the capsules contains omeprazole acid. The tablets contain magnesium salt of omeprazole acid. The salt dissolves more easily in water and is more stable. It is thus easier to manufacture tablets than capsules.

16. In a letter sent to Paranova on 8 October 1998, the Läkemedelsverket gave notice that it had withdrawn the marketing authorisation held by Astra for the capsules and that the validity of the licence which Paranova held for the capsules expired on the same date, that is to say, 30 September 1998. g

17. On 24 November 1998 the Läkemedelsverket gave notice that the parallel import licence held by Paranova for the capsules was no longer valid, with immediate effect, regardless of any objection by Paranova. In the grounds for the decision the Läkemedelsverket pointed out that the parallel import licence did not meet the conditions set out in Regulation 1/1997, since the validity of the parallel import licence depends on that of the marketing authorisation granted for the medicinal product at issue in Finland and remains in force only as long as that authorisation is itself valid. h

18. Paranova appealed against that decision before the Högsta förvaltningsdomstolen, claiming that it is incompatible with arts 28 and 30 EC. It argued that it became aware of the revocation of the marketing authorisation which Astra held when its own parallel import licence became invalid. It thus did not have the time necessary to adapt its stock and sale contracts concluded before the new situation arose. For parallel importers, i

a securing a supply which is consistent with consumption of the medicinal product constitutes one of the most important commercial criteria.

19. The Läkemedelsverket countered that parallel import licences are granted for five years. However, their validity is limited by that of the marketing authorisation of reference in Finland and in the country of origin of the medicinal product imported as a parallel import. It is thus for the parallel importer to check that each consignment imported is covered by a marketing authorisation in both states. The Läkemedelsverket also contends that the two medicinal products are essentially the same if they have the same qualitative and quantitative composition in terms of active principles, if they have the same pharmaceutical form and, where appropriate, if they are 'bioequivalent'. However, as the capsules and the tablets have different pharmaceutical forms, they cannot constitute the same medicinal product.

20. It is against that background that the Högsta förvaltningsdomstolen decided to stay proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

d '(1) Is it compatible with Articles 28 EC and 30 EC for a national agency to decide that a marketing authorisation for a medicinal product imported as a parallel import automatically comes to an end if the original marketing authorisation for the medicinal product has been withdrawn at the holder's request for reasons unconnected with the effectiveness or the safety of the medicinal product and despite the fact that the product has a valid marketing authorisation in the Member State from which the parallel imports come?

e (2) If Community law imposes restrictions or conditions on the right of a national agency to decide that a marketing authorisation for parallel imports comes to an end in the situation referred to in Question (1), what importance should be accorded to the facts that

f (a) the holder of the original marketing authorisation has obtained a new marketing authorisation for a medicinal product designed to replace the original medicinal product but that new product is not in the same pharmaceutical form (tablets instead of capsules) and the active ingredient is not exactly the same (magnesium Omeprazole instead of Omeprazole); on the other hand, the national agency considers that the medicinal products are bioequivalent and that they have the same therapeutic effect;

g (b) subsequent control of the effectiveness and safety of the medicinal product is possibly made more difficult by the fact that the marketing authorisation for the original medicinal product has been withdrawn;

h (c) the medicinal product imported as a parallel import has been widely used over many years in Member States and it is improbable that its continued sale presents a danger to public health?

i (3) If, in the situation referred to in Question (1), Articles 28 EC and 30 EC allow it to be found that the marketing authorisation granted for a parallel import has expired, may it be decided that the marketing authorisation for the parallel import expired immediately the original marketing authorisation was withdrawn, without allowing the parallel importer any time to adapt his activity? Do any of the circumstances referred to in Question (2) affect the question whether it may be decided that the marketing authorisation for a parallel import expires immediately?



## THE QUESTIONS REFERRED FOR A PRELIMINARY RULING

21. As a preliminary point it must be observed that:

—the parallel import licence for the capsules (the old version of the medicinal product) was issued by reference to the marketing authorisation granted by the national authorities for that same medicinal product;

—that marketing authorisation was withdrawn at the request of its holder for reasons unconnected with the safety of the product;

—that holder obtained a marketing authorisation for a new variant of that medicinal product; and

—the old version of the medicinal product is still marketed legally in other member states under marketing authorisations which have not been revoked.

22. In those circumstances, the question arises as to whether arts 28 and 30 EC preclude national legislation under which the withdrawal, at the request of its holder, of the marketing authorisation granted for the old version of a medicinal product of itself entails the withdrawal of the parallel import licence for that same product.

23. It must be noted at the outset that the cessation of the validity of a parallel import licence following the withdrawal of the marketing authorisation of reference constitutes a restriction on the free movement of goods contrary to art 28 EC (see *Ferring Arzneimittel GmbH v Eurim Pharm Arzneimittel GmbH* Case C-172/00 [2002] ECR I-6891 (para 33)).

24. However, such a restriction may be justified by reasons relating to the protection of public health, in accordance with the provisions of art 30 EC (see the *Ferring* case (para 33)).

25. It is for the national authorities responsible for the operation of the legislation governing the production and marketing of medicinal products—legislation which, as is made clear in the first recital of Directive 65/65, has as its primary objective the safeguarding of public health—to ensure that it is fully complied with. Nevertheless, the principle of proportionality, which is the basis of the last sentence of art 30 EC, requires that the power of the member states to prohibit imports of products from other member states be restricted to what is necessary in order to achieve the aims concerning the protection of health that are legitimately pursued. Thus, national legislation or practice cannot benefit from the derogation laid down in art 30 EC when the health and life of humans can be protected equally effectively by measures less restrictive of intra-Community trade (see the *Ferring* case (para 34)).

26. No reason has been put before the court to justify why the mere fact that a marketing authorisation of reference was withdrawn at the request of its holder should entail the automatic withdrawal of the parallel import licence issued for the medicinal product in question (see, to that effect, the *Ferring* case (para 35)).

27. First, it must be observed that the withdrawal of a marketing authorisation of reference does not mean in itself that the quality, efficacy and non-toxicity of the old version of the medicinal product is called into question. In that respect it must be noted that that version continues to be lawfully marketed in the member state of exportation under the marketing authorisation issued in that state (see the *Ferring* case (para 36)).

28. Next, although the competent authorities of the member state of importation can, and indeed must, adopt the measures necessary for the purpose of verifying the quality, efficacy and non-toxicity of the old version of the medicinal product, it does not appear that that objective cannot be attained by other measures having a less restrictive effect on the import of medicinal

a products than the automatic cessation of the validity of the parallel import licence in consequence of the withdrawal of the marketing authorisation of reference (see the *Ferring* case (para 37)).

29. Although adequate monitoring of the old version of the medicinal product remains necessary and may in certain cases mean that information is requested from the importer, it must be pointed out that pharmacovigilance satisfying the relevant requirements of Directive 75/319 as amended can ordinarily be guaranteed for medicinal products that are the subject of parallel imports, such as those in question in the main proceedings, through co-operation with the national authorities of the other member states by means of access to the documents and data produced by the manufacturer or other companies in the same group, relating to the old version in the member states in which that version is still marketed on the basis of a marketing authorisation still in force (see the *Ferring* case (para 38)).

30. In that connection, it must be observed that the 'Note for Guidance on Procedure for Competent Authorities on the Undertaking of Pharmacovigilance Activities' (CPMP/PhVWP/175/95), published in June 1995 by the European Agency for the Evaluation of Medicinal Products, requires, in its para 3.1.4, that the terminologies used to code medicinal products, adverse reactions to them and diseases should ensure compatibility of reports between member states and in particular ensure that reports entered into a database should be coded according to internationally approved terminologies or with mutually accepted terms allowing connections to be made with such terminologies.

31. Finally, it must also be observed that, while it cannot be ruled out that there are reasons relating to the protection of public health which require a parallel import licence for medicinal products to be linked to a marketing authorisation of reference, no such reasons are apparent from the observations put before the court.

f 32. If there are no reasons of a general nature which could explain why the withdrawal of the marketing authorisation of reference should entail that of the parallel import licence, that does not preclude the existence, in specific circumstances, of reasons relating to the protection of public health which could justify the withdrawal of the parallel import licence.

g 33. As the court has held, such reasons could arise, for example, where there is in fact a risk to public health arising from the coexistence of two versions of the same medicinal product on the market of the importing member state (see the *Ferring* case (para 43)).

h 34. In the light of those considerations the answer to the first question should be that arts 28 and 30 EC preclude national legislation under which the withdrawal, at the request of its holder, of the marketing authorisation of reference of itself entails the withdrawal of the parallel import licence granted for the medicinal product in question. However, those provisions do not preclude restrictions on parallel imports of the medicinal product in question if there is in fact a risk to the health of humans as a result of the continued existence of that medicinal product on the market of the importing member state.

i 35. In the light of that reply, there is no need to reply to the second question. Similarly, it is not necessary to consider the third question in which the referring court essentially seeks to know whether the parallel import licence loses its validity immediately on withdrawal of the marketing authorisation of reference.

## COSTS

36. The costs incurred by the Finnish, Danish, Netherlands and Norwegian governments and by the Commission of the European Communities, which have submitted observations to the court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds, the Court of Justice (Sixth Chamber), in answer to the questions referred to it by the Högsta förvaltningsdomstolen by order of 8 March 2001, hereby rules:

Articles 28 and 30 EC preclude national legislation under which the withdrawal, at the request of its holder, of a marketing authorisation of reference of itself entails the withdrawal of the parallel import licence granted for the medicinal product in question. However, those provisions do not preclude restrictions on parallel imports of the medicinal product in question where there is in fact a risk to the health of humans as a result of the continued existence of that medicinal product on the market of the importing member state.



**a**      **Chen and another v Secretary of State for the Home Department**  
(Case C-200/02)

**b**      COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

JUDGES SKOURIS (PRESIDENT), JANN, TIMMERMANS, ROSAS, SILVA DE LAPUERTA, LENAERTS (PRESIDENTS OF CHAMBERS), GULMANN, SCHINTGEN, COLNERIC, VON BAHN AND CUNHA RODRIGUES (RAPPOREUR)

**c**      ADVOCATE GENERAL TIZZANO

11 NOVEMBER 2003, 18 MAY, 19 OCTOBER 2004

**d**      *European Community – Citizenship – Person holding nationality of a member state – Freedom to reside and move freely within territory of member states – Child having nationality of one member state but residing in host member state – Primary carer of child having nationality of third party state – Whether child and primary carer entitled to reside in host member state – Article 18 EC (formerly EC Treaty, art 8a) – Council Directive (EEC) 90/354, art 1.*

**e**      A mother (who was a national of China) had entered the territory of Northern Ireland and given birth to a child. That child was dependent both emotionally and financially on her mother (who was her primary carer). Further, she received private medical and child-care services in return for payment in the United Kingdom, and both her and her mother were insured against ill-health, such that they did not rely on public funds and there was no realistic possibility of their becoming so reliant. By virtue of the fact that the child had been born on the island of Ireland, she was entitled to, and had acquired, Irish nationality.

**f**      However, by contrast, birth within British territory did not automatically confer United Kingdom nationality on a person. In due course, the United Kingdom authorities refused to grant a long-term residence permit to the child and to the mother on the basis that the child was not exercising any rights arising from the EC Treaty. An appeal against that decision was brought before

**g**      the relevant appellate authority, which decided to stay the proceedings and refer to the Court of Justice of the European Communities certain questions, pursuant to art 234 EC (formerly art 177 of the EC Treaty), concerning whether the freedom of citizens of the Union to reside and move freely within the territory of the member states guaranteed by art 18 EC<sup>a</sup> (formerly art 8a of the EC Treaty) and read in the light of the limitations placed upon that

**h**      freedom by art 1<sup>b</sup> of Council Directive (EEC) 90/354 (on the right of residence) conferred any right to reside in the United Kingdom on the child and her mother.

**i**      **Held** – Article 18 EC and the directive conferred on both a young minor—who was a national of a member state, who was covered by appropriate sickness insurance, and whose primary carer was a third-country national having

<sup>a</sup> Article 18 EC, so far as material, provides: 'Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect.'

<sup>b</sup> Article 1 is set out at judgment para 5, below

sufficient resources for the minor not to become a burden on the public finances of the host member state—and the minor's primary carer a right to reside for an indefinite period in that host state. The right of citizens of the Union to reside in the territory of the member states guaranteed by art 18(1) EC was recognised subject to the limitations and conditions imposed by the Treaty and by the measures adopted to give it effect, particularly, so far as relevant, art 1 of the directive. Although that right might be limited by a requirement that nationals of member states and their families were covered by sickness insurance in respect of all risks in the host member state and had sufficient resources to avoid becoming a burden on the social assistance system in the host member state during their period of residence, there was no requirement laid down as to the origin of those resources. Therefore, there was no condition that the person concerned, such as the child in the main proceedings, had to possess those resources personally. Any contrary interpretation would add to the condition of sufficiency of resources a requirement which was unnecessary for the attainment of the objective pursued, namely the protection of the public finances of the member state, such as to constitute a disproportionate interference with the fundamental right of freedom of movement and residence guaranteed by art 18 EC. Furthermore, it was irrelevant that, in the main proceedings, the purpose of the mother's stay in the United Kingdom had been to create a situation in which the child she was expecting would acquire the nationality of another member state in order to secure for her child and for herself a long-term right to reside in the United Kingdom, since there was dispute as to the legality of the child's acquisition of Irish nationality. In that regard, it was not permissible for a member state to restrict the effects of the grant of the nationality of another member state by imposing an additional condition for recognition of that nationality with a view to the exercise of the fundamental freedoms provided for in the Treaty. So far as the child's mother was concerned, a refusal to allow a parent, whether a national of a member state or a national of a non-member country, who was the carer of a child to whom art 18 EC and the directive granted a right of residence, to reside with that child in the host member state would deprive the child's right of residence of any useful effect, since enjoyment by a young child of a right of residence necessarily implied that that child was entitled to be accompanied by the person who was his or her primary carer (see judgment paras 26, 27, 29–30, 33, 36–39, 45, below).

*Baumbast v Secretary of State for the Home Dept* Case C-413/99 [2003] ICR 1347 applied.

## Notes

For admission to the United Kingdom under European Law, see 4(2) *Halsbury's Laws* (4th edn) (2002 reissue) para 225.

For the EC Treaty, art 18 EC (formerly art 8a), see 50 *Halsbury's Statutes* (4th edn) Current Statutes Service (issue 88) 361.

## Cases cited

*Ahmut v Netherlands* (1997) 24 EHRR 62, [1996] ECHR 21702/93, ECt HR.

*Allué v Università degli Studi di Venezia* Joined cases C-259/91, C-331/91 and C-332/91 [1993] ECR I-4309, ECJ.

*Baumbast v Secretary of State for the Home Dept* Case C-413/99 [2003] ICR 1347, [2002] ECR I-7091, ECJ.

- a* *Carpenter v Secretary of State for the Home Dept* Case C-60/00 [2003] All ER (EC) 577, [2003] QB 416, [2003] 2 WLR 267, [2002] ECR I-6279, ECJ.  
*Centre Public d'Aide Sociale de Courcelles v Lebon* Case 316/85 [1987] ECR 2811, ECJ.
- Centros Ltd v Erhvervs-og Selskabsstyrelsen* Case C-212/97 [2000] All ER (EC) 481, [2000] Ch 446, [2000] 2 WLR 1048, [1999] ECR I-1459, ECJ.
- b* *Ciliz v Netherlands* [2000] 2 FLR 469, ECt HR.  
*Cowan v Trésor public* Case 186/87 [1989] ECR 195, ECJ.  
*Echternach (GBC) v Netherlands Minister for Education and Science* Joined cases 389/87 and 390/87 [1989] ECR 723, ECJ.  
*Emsland-Stärke GmbH v Hauptzollamt Hamburg-Jonas* Case C-110/99 [2000] ECR I-11569, ECJ.
- c* *Garcia Avello v Belgium* Case C-148/02 [2004] All ER (EC) 740, ECJ.  
*Gül v Switzerland* (1996) 22 EHRR 93, [1996] ECHR 23218/94, ECt HR.  
*Luisi v Ministero del Tesoro* Joined cases 286/82 and 26/83 [1984] ECR 377, ECJ.  
*Matteucci v Communauté française of Belgium* Case 235/87 [1988] ECR 5589, ECJ.  
*Micheletti v Delegación del Gobierno en Cantabria* Case C-369/90 [1992] ECR I-4239, ECJ.
- d* *Moustaquim v Belgium* (1991) 13 EHRR 802, [1991] ECHR 12313/86, ECt HR.  
*Nottebohm case: Lichtenstein v Guatemala (second phase)* (1955) ICJ Rep 4, ICJ.  
*R (on the application of Gloszczuk) v Secretary of State for the Home Dept* Case C-63/99 [2002] All ER (EC) 353, [2001] ECR I-6369, ECJ.
- e* *R (on the application of Kaur) v Secretary of State for the Home Dept (JUSTICE, intervening)* Case C-192/99 [2001] All ER (EC) 250, [2001] ECR I-1237, ECJ.  
*Rutili v Minister for the Interior* Case 36/75 [1975] ECR 1219, ECJ.  
*Sen v Netherlands* (2003) 36 EHRR 81, [2003] ECHR 41478/98, ECt HR.  
*Sodemare SA v Regione Lombardia* Case C-70/95 [1997] ECR I-3395, ECJ.  
*Steymann v Staatssecretaris van Justitie* Case 196/87 [1988] ECR 6159, ECJ.
- f* *X v Riksskatteverket* Case C-436/00 (2002) 5 ITLR 433, [2002] ECR I-10829, ECJ.

## Reference

- By a decision of 27 May 2002, the Immigration Appellate Authority (United Kingdom) made a reference under art 234 EC (formerly art 177 of the EC Treaty) to the Court of Justice of the European Communities for a preliminary ruling concerning the interpretation of Council Directive (EEC) 73/148 (on the abolition of restrictions on movement and residence within the Community for nationals of member states with regard to establishment and the provision of services), Council Directive (EEC) 90/364 (on the right of residence) and of art 18 EC (formerly art 8a of the EC Treaty). The reference was made in the
- g* course of proceedings brought by Kunqian Catherine Zhu (Catherine), an Irish national, and her mother, Man Lavette Chen (Mrs Chen), a Chinese national, against the Secretary of State for the Home Department concerning the latter's rejection of applications by Catherine and Mrs Chen for a long-term permit to reside in the United Kingdom. Observations were submitted on behalf of: Man Lavette Chen, by R de Mello and A Berry, Barristers, assisted by M Barry,
- h* Solicitor; the Irish government, by DJ O'Hagan, acting as agent, assisted by P Callaghan SC, and P McGarry, BL; the United Kingdom government, by JE Collins, R Plender QC, and R Caudwell, acting as agents; the Commission of the European Communities, by C O'Reilly, acting as agent. The language of the case was English. The facts are set out in the opinion of the Advocate
- i* General.



18 May 2004. **The Advocate General (A Tizzano)** delivered the following opinion<sup>1</sup>. a

## I—INTRODUCTION

1. The Immigration Appellate Authority, Hatton Cross (United Kingdom) (the Immigration Authority), wishes to ascertain whether Community law, in the particular and unusual circumstances of the present case, precludes refusal by a member state to grant a long-term residence permit to a young child who is a national of another member state and has lived since birth in the territory of the first state, and to the child's mother, who is a national of a non-member country. b

## II—RELEVANT COMMUNITY LAW c

2. Article 17 EC (formerly art 8 of the EC Treaty) provides for citizenship of the Union, which supplements Member-state nationality and involves, in particular, under art 18 EC (formerly art 8a of the EC Treaty), in addition to other rights and duties provided for by the Treaty, 'the right to move and reside freely within the territory of the member states, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect'. d

3. Among the provisions of secondary law relevant to movement of persons and residence, of primary importance here is Council Directive (EEC) 73/148 (on the abolition of restrictions on movement and residence within the Community for nationals of member states with regard to establishment and the provision of services)<sup>2</sup>. e

4. Pursuant to art 1 thereof:

'1. The Member States shall, acting as provided in this Directive, abolish restrictions on the movement and residence of ...

(b) nationals of Member States wishing to go to another Member State as recipients of services ... f

(d) the relatives in the ascending and descending lines of such nationals and of the spouse of such nationals, which relatives are dependent on them, irrespective of their nationality.'

5. The first subparagraph of art 4(2) provides that '[t]he right of residence for persons providing and receiving services shall be of equal duration with the period during which the services are provided'. g

6. Council Directive (EEC) 90/364 (on the right of residence) (Directive 90/364)<sup>3</sup> governs the rights of movement and residence of people who are not economically active. Thus, art 1 thereof provides:

'1. Member States shall grant the right of residence to nationals of Member States who do not enjoy this right under other provisions of Community law and to members of their families as defined in paragraph 2, provided that they themselves and the members of their families are covered by sickness insurance in respect of all risks in the host Member State and have sufficient resources to avoid becoming a burden on the social assistance system of the host Member State during their period of residence ... h

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<sup>1</sup> Original language: Italian.

<sup>2</sup> OJ 1973 L172 p 14.

<sup>3</sup> OJ 1990 L180 p 26.

a 2. The following shall, irrespective of their nationality, have the right to install themselves in another Member State with the holder of the right of residence:

(a) his or her spouse and their descendants who are dependants;

b (b) dependent relatives in the ascending line of the holder of the right of residence and his or her spouse.'

### III—FACTS AND PROCEDURE

c 7. The questions submitted to the Court of Justice of the European Communities were raised in proceedings before the Immigration Appellate Authority by Kunqian Catherine Zhu, an Irish national born on 16 September 2000 in Belfast, United Kingdom, (hereinafter 'Catherine' or 'the first appellant') and by her mother, Man Chen, a Chinese national (hereinafter 'the mother', 'her mother' or 'Mrs Chen') against the refusal by the Secretary of State for the Home Department (hereinafter 'the Secretary of State') to grant them a permanent residence permit in the United Kingdom.

d 8. Mrs Chen works with her husband, who is also a Chinese national, for a company whose registered office is in the People's Republic of China. It is a very large company, which produces and exports chemicals to various parts of the world, in particular to the United Kingdom and other member states of the European Union.

e 9. Mr Chen is one of the directors of that company, in which he has a controlling shareholding. In his capacity as director, he undertakes frequent business trips to the United Kingdom and other member states of the European Union.

f 10. Before Catherine's birth, the couple had only one child, Huixiang Zhu, who was born in the People's Republic of China in 1998. Mr and Mrs Chen had decided to have a second child, but came up against obstacles inherent in the birth control policy—the 'one child policy'—adopted by the People's Republic of China to dissuade couples living in China from having a second child.

g 11. In 2000, in order to ensure that the birth of her second child would not give rise to any of the negative repercussions associated with the above-mentioned demographic policy, Mrs Chen decided to give birth abroad and for that purpose travelled to the United Kingdom.

12. Catherine came into the world on 16 September 2000, in Belfast, Northern Ireland.

h 13. The choice of the place of birth was no accident. It is noteworthy that, when certain conditions are fulfilled, anyone born within the territory of the island of Ireland, even outside the political boundaries of Ireland, Eire, acquires Irish nationality. As is apparent from the file, it was specifically because of that particular feature of Irish law, brought to their attention by the lawyers they consulted, that Mr and Mrs Chen decided to arrange for their child to be born in Belfast. They intended to take advantage of the child's Community nationality in order to ensure that she and her mother would be able to establish themselves in the United Kingdom.

i 14. Catherine in fact met the above-mentioned conditions laid down by Irish law and therefore acquired Irish nationality and, as a result, citizenship of the Union. However, she did not acquire United Kingdom nationality because she did not meet the requirements laid down for that purpose by the relevant United Kingdom legislation.

15. After moving to Cardiff with her child, Mrs Chen applied to the United Kingdom authorities for a permit to enable her and her child Catherine to reside in the United Kingdom. a

16. Those applications were rejected by decision of the Secretary of State of 15 June 2000. Catherine and her mother appealed to the Immigration Appellate Authority.

17. That Authority found that the contested decision was, in principle, in conformity with the relevant national law. However, certain circumstances prompted it to query whether it was also compatible with Community law. b

18. It noted, in essence, that Catherine, as a citizen of the Union, could be vested with a right of residence conferred on her directly by provisions of Community law; her mother, for her part, might enjoy a right deriving from her child's right, in so far as she is primarily responsible for her care and upbringing. c

19. More specifically, with regard to the child, the question arises whether the right to remain in the United Kingdom derives primarily from her status as a recipient of services within the meaning of Directive 73/148: Catherine is a recipient in the United Kingdom of child-care services and medical services provided privately in return for payment. d

20. In addition, the mother and child, who have always lived under the same roof, constitute an economically self-sufficient family unit, thanks to the resources made available by the mother. There is no charge on public United Kingdom funds, nor does it seem reasonable to conclude that there will be in the future. Both are covered by sickness insurance. The possibility cannot therefore be ruled out, according to the Immigration Authority, that they enjoy a right of residence under Directive 90/364. e

21. Finally, the Immigration Authority observes that Catherine is entitled to enter the territory of the People's Republic of China for not more than 30 days at a time and then only with permission from the government of that country, of which she is not a national. To deny the child or her mother a right to reside in the United Kingdom could therefore constitute unlawful interference with their family life, because the possibility of their continuing to live together would thereby be significantly undermined. f

22. For those reasons, the Immigration Appellate Authority referred the following questions to the Court of Justice for a preliminary ruling: g

'(1) On the facts of the present case, does Article 1 of Council Directive 73/148/EEC or in the alternative Article 1 of Council Directive 90/364/EEC: (a) confer the right on the First Appellant, who is a minor and a citizen of the Union, to enter and reside in the host Member State? (b) and if so, does it consequently confer the right on the Second Appellant, a third country national who is the First Appellant's mother and primary carer, to reside with the First Appellant (i) as her dependent relative, or (ii) because she lived with the First Appellant in her country of origin, or (iii) on any other special basis? h

(2) If and to the extent that the First Appellant is not a "national of a Member State" for purposes of exercising Community rights pursuant to Council Directive 73/148/EEC or Article 1 of Council Directive 90/364/EEC, what then are the relevant criteria for identifying whether a child, who is a citizen of the Union, is a national of a Member State for purposes of exercising Community rights? i



a (3) In the circumstances of the present case, does the receipt of child care by the First Appellant constitute services for purposes of Council Directive 73/148/EEC?

b (4) In the circumstances of the present case, is the First Appellant precluded from residing in the host State pursuant to Article 1 of Council Directive 90/364/EEC because her resources are provided exclusively by her third country national parent who accompanies her?

c (5) On the special facts of this case does Article 18(1) EC give the First Appellant the right to enter and reside in the host Member State even when she does not qualify for residence in the host State under any other provision of EU law?

d (6) If so, does the Second Appellant consequently enjoy the right to remain with the First Appellant, during that time<sup>4</sup> in the host State?

(7) In this context, what is the effect of the principle of respect for fundamental human rights under Community law claimed by the Appellants, in particular where the Appellants rely on Article 8 [European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998)] that everyone has the right to respect for his private and family life and his home in conjunction with Article 14 [of the convention] given that the First Appellant cannot live in China with the Second Appellant and her father and brother?

e 23. In the proceedings before the Court of Justice, observations were submitted by the appellants in the main proceedings, and by Ireland, the United Kingdom and the Commission of the European Communities.

#### IV—ASSESSMENT

##### *A—Preliminary observations*

f 24. As I have already stated and as is confirmed by the account of the facts, this is certainly an unusual case whose features are so singular that the discussions between the parties have to some extent been influenced by that fact. On occasion, the parties have seemed more concerned with seeking similarly individualistic solutions than with verifying whether the more unusual aspects of the case might not be brought within the usual rules and principles of Community law, as defined by the case law of the court. As we shall see below, that is precisely the course which, in my opinion, should be followed in replying to the questions raised by Catherine's circumstances.

g 25. To that end, it is necessary in the first place to consolidate the various questions submitted by the Immigration Appellate Authority so as to highlight the essential issues brought before this court and also to ensure that they are dealt with in an orderly manner.

h It seems to me that this can be done by extracting from those questions two main issues which can be summarised in the following terms: (a) whether Catherine is entitled to reside permanently in the United Kingdom as a recipient of services, within the meaning of Directive 73/148, or as a Community national who is not active but has at her disposal sufficient resources and sickness insurance, within the meaning of Directive 90/364, or, finally, directly on the basis of art 18 EC; (b) and whether her mother has a right of residence as being 'a dependent member of the family' of the child for

4 Sic.

the purposes of the above-mentioned directive or as Catherine's primary carer, or, finally, on the basis of the right to respect for family life upheld by art 8 European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998).

26. I shall therefore now deal with the questions raised by the Immigration Authority on the basis of the approach outlined above, taking into account, when and where necessary or appropriate, the arguments put forward by those who have submitted observations in these proceedings.

*B—The internal nature of the dispute*

27. However, before examining those questions, I must spend some time on an objection of inadmissibility raised by the United Kingdom government.

28. The United Kingdom government has raised the preliminary objection that the court has no jurisdiction to give a ruling on the questions submitted by the Immigration Appellate Authority because the dispute relates to a purely internal situation. The only foreign element, namely the nationality of the child, is in its opinion the result of a subterfuge resorted to by Mr and Mrs Chen, which should be seen as an abuse of law.

29. I shall for the moment leave aside the latter point, that being a matter which may well become clearer after I have examined the merits of the questions submitted (see below, para 108 et seq).

30. Turning instead to the objection concerning the purely internal nature of the facts, I would observe that, according to the United Kingdom government, the appellants have never exercised the freedom of movement granted to them by the Treaty because they have never left the United Kingdom to go to another member state. Therefore there are no foreign elements of such a kind as to render Community law applicable to the applications for residence permits at issue.

31. My view, however, is that that objection cannot be upheld.

32. It should be borne in mind, first, that, according to settled Community case law, the fact of possessing the nationality of a member state other than the one in which a person resides is sufficient to render Community law applicable, even where the person relying on those provisions has never crossed the frontiers of the member state in which he lives<sup>5</sup>.

33. In particular, in its recent judgment in *Garcia Avello v Belgium* Case C-148/02 [2004] All ER (EC) 740, after stating that '[c]itizenship of the Union, established by art 17 EC, is not ... intended to extend the scope of the Treaty also to internal situations which have no link with Community law'<sup>6</sup>, the court made it clear that '[s]uch a link with Community law does, however, exist in regard to ... nationals of one member state lawfully resident in the territory of another member state'<sup>7</sup>, and that is the case regardless of whether they have exercised the freedom of movement provided for by the Treaty or, as in that case, had lived since birth in the territory of the host member state.

<sup>5</sup> See for example *Matteucci v Communauté française of Belgium* Case 235/87 [1988] ECR 5589, which was concerned with the right of an Italian citizen, born and living in Belgium, where he worked, not to be discriminated against regarding a vocational training grant. See also the earlier well-known judgment in *Rutili v Minister for the Interior* Case 36/75 [1975] ECR 1219, in which the court held that art 48 of the Treaty (now art 39 EC) was applicable outright to measures restricting the freedom of movement in French territory of an Italian worker who was born and lived in France, where he worked and engaged in trade-union activity.

<sup>6</sup> See para 26.

<sup>7</sup> See para 27.

a 34. Catherine's Irish nationality is therefore sufficient to establish that the proceedings between her, with her mother, and the Secretary of State are not purely internal to United Kingdom law.

b 35. A different conclusion might possibly be reached only if it were considered that Catherine *does not in fact possess Irish nationality* or that in some way the fact of such nationality could not be relied on against the United Kingdom government.

c 36. However, at no stage of the proceedings, either before the Immigration Authority or before this court, has there ever been any doubt that Catherine does possess Irish nationality, and likewise the United Kingdom government has not challenged the legality, from the point of view of international or Community law, of the grant of that nationality by the Irish state.

d 37. In those circumstances, it is not necessary to express any view as to the existence or otherwise of any provision of general international law to the effect that no state is required to recognise nationality granted to an individual by another state in the absence of a real and effective link between the individual and that state<sup>8</sup>.

e 38. I shall merely point out that, as regards Community law, the court has held in its judgments in *Micheletti v Delegación del Gobierno en Cantabria*<sup>9</sup> and *R (on the application of Kaur) v Secretary of State for the Home Dept (JUSTICE, intervening)*<sup>10</sup> that '[u]nder international law, it is for each Member State, having due regard to Community law, to lay down the conditions for the acquisition and loss of nationality'<sup>11</sup>, and that therefore—

f 'it is not permissible for the legislation of a Member State to restrict the effects of the grant of the nationality of another Member State by imposing an additional condition for recognition of that nationality with a view to the exercise of the fundamental freedoms provided for in the Treaty.'<sup>12</sup>

g 39. I think that therefore it can be concluded that, in view of Catherine's Irish nationality, the dispute pending before the Immigration Authority falls, as a matter of principle, within the scope of the Treaty, and that the objection of inadmissibility raised by the United Kingdom government must therefore be rejected.

h C—Catherine's right of residence

40. That said, and moving on to the merits of the questions set out above (para 25(a)), the first point to be dealt with is what rights of movement and residence are available under Community law to a child, like Catherine, who is a national of one member state of the Union and has lived since birth in another member state.

8 In support of such a rule, in relation to matters of diplomatic protection, see the well-known judgment of the International Court of Justice in the *Nottebohm case: Lichtenstein v Guatemala (second phase)* (1955) ICJ Rep 4, in particular at p 20 et seq.

i 9 Case C-369/90 [1992] ECR I-4239.

10 Case C-192/99 [2001] All ER (EC) 250, [2001] ECR I-1237.

11 *Micheletti's case* (para 10), *Kaur's case* (para 19). That finding, it should be noted, is entirely consistent with the case law of the International Court of Justice, according to which '[i]t is ... for every sovereign state to settle by its own legislation the rules relating to the acquisition of its nationality' (the *Nottebohm case* (p 20), cited above).

12 *Micheletti's case* (para 10) and, more recently, *Garcia Avello's case* (para 28).



—Can a minor be vested with rights of movement and residence?

41. In that connection, the Irish government appears to object that, as a matter of principle, Catherine could not invoke the rights of movement and residence provided for by the Treaty.

42. If I have correctly understood that government's reasoning, it considers that, given her tender age, Catherine is not in fact capable of independently exercising the right to choose a place of residence and establish herself there<sup>13</sup>. Consequently, she cannot be regarded as a person entitled to the rights accorded to nationals of a member state by Directive 90/364<sup>14</sup>.

43. I do not agree with that reasoning. I think it derives from a confusion between the capacity of a person to be the subject of rights and obligations (legal personality)<sup>15</sup> and the capacity of that person to take action which produces legal effects (legal capacity)<sup>16</sup>.

44. The fact that a minor cannot exercise a right independently does not mean that he has no capacity to be an addressee of the legal provision on which that right is founded.

45. The line of reasoning should instead follow the opposite course. Because, according to a general principle which is common to the legal systems of the member states (and not only to them), legal capacity is acquired at birth, even a minor is a subject of law and, as such, is therefore a holder of the rights conferred by law.

46. The fact that he is not in a position to exercise those rights independently does not detract from his status as the holder of those rights. On the contrary, it is precisely because he has that status that other persons, appointed by operation of law (parents, guardian, etc), will be able to give effect to his rights and will be able to do so not because they are the holders of those rights but because they are acting on behalf of the minor, that is, they are acting on behalf of the sole and actual holder of those rights.

47. In the present case, however, the argument put forward by the Irish government is not only not supported by any textual provision but is likewise not justified by the nature of the rights and freedoms in question. That argument appears to be incompatible with the aims pursued by the relevant provisions of the Treaty, namely art 49 EC et seq (formerly art 59 of the EC Treaty) as regards the free movement of services and art 18 EC as regards the right of residence of nationals of the Union.

48. As regards art 49 EC et seq, it is clear that one of the objectives of the freedom for which they provide is precisely that of facilitating the movement of persons who must travel in order to receive supplies of services<sup>17</sup>.

<sup>13</sup> The child is 'unable to assert a choice of residence in her own right'.

<sup>14</sup> 'While a minor, and unable to exercise a choice of residence, Catherine cannot be a national for the purposes of Art. 1(1)'.

<sup>15</sup> 'Capacité de jouissance'; 'Rechtsfähigkeit'; and in English legal terminology, 'general legal personality' (see A Heldrich, AF Steiner 'Legal Personality' in *International Encyclopaedia of Comparative Law* (1995) vol IV, 'Persons and Family', ch 2, 'Persons' p 4).

<sup>16</sup> 'Handlungsfähigkeit'; 'capacité d'exercice'; and in English legal terminology, 'capacity' or 'active legal capacity' (see A Heldrich, AF Steiner 'Capacity' in *International Encyclopaedia of Comparative Law*, vol IV, p 9, cited above).

<sup>17</sup> The Community case law is consistent to the effect that a recipient of services too can invoke the freedom to provide services provided for by the Treaty: see, amongst many, *Luisi v Ministero del Tesoro* Joined cases 286/82 and 26/83 [1984] ECR 377 (para 16) and *Cowan v Trésor public* Case 186/87 [1989] ECR 195 (para 15).

a 49. It must be pointed out that a minor, even one who is very young, can indeed be the recipient of a wide range of services, including services of very great importance (for example, medical treatment).

50. For that very reason, the minor will be the holder of the rights conferred by art 49 EC et seq, as a recipient of services.

b 51. As regards, next, the provisions on the right of residence, I would observe that art 18 EC, supplemented by art 1 of Directive 90/364, seeks to guarantee for every *Community national*—who satisfies certain conditions—the right to establish himself in any member state, even if he does not want or is not able to carry on any economic activity.

c 52. Having regard to the points I clarified earlier (para 43 et seq), there is no reason to deprive a minor of a right conferred in general terms on all Community citizens by a fundamental provision of Community law, such as art 18 EC. Thus, if the conditions laid down by the directive are satisfied, even a minor can claim the right to reside freely, as an economically non-active person, in a member state other than the one whose nationality he possesses.

d 53. Moreover, that is confirmed by the case law of the Court of Justice, by virtue of which there is no doubt that minors can be vested with residence rights. In the case of *Echternach (GBC) v Netherlands Minister for Education and Science*<sup>18</sup>, for example, it was explicitly stated that a minor who was the son of a worker who had in the meantime left the host country ‘retains the right to rely on the provisions of Community law’, which allow him to remain in that country to complete studies already commenced<sup>19</sup>.

e 54. And that outcome cannot vary according to the age of the minor because, as far as the relevant principles are concerned, the situation does not change.

55. I conclude therefore that even a very young minor like Catherine can be vested with rights of movement and residence within the Community.

f —*The existence of a right of residence in Catherine’s specific case*

56. Following those considerations of a general nature, it is now necessary to establish whether, in the present case, Catherine may invoke a right of residence (i) as a recipient of services within the meaning of Directive 73/148 or (ii) on the basis of art 18 EC and Directive 90/364.

g 57. (i) Let me start by saying that Catherine’s right to reside permanently in the United Kingdom could not be based on her status as a recipient of child-care services and medical services (see para 19, above).

h 58. So far as concerns the first category of services, even if we disregard the problem of identifying the recipient of the services, who would appear in fact to be her mother, it is clear from the file that the services in question are not provided on a temporary basis, but on a long-term and continuous basis.

59. However, as the Commission rightly pointed out, the Community case law has long since made it clear that the freedom to provide services cannot be invoked in relation to ‘an activity carried out on a permanent basis or, in any

i 18. Joined cases 389/87 and 390/87 [1989] ECR 723.

19. The *Echternach* case (para 21). That case concerned Council Regulation (EEC) 1612/68 (on the free movement of workers within the Community) (OJ English Sp Ed 1968 (II) p 475), art 12 of which provides: ‘The children of a national of a Member State who is or has been employed in the territory of another Member State shall be admitted to that State’s general educational, apprenticeship and vocational training courses under the same conditions as the nationals of that State, if such children are residing in its territory.’

event, without a foreseeable limit to its duration'<sup>20</sup>, because in such circumstances it would be the provisions of the Treaty on freedom of establishment that would come into play. That is true, primarily, for the provider, but it is also clearly valid, with greater reason, for the recipient of services, who can invoke that freedom only if he does not intend to establish himself definitively in the host country<sup>21</sup>. a

60. But a right of permanent residence likewise could not be established for Catherine in relation to medical services. Such services, by their very nature, are provided for a limited period. If, therefore, she was in fact the recipient of those services (and there is no clear indication in the file that she is), Catherine could claim, on the basis of the explicit provisions of the first subparagraph of art 4(2) of Directive 73/148, only the right to remain in the United Kingdom for the periods necessary to receive that treatment. b

61. In other words, she could claim a *temporary* right of residence of 'equal duration with the period during which the services are provided' but could not, under that directive, obtain a long-term residence permit. c

62. (ii) The question remains to be considered whether Catherine may claim a right of residence in the United Kingdom under art 18 EC and Directive 90/364. d

63. Article 18 EC, it will be remembered, confers on every citizen of the Union the right to move and reside freely in the territory of the member states, subject to the limitations and conditions laid down by the Treaty and by the rules of secondary law.

64. For the purposes of this case, those limits and conditions are defined by Directive 90/364. e

65. Article 1, in particular, by granting 'the right of residence to nationals of member states who do not enjoy this right under other provisions of Community law', imposes the condition—

'that they themselves and the members of their families are covered by sickness insurance in respect of all risks in the host Member State and have sufficient resources to avoid becoming a burden on the social assistance system of the host Member State during their period of residence.' f

66. As is apparent from the order for reference, Catherine is covered by adequate sickness insurance and also has, through the members of her family, sufficient resources to obviate any danger that she might become 'a burden on the social assistance system of the host Member State during [her] period of residence'. g

67. It would therefore appear that both the requirements laid down by the directive are fulfilled.

68. That is not, however, the opinion of the governments which have submitted observations: they consider that Catherine is not economically self-sufficient because the financial resources available to her are in fact provided to her by her mother. h

69. According to those governments, the right of residence created by Directive 90/364 is essentially limited to those persons who 'in [their] own right' have income or earnings which guarantee the availability of sufficient resources. i

20 *Steymann v Staatssecretaris van Justitie* Case 196/87 [1988] ECR 6159 (para 16).

21 *Steymann's case* (para 17) and *Sodemare SA v Regione Lombardia* Case C-70/95 [1997] ECR I-3395 (para 38).



a 70. I must, however, observe, as the Commission rightly points out, that no such limitation on the right of residence is to be found in the wording of the directive, which in fact confines itself to requiring that those who claim that right 'have sufficient resources'<sup>22</sup>.

71. Nor, moreover, does it seem to me that such a limitation is consistent with the purposes of the directive.

b 72. The directive was adopted to extend the scope of the right of movement and residence to all Community nationals, subject to certain limitations designed to ensure that they do not 'become an unreasonable burden on the public finances of the host Member State' (see the fourth recital).

c 73. Following the introduction by the Maastricht Treaty of art 8a of the EC treaty, now art 18 EC, freedom of movement and residence came to be declared as fundamental rights of Community nationals, albeit subject to the limits and conditions laid down by (inter alia) Directive 90/364.

d 74. In that new context, that directive has thus become a measure which limits the exercise of a fundamental right. The conditions imposed by it must therefore be interpreted restrictively, in the same way as all exceptions and limitations imposed on the freedoms upheld by the Treaty. There is therefore no question of stretching its text so far as to incorporate in it a condition not expressly laid down, like the one contended for by the governments involved in this case.

e 75. That is not all. As the court recognised in its judgment in *Baumbast v Secretary of State for the Home Dept*, 'the exercise of the right of residence of citizens of the Union can be subordinated to the legitimate interests of the member states'<sup>23</sup>—

f '[h]owever, those limitations and conditions must be applied in compliance with the limits imposed by Community law and in accordance with the general principles of that law, in particular the principle of proportionality. That means that national measures adopted on that subject must be necessary and appropriate to attain the objective pursued

...<sup>24</sup>

g 76. It seems to me that an interpretation of the directive like that proposed by the United Kingdom and by Ireland would unnecessarily hamper the pursuit of the objectives of the directive.

h 77. What is important is to ensure that the citizens of the Union who exercise freedom of movement do not become a burden on the finances of the host state. Whilst therefore it is necessary to that end that they should 'have' sufficient financial resources, it is not, on the other hand, necessary to seek to impose the further condition—which, moreover, is difficult to define clearly—that those resources must belong to them directly.

i 78. In conclusion, I am of the opinion that the court's answer to the Immigration Authority should be to the effect that a very young minor who is a Community national and is covered by sickness insurance covering all risks in the host member state and who, although not directly possessing income or earnings in his own right, nevertheless has at his disposal, through his parents,

22 'Disposent ... de ressources suffisantes' in the French text, 'dispongano ... di risorse sufficienti' in Italian, 'über ausreichende Existenzmittel verfügen' in German, 'dispongan ... de recursos suficientes' in Spanish (my emphasis).

23 Case C-413/99 [2003] ICR 1347, [2002] ECR I-7091 (para 90).

24 See *Baumbast's* case (para 91). To the same effect, see the earlier judgment in *Allué v Università degli Studi di Venezia* Joined cases C-259/91, C-331/91 and C-332/91 [1993] ECR I-4309 (para 15).

sufficient resources to ensure that he will not become a burden on the finances of the host member state, meets the requirements laid down by art 1 of Directive 90/364 and therefore enjoys a right to reside for an indeterminate period in the territory of a member state other than the one of which he is a national. a

*D—The mother's right of residence* b

79. We now come to the question of Catherine's mother's right of residence.

80. It seems to me to be beyond question, as a starting point, that Mrs Chen, as a national of a non-member country, is unable to invoke the right of residence granted to *Community nationals* by art 1(1)(b) of Directive 73/148 (see para 4, above) and by art 1(1) of Directive 90/364 (see para 6, above). c

*—The existence of a right as a 'dependent' family member*

81. That said, there is likewise no possibility that Mrs Chen could invoke the right of residence provided for by art 1(1)(d) of Directive 73/148 and by art 1(2)(b) of Directive 90/364 in favour of 'dependent' relatives in the ascending line of Community citizens with a right of residence, regardless of their nationality. d

82. The Community case law has made it clear that a 'dependent' family member is one who is *dependent on material resources supplied by another member of the family*<sup>25</sup>.

83. That clearly is not the case here, since Mrs Chen is financially self-sufficient and indeed it is she herself who ensures that her daughter's material needs are satisfied. e

84. Nor can it be concluded, contrary to what may be inferred from the order for reference, that the concept of a dependent family member includes people who are 'emotionally dependent' on the Community national who has a right of residence or those persons whose right to remain in a member state 'depends' on the right of the Community national. f

85. Even if we were to ignore the case law of the Court of Justice just referred to, I would observe that only the English language version uses a neutral term like 'dependent' whereas, as the Commission correctly points out, in all the other language versions the term used relates unambiguously to *material dependency*. g

86. In the present case, therefore, Mrs Chen cannot be described as a 'dependent member' of Catherine's family within the meaning of the directive, notwithstanding the undoubted emotional bond that exists between her and her daughter and notwithstanding the fact that any right she may have to remain is linked to that of her daughter.

87. It seems to me, therefore, that neither Directive 73/148 nor Directive 90/364 confers directly upon Mrs Chen a permanent right of residence in the United Kingdom. h

*—The existence of a derivative right of residence*

88. It remains to be considered whether Catherine's mother could invoke a right of residence deriving from that of her daughter. i

89. Let me say straight away that in my opinion that question should be answered in the affirmative.

<sup>25</sup> *Centre Public d'Aide Sociale de Courcelles v Lebon* Case 316/85 [1987] ECR 2811 (para 22).

a 90. I consider that the opposite conclusion would be manifestly contrary to the interests of the minor and to the requirement of respecting the unity of family life. But above all, it would deprive of any useful effect the right of residence conferred by the Treaty upon Catherine because clearly, since she cannot remain alone in the United Kingdom, she would otherwise ultimately be unable to enjoy that right.

b 91. Those same considerations also appear to inspire the Community case law. In *Baumbast's* case, the court recognised that 'where children have the right to reside in a host member state' Community law 'entitl[es] the parent who is the primary carer of those children, *irrespective of his nationality*, to reside with them in order to facilitate the exercise of that right'<sup>26</sup>. It is clear that if a similar conclusion was valid in a case like the one cited concerning children of school age, a fortiori it must be valid in the case of a very young child like Catherine.

c 92. The rationale of the above-mentioned case law lies, of course, above all in the requirement of protecting the *interests of the minor*, having regard to the fact that it is precisely that purpose which must be pursued when the power granted to the parents (or guardian) to choose the place of establishment of the minor on behalf of the latter is exercised.

d 93. If she were denied a right of residence in Great Britain, the mother would only be able to exercise the right of establishment in the territory of that state on Catherine's behalf in a manner manifestly contrary to the interests of her daughter, because in such a case the child would automatically have to be abandoned by her mother.

e 94. For the same reason, therefore, that denial would likewise contravene the principle of respect for the unity of family life, as laid down by art 8 of the convention<sup>27</sup> to which the Court of Justice itself attributes fundamental importance<sup>28</sup>.

f 95. In order to preclude such a result, therefore, Mrs Chen would simply have to decline to exercise the right of her daughter to establish her residence in Great Britain. That means, however, that, contrary to the case law just referred to, the right of movement and residence attaching to the Irish national Catherine under art 18 EC and Directive 90/364 would not only not be 'facilitated' but would even be deprived of any useful effect.

g 96. For that reason alone, therefore, I consider that Catherine's mother may invoke a right of residence derived from her daughter's right.

—*The prohibition of discrimination on grounds of nationality*

h 97. Furthermore, it seems to me that the grant to Mrs Chen of a right of residence is decisively supported by art 12 EC (formerly art 6 of the EC Treaty), which prohibits, within the scope of the Treaty, any discrimination on grounds of nationality.

98. I consider that in this case all the conditions for the application of that provision are satisfied.

i <sup>26</sup> See *Baumbast's* case (para 75) (my emphasis). That case concerned a parent of United States nationality.

<sup>27</sup> In the case law of the European Court of Human Rights, see the judgments of *Moustaquim v Belgium* (1991) 13 EHRR 802, *Gül v Switzerland* (1996) 22 EHRR 93, *Ahmut v Netherlands* (1997) 24 EHRR 62, *Ciliz v Netherlands* [2000] 2 FLR 469, *Sen v Netherlands* (2003) 36 EHRR 81, all published at: <http://hudoc.echr.coe.int> in the ECHR database of case law.

<sup>28</sup> See in particular *Carpenter v Secretary of State for the Home Dept* Case C-60/00 [2003] All ER (EC) 577, [2002] ECR I-6279 (paras 41–45).



99. In the first place, the present dispute indubitably falls within the scope of the Treaty since it concerns the right of a Community national to reside in the territory of a member state pursuant to art 18 EC and Directive 90/364; and that is also true as regards the mother's right of residence which, as we have seen, is inextricably linked with that of her daughter. a

100. It should then be noted that, according to settled case law, the prohibition of discrimination 'requires that comparable situations must not be treated differently and that different situations must not be treated in the same way'.<sup>29</sup> b

101. As has become clear in the course of these proceedings and particularly at the hearing, if Catherine were a British national<sup>30</sup>, her mother, although a national of a non-member country, would be entitled to remain with her daughter in the United Kingdom. c

102. That means that, if other things were equal from a factual point of view and thus there were an 'analogous situation', the nationality of the child would give rise to favourable treatment of her mother's application for a residence permit.

103. There is no objective justification for different treatment in the present case. d

104. If a national of a non-member country, being the mother of an English child, is entitled purely because of that circumstance to remain in the United Kingdom, that position clearly derives from the fundamental role of a mother in caring for and bringing up her child, and, in more general terms, is based on reasons of protection of the family and family unity. e

105. Such considerations apply equally, however, to a case like the present one, in which the child, although not able to derive its right of residence directly from British nationality, nevertheless enjoys a right of permanent residence in the United Kingdom by reason of her Community citizenship. It is entirely clear that the irreplaceable role of a mother in caring for and bringing up a very young minor does not in any way depend upon the nationality of the child. f

106. Therefore, in the absence of objective reasons which might justify differing treatment of the mother's application for a residence permit on the basis of the nationality of her child, it must be concluded that the United Kingdom measures in question constitute discrimination on grounds of nationality contrary to art 12 EC. g

#### —Final considerations

107. I therefore propose, in conclusion, that the answer to be given to the Immigration Authority is that a measure whereby the authorities of a member state reject an application for a long-term residence permit submitted by the mother of a Community national who is a minor and has a right of residence in that member state not only renders ineffective the right granted to the minor by art 18 EC and by art 1 of Directive 90/364 but also constitutes discrimination on grounds of nationality prohibited by art 12 EC. h

<sup>29</sup> See, most recently, *Garcia Avello's case* (para 31).

<sup>30</sup> Such a hypotheses is entirely realistic: for that purpose, it would have been sufficient if the other parent had had British nationality or, although a foreigner, had a right of permanent residence in the United Kingdom (s 1 of the British Nationality Act 1981: see note 8 to the United Kingdom's observations submitted to the court). i

*a E—Abuse of law*

108. As I have already stated (see para 28 et seq), the United Kingdom government also objected that Mr and Mrs Chen had arranged for their daughter to be born in Northern Ireland with the manifest intention of ensuring that she would acquire Irish nationality and thereby the right of residence in another member state of the Community. Catherine's Irish nationality is therefore 'contrived', being the result of a specific plan put into effect by her parents in order to acquire a right of residence in the Community.

109. It is clear from the case law of the court that a member state is entitled to adopt measures designed to ensure that people do not use the opportunities offered by the Treaty to take advantage, improperly or fraudulently, of Community law in order to escape the effects of national laws<sup>31</sup>.

110. In the present case, it is alleged that there has been an abuse of law which is liable to affect the outcome of these proceedings.

111. For my part, however, I am unable to endorse that view, and that would be the case even if I were to disregard the reservations of a general nature prompted by the transposition to Community level of a concept whose existence is a matter of dispute in national systems of law and of which the definition is even less certain.

112. However, even if the United Kingdom's reasoning were to be taken into consideration, it seems to me that the scheme of the relationship between Community law and the laws of the member states, as now clearly defined over several decades of case law of the court, necessarily implies that it is only in exceptional circumstances that the exercise of a right conferred by the Treaty can constitute an abuse, because the non-application of a national provision as a result of reliance on a right conferred by Community law constitutes the normal consequence of the principle of the supremacy of Community law.

113. Nor does the fact that a person knowingly places himself in a situation which causes a right deriving from Community law to arise in his favour, in order to avoid the application of certain national legislation unfavourable to him, constitute, *in itself*, a sufficient basis for the relevant Community provisions to be rendered inapplicable<sup>32</sup>.

114. For it to be possible to speak of an abuse of law, there must, in contrast, also be an underlying 'combination of objective circumstances' in which 'despite formal observance of the conditions laid down by the Community rules, *the purpose of those rules has not been achieved*'<sup>33</sup>. In other words, it must be ascertained whether the person concerned, by invoking the Community provision which grants the right in question, is betraying its spirit and scope.

115. The test is therefore, essentially, whether or not there has been a distortion of the purposes and objectives of the *Community provision* which grants the right in question.

116. In my opinion, those conditions are not fulfilled. I do not consider that the conduct of Mr and Mrs Chen can be regarded as being such as to imply

<sup>31</sup> See *Centros Ltd v Erhvervs-og Selskabsstyrelsen* Case C-212/97 [2000] All ER (EC) 481, [1999] ECR I-1459 (para 24) and the copious case law referred to therein.

<sup>32</sup> See the *Centros* case (para 27), and, in more detail, the opinion of Advocate General La Pergola in that case ([2000] All ER (EC) 481 at 486, [1999] I-1459 at 1461 et seq).

<sup>33</sup> *Emsland-Stärke GmbH v Hauptzollamt Hamburg-Jonas* Case C-110/99 [2000] ECR I-11569 (para 52). To the same effect, see the *Centros* case (para 25), and *X v Riksskatteverket* Case C-436/00 (2002) 5 ITLR 433, [2002] ECR I-10829 (para 42).

'circumvention of national law by Community nationals *improperly or fraudulently* invoking Community law'<sup>34</sup>. a

117. It is true that Mrs Chen, in availing herself of the Treaty provisions which grant a right of residence to Catherine and, by ricochet, to herself as the child's mother, is ultimately circumventing the United Kingdom provisions which restrict the right of residence of nationals of non-member countries.

118. However, that does not, in my opinion, involve any distortion of the purposes of the Community provisions relied on. b

119. The aim pursued by the provisions on the right of residence, in particular art 18 EC, as implemented by Directive 90/364 and taken up in art 45 of the Charter of Fundamental Rights of the European Union (OJ 2000 C364 p 1), is entirely clear. Its purpose is to eliminate any restriction on the movement and residence of Community nationals, subject to the sole condition that they must not constitute a financial burden for the host state. c

120. When a future parent decides, as in the present case, that the welfare of his or her child requires the acquisition of Community nationality in order to allow him to enjoy the rights associated with that status, and in particular the right of establishment under art 18 EC, there is nothing 'abusive' about taking action, in compliance with the law, to ensure that the child, when born, satisfies the conditions for acquiring the nationality of a member state. d

121. Likewise, the fact that such a parent takes action to ensure that his or her daughter can exercise her legitimately acquired right of residence and consequently applies to be allowed to reside with her in the same host state cannot be classified as 'abusive'. e

122. This is not a case of people '*improperly or fraudulently* invoking Community law'<sup>35</sup>, failing to observe the scope and purposes of the provisions of that legal system, but rather one of people who, apprised of the nature of the freedoms provided for by Community law, take advantage of them by legitimate means, specifically in order to attain the objective which the Community provision seeks to uphold: the child's right of residence. f

123. Nor can the non-application to the mother of the United Kingdom provisions on residence of nationals of non-member countries be regarded as following on from of an abuse of law. As has been seen, that result is entirely consistent with the purpose of the Community provision in question and is even a necessary precondition for the attainment of that objective, in so far as it allows Community nationals to be assured of the right to reside freely in the territory of a member state. g

124. The fact is that the problem, if problem there be, lies in the criterion used by the Irish legislation for granting nationality, the *ius soli*<sup>36</sup>, which lends itself to the emergence of situations like the one at issue in this case.

125. In order to avoid such situations, the criterion could have been moderated by the addition of a condition of settled residence of the parent h

34 Abuse of Community law was thus defined in *R (on the application of Gloszczuk) v Secretary of State for the Home Dept* Case C-63/99 [2002] All ER (EC) 353, [2001] ECR I-6369 (para 75). My emphasis. i

35 See *Gloszczuk's* case (para 75).

36 On the other hand, no importance, for the purposes of this case, attaches to the fact that the 'land' to which the *ius soli* relates, namely Belfast, as a result of the well-known history of Ireland, is under the sovereignty not of Ireland (Eire) but of the United Kingdom. The issues would have been the same if the child had been born in the territory of Ireland (Eire) and had then moved to Belfast or Cardiff with her mother.



a within the territory of the island of Ireland<sup>37</sup>. But there is no such additional condition in Irish legislation, or in any event no such condition was applicable to Catherine.

126. In those circumstances, I repeat, there is certainly no basis for criticising Catherine or her mother for legitimately taking advantage of the opportunities and rights available to them under Community law.

b 127. Furthermore, if the United Kingdom's argument were accepted, suspicions of abuse could be raised in almost all cases of *intentional* acquisition of nationality of a member state. And, paradoxically, that could lead to a situation in which the enjoyment of rights deriving from citizenship of the Union was subject to the condition that such citizenship had to have been acquired involuntarily.

c 128. But that would be equivalent—

‘to restrict[ing] the effects of the grant of the nationality of another Member State by imposing an additional condition for recognition of that nationality with a view to the exercise of the fundamental freedoms provided for in the Treaty.’

d And as the court has made clear, that is not allowed in the Community legal order<sup>38</sup>.

e 129. To my way of thinking, therefore, the answer to be given to the Immigration Authority must not be influenced by the fact that Mr and Mrs Chen arranged for their daughter to be born in Northern Ireland specifically in order to ensure that she acquired Irish nationality and as a result the right to reside in the United Kingdom and the other member states of the Community.

#### F—*The right to respect for family life*

f 130. Having concluded that Community law grants to Catherine the right to establish herself in the United Kingdom and to her mother the right to remain with her daughter, I consider that it is unnecessary to go into the question of the compatibility of the national measures with the convention. The interpretation of the Treaty proposed here is, as has been seen, entirely in conformity with the values embodied in art 8 of the convention and in particular the requirement of respecting the unity of family life (see para 94, above).

#### V—CONCLUSION

h 131. I therefore suggest that the Court of Justice give the following answers to the questions referred to it by the Immigration Appellate Authority, Hatton Cross:

37 As, it may be noted incidentally, is provided in art 1 and annex 2 to the 'Agreement between the government of the United Kingdom of Great Britain and Northern Ireland and the government of Ireland signed at Belfast on 10 April 1998. Article 1(vi) provides that the two governments 'recognise the birthright of all the people of Northern Ireland to identify themselves and be accepted as Irish or British, or both, as they may so choose, and accordingly confirm that their right to hold both British and Irish citizenship is accepted by both governments and would not be affected by any future change in the status of Northern Ireland'. Annex 2 states that the term 'the people of Northern Ireland' in art 1 of the agreement means 'all persons born in Northern Ireland and having, at the time of their birth, at least one parent who is a British citizen, an Irish citizen or is otherwise entitled to reside in Northern Ireland without any restriction on their period of residence'. (My emphasis.)

38 See *Micheletti's case* (para 10), cited in footnote 9, above, see *Kaur's case* (para 19), cited in footnote 10, above.

(1) A very young minor who is a Community national and is covered by sickness insurance covering all risks in the host member state and who although not directly entitled to income or earnings in her own right, nevertheless has at her disposal, through her parents, sufficient resources to ensure that she will not become a burden on the finances of the host member state, meets the requirements laid down by art 1 of Council Directive (EEC) 90/364 (on a right of residence) and therefore enjoys a right to reside for an indeterminate period in the territory of a member state other than that of which she is a national. a

(2) A measure whereby the authorities of a member state reject an application for a long-term residence permit submitted by the mother of a Community national who is a minor and has a right of residence in that member state not only renders ineffective the right granted to the minor by art 18 EC and by art 1 of Directive 90/364 but also constitutes discrimination on grounds of nationality prohibited by art 12 EC. b

19 October 2004. **The COURT OF JUSTICE** delivered the following judgment.

1. This reference for a preliminary ruling concerns the interpretation of Council Directive (EEC) 73/148 (on the abolition of restrictions on movement and residence within the Community for nationals of member states with regard to establishment and the provision of services) (OJ 1973 L172 p 14), of Council Directive (EEC) 90/364 (on the right of residence) (OJ 1990 L180 p 26) and of art 18 EC (formerly art 8a of the EC Treaty). c

2. The reference was made in the course of proceedings brought by Kunqian Catherine Zhu (hereinafter Catherine), of Irish nationality, and her mother, Man Lavette Chen (hereinafter Mrs Chen), a Chinese national, against the Secretary of State for the Home Department concerning the latter's rejection of applications by Catherine and Mrs Chen for a long-term permit to reside in the United Kingdom. d

## LEGAL BACKGROUND

### *Community legislation*

3. Article 1 of Directive 73/148 provides:

'1. The Member States shall, acting as provided in this Directive, abolish restrictions on the movement and residence of:

(a) nationals of a Member State who are established or who wish to establish themselves in another Member State in order to pursue activities as self-employed persons, or who wish to provide services in that State;

(b) nationals of Member States wishing to go to another Member State as recipients of services;

(c) the spouse and the children under twenty one years of age of such nationals, irrespective of their nationality;

(d) the relatives in the ascending and descending lines of such nationals and of the spouse of such nationals, which relatives are dependent on them, irrespective of their nationality.

2. Member States shall favour the admission of any other member of the family of a national referred to in paragraph 1(a) or (b) or of the spouse of that national, which member is dependent on that national or spouse of that national or who in the country of origin was living under the same roof.'

4. Article 4(2) of the same directive states:

a 'The right of residence for persons providing and receiving services shall be of equal duration with the period during which the services are provided.

Where such period exceeds three months, the Member State in the territory of which the services are performed shall issue a right of abode as proof of the right of residence.

b Where the period does not exceed three months, the identity card or passport with which the person concerned entered the territory shall be sufficient to cover his stay. The Member State may, however, require the person concerned to report his presence in the territory.'

5. Under art 1 of Directive 90/364:

c '1. Member States shall grant the right of residence to nationals of Member States who do not enjoy this right under other provisions of Community law and to members of their families as defined in paragraph 2, provided that they themselves and the members of their families are covered by sickness insurance in respect of all risks in the host Member State and have sufficient resources to avoid becoming a burden on the social assistance system of the host Member State during their period of residence.

d The resources referred to in the first subparagraph shall be deemed sufficient where they are higher than the level of resources below which the host Member State may grant social assistance to its nationals, taking into account the personal circumstances of the applicant and, where appropriate, the personal circumstances of persons admitted pursuant to paragraph 2.

e Where the second subparagraph cannot be applied in a Member State, the resources of the applicant shall be deemed sufficient if they are higher than the level of the minimum social security pension paid by the host Member State.

f 2. The following shall, irrespective of their nationality, have the right to install themselves in another Member State with the holder of the right of residence:

(a) his or her spouse and their descendants who are dependants;

g (b) dependent relatives in the ascending line of the holder of the right of residence and his or her spouse.'

#### *The United Kingdom legislation*

6. Under Regulation 5 of the Immigration (European Economic Area) Regulations 2000, SI 2000/2326, (the EEA Regulations):

h '(1) In these Regulations, "qualified person" means a person who is an EEA national and in the United Kingdom as—(a) a worker; (b) a self employed person; (c) a provider of services; (d) a recipient of services; (e) a self sufficient person; (f) a retired person; (g) a student; or (h) a self employed person who has ceased activity; or who is a person to whom paragraph (4) applies.'

i THE MAIN PROCEEDINGS AND THE QUESTIONS REFERRED TO THE COURT OF JUSTICE

7. The order for reference states that Mrs Chen and her husband, both of Chinese nationality, work for a Chinese undertaking established in China. Mrs Chen's husband is a director and the majority shareholder of that



company. For the purposes of his work, he travels frequently to various member states, in particular the United Kingdom. a

8. The couple's first child was born in the People's Republic of China in 1998. Mrs Chen, who wished to give birth to a second child, entered the United Kingdom in May 2000 when she was about six months pregnant. She went to Belfast in July of the same year and Catherine was born there on 16 September 2000. The mother and her child live at present in Cardiff, Wales (United Kingdom). b

9. Under s 6(1) of the Irish Nationality and Citizenship Act of 1956, which was amended in 2001 and applies retroactively as from 2 December 1999, Ireland allows any person born on the island of Ireland to acquire Irish nationality. Under s 6(3), a person born in the island of Ireland is an Irish citizen from birth if he or she is not entitled to citizenship of any other country. c

10. Under those rules, Catherine was issued with an Irish passport in September 2000. According to the order for reference, Catherine is not entitled, on the other hand, to acquire United Kingdom nationality since, in enacting the British Nationality Act 1981, the United Kingdom departed from the *jus soli*, so that birth in the territory of that member state no longer automatically confers United Kingdom nationality. d

11. It is common ground that Mrs Chen took up residence in the island of Ireland in order to enable the child she was expecting to acquire Irish nationality and, consequently, to enable her to acquire the right to reside, should the occasion arise, with her child in the United Kingdom.

12. The referring court also observes that Ireland forms part of the Common Travel Area within the meaning of the Immigration Acts, so that, because Irish nationals do not as a general rule have to obtain a permit to enter and reside in the United Kingdom, Catherine, in contrast to Mrs Chen, may move freely within the United Kingdom and within Ireland. Aside from Catherine's right of free movement limited to those two member states, neither of the appellants in the main proceedings is entitled to reside in the United Kingdom under its domestic legislation. e

13. The order for reference also makes it clear that Catherine is dependent both emotionally and financially on her mother, that her mother is her primary carer, that Catherine receives private medical services and child-care services in return for payment in the United Kingdom, that she lost the right to acquire Chinese nationality by virtue of having been born in Northern Ireland and her subsequent acquisition of Irish nationality and, as a result, that she only has the right to enter Chinese territory under a visa allowing residence for a maximum of 30 days per visit; that the two appellants in the main proceedings provide for their needs by reason of Mrs Chen's employment, that the appellants do not rely upon public funds in the United Kingdom and there is no realistic possibility of their becoming so reliant, and, finally, that the appellants are insured against ill health. f

14. The Secretary of State for the Home Department's refusal to grant a long-term residence permit to the two appellants in the main proceedings was based on the fact that Catherine, a child of eight months of age, was not exercising any rights arising from the EC Treaty such as those laid down by reg 5(1) of the EEA Regulations and the fact that Mrs Chen was not entitled to reside in the United Kingdom under those regulations. g

15. The decision not to grant a permit was the subject of an appeal to the Immigration Appellate Authority, which stayed the proceedings pending a preliminary ruling from the Court of Justice on the following questions: h

i

a (1) On the facts of the present case, does Article 1 of Council Directive 73/148/EEC or in the alternative Article 1 of Council Directive 90/364/EEC: (a) confer the right on the First Appellant, who is a minor and a citizen of the Union, to enter and reside in the host Member State? (b) and if so, does it consequently confer the right on the Second Appellant, a third country national who is the First Appellant's mother and primary carer, to reside with the First Appellant (i) as her dependent relative, or (ii) because she lived with the First Appellant in her country of origin, or (iii) on any other special basis?

b (2) If and to the extent that the First Appellant is not a "national of a Member State" for purposes of exercising Community rights pursuant to Council Directive 73/148/EEC or Article 1 of Council Directive 90/364/EEC, what then are the relevant criteria for identifying whether a child, who is a citizen of the Union, is a national of a Member State for purposes of exercising Community rights?

c (3) In the circumstances of the present case, does the receipt of child care by the First Appellant constitute services for purposes of Council Directive 73/148/EEC?

d (4) In the circumstances of the present case, is the First Appellant precluded from residing in the host State pursuant to Article 1 of Council Directive 90/364/EEC because her resources are provided exclusively by her third country national parent who accompanies her?

e (5) On the special facts of this case does Article 18(1) EC give the First Appellant the right to enter and reside in the host Member State even when she does not qualify for residence in the host State under any other provision of EU law?

f (6) If so, does the Second Appellant consequently enjoy the right to remain with the First Appellant, during that time in the host State?

g (7) In this context, what is the effect of the principle of respect for fundamental human rights under Community law claimed by the Appellants, in particular where the Appellants rely on Article 8 [of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998)] that everyone has the right to respect for his private and family life and his home in conjunction with Article 14 [of the convention] given that the First Appellant cannot live in China with the Second Appellant and her father and brother?

#### THE QUESTIONS REFERRED TO THE COURT OF JUSTICE

h 16. By those questions, the national court seeks in essence to ascertain whether Directive 73/148, Directive 90/364 or art 18 EC, if appropriate, read in conjunction with arts 8 and 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) (ECHR), confer, in circumstances such as those of the main proceedings, upon a young minor who is a national of a member state, and is in the care of a parent who is a national of a non-member country, the right to reside in another member state where the minor receives child-care services. If such right be conferred, the national court wishes to ascertain whether those same provisions consequently confer a right of residence on the parent concerned.

i 17. It is therefore necessary to examine the provisions of Community law concerning the right of residence in the light of the situation of a national not

of legal age such as Catherine, and then that of a parent who is a national of a non-member country and looks after the child. a

*The right of residence of a person in Catherine's situation*

*Preliminary considerations*

18. The Irish and United Kingdom governments' contention that a person in Catherine's situation cannot claim the benefit of the provisions of Community law on free movement of persons and residence simply because that person has never moved from one member state to another member state must be rejected at the outset. b

19. The situation of a national of a member state who was born in the host member state and has not made use of the right to freedom of movement cannot, for that reason alone, be assimilated to a purely internal situation, thereby depriving that national of the benefit in the host member state of the provisions of Community law on freedom of movement and of residence (to that effect, see, in particular, *Garcia Avello v Belgium* Case C-148/02 [2004] All ER (EC) 740 (paras 13, 27)). c

20. Moreover, contrary to the Irish government's contention, a young child can take advantage of the rights of free movement and residence guaranteed by Community law. The capacity of a national of a member state to be the holder of rights guaranteed by the Treaty and by secondary law on the free movement of persons cannot be made conditional upon the attainment by the person concerned of the age prescribed for the acquisition of legal capacity to exercise those rights personally (to that effect, see, in particular, in the context of Council Regulation (EEC) 1612/68 (on freedom of movement for workers within the Community) (OJ English Sp Edn 1968 (II) p 475), *Echternach (GBC) v Netherlands Minister for Education and Science* Joined cases 389/87 and 390/87 [1989] ECR 723 (para 21) and *Baumbast v Secretary of State for the Home Dept* Case C-413/99 [2003] ICR 1347, [2002] ECR I-7091 (paras 52–63) and, in relation to art 17 EC (formerly art 8 of the EC Treaty), *Garcia Avello's* case (para 21)). Moreover, as Advocate General Tizzano made clear in paras 47 to 52 of his opinion, it does not follow either from the terms of, or from the aims pursued by, arts 18 and 49 EC and Directives 73/148 and 90/364 that the enjoyment of the rights with which those provisions are concerned should be made conditional upon the attainment of a minimum age. d e f g

*Directive 73/148*

21. The national court wishes to ascertain whether a person in Catherine's situation may rely on the provisions of Directive 73/148 with a view to residing on a long-term basis in the United Kingdom as a recipient of child-care services provided in return for payment. h

22. According to the case law of the court, the provisions on freedom to provide services do not cover the situation of a national of a member state who establishes his principal residence in the territory of another member state with a view to receiving services there for an indefinite period (to that effect, see, in particular, *Steymann v Staatssecretaris van Justitie* Case 196/87 [1988] ECR 6159). The child-care services to which the national court refers fall precisely within that case. i

23. As regards the medical services that Catherine is receiving on a temporary basis, it must be observed that, under the first subparagraph of art 4(2) of Directive 73/148, the right of residence of persons receiving services



- a by virtue of the freedom to provide services is co-terminous with the duration of the period for which they are provided. Consequently, that directive cannot in any event serve as a basis for a right of residence of indefinite duration of the kind with which the main proceedings are concerned.

*Article 18 EC and Directive 90/364*

- b 24. Since Catherine cannot rely on Directive 73/148 for a right of long-term residence in the United Kingdom, the national court would like to know whether Catherine might have a right to long-term residence under art 18 EC and under Directive 90/364, which, subject to certain conditions, guarantees such a right for nationals of member states to whom it is not available under other provisions of Community law, and for members of their families.

- c 25. By virtue of art 17(1) EC, every person holding the nationality of a member state is a citizen of the Union. Union citizenship is destined to be the fundamental status of nationals of the member states (see, in particular, *Baumbast's case* (para 82)).

- d 26. As regards the right to reside in the territory of the member states provided for in art 18(1) EC, it must be observed that that right is granted directly to every citizen of the Union by a clear and precise provision of the Treaty. Purely as a national of a member state, and therefore as a citizen of the Union, Catherine is entitled to rely on art 18(1) EC. That right of citizens of the Union to reside in another member state is recognised subject to the limitations and conditions imposed by the Treaty and by the measures adopted to give it effect (see, in particular, *Baumbast's case* (paras 84, 85)).

- e 27. With regard to those limitations and conditions, art 1(1) of Directive 90/364 provides that the member states may require that the nationals of a member state who wish to benefit from the right to reside in their territory and the members of their families be covered by sickness insurance in respect of all risks in the host member state and have sufficient resources to avoid becoming a burden on the social assistance system of the host member state during their period of residence.

- f 28. It is clear from the order for reference that Catherine has both sickness insurance and sufficient resources, provided by her mother, for her not to become a burden on the social assistance system of the host member state.

- g 29. The objection raised by the Irish and United Kingdom governments that the condition concerning the availability of sufficient resources means that the person concerned must, in contrast to Catherine's case, possess those resources personally and may not use for that purpose those of an accompanying family member, such as Mrs Chen, is unfounded.

- h 30. According to the very terms of art 1(1) of Directive 90/364, it is sufficient for the nationals of member states to 'have' the necessary resources, and that provision lays down no requirement whatsoever as to their origin.

- i 31. The correctness of that interpretation is reinforced by the fact that provisions laying down a fundamental principle such as that of the free movement of persons must be interpreted broadly.

- i 32. Moreover, the limitations and conditions referred to in art 18 EC and laid down by Directive 90/364 are based on the idea that the exercise of the right of residence of citizens of the Union can be subordinated to the legitimate interests of the member states. Thus, although, according to the fourth recital in the preamble to Directive 90/364, beneficiaries of the right of residence must not become an 'unreasonable' burden on the public finances of the host member state, the court nevertheless observed that those limitations and

conditions must be applied in compliance with the limits imposed by Community law and in accordance with the principle of proportionality (see, in particular, *Baumbast's case* (paras 90, 91)). a

33. An interpretation of the condition concerning the sufficiency of resources within the meaning of Directive 90/364, in the terms suggested by the Irish and United Kingdom governments would add to that condition, as formulated in that directive, a requirement as to the origin of the resources which, not being necessary for the attainment of the objective pursued, namely the protection of the public finances of the member states, would constitute a disproportionate interference with the exercise of the fundamental right of freedom of movement and of residence upheld by art 18 EC. b

34. The United Kingdom government contends, finally, that the appellants in the main proceedings are not entitled to rely on the Community provisions in question because Mrs Chen's move to Northern Ireland with the aim of having her child acquire the nationality of another member state constitutes an attempt improperly to exploit the provisions of Community law. The aims pursued by those Community provisions are not, in its view, served where a national of a non-member country wishing to reside in a member state, without however moving or wishing to move from one member state to another, arranges matters in such a way as to give birth to a child in a part of the host member state to which another member state applies its rules governing acquisition of nationality *jure soli*. It is, in their view, settled case law that member states are entitled to take measures to prevent individuals from improperly taking advantage of provisions of Community law or from attempting, under cover of the rights created by the Treaty, illegally to circumvent national legislation. That rule, which is in conformity with the principle that rights must not be abused, was in their view reaffirmed by the court in its judgment in *Centros Ltd v Erhvervs-og Selskabsstyrelsen* Case C-212/97 [2000] All ER (EC) 481, [1999] ECR I-1459. c

35. That argument must also be rejected. d

36. It is true that Mrs Chen admits that the purpose of her stay in the United Kingdom was to create a situation in which the child she was expecting would be able to acquire the nationality of another member state in order thereafter to secure for her child and for herself a long-term right to reside in the United Kingdom. e

37. Nevertheless, under international law, it is for each member state, having due regard to Community law, to lay down the conditions for the acquisition and loss of nationality (see, in particular, *Micheletti v Delegación del Gobierno en Cantabria* Case C-369/90 [1992] ECR I-4239 (para 10) and *R (on the application of Kaur) v Secretary of State for the Home Dept (JUSTICE, intervening)* Case C-192/99 [2001] All ER (EC) 250, [2001] ECR I-1237 (para 19)). f

38. None of the parties that submitted observations to the court has questioned either the legality, or the fact, of Catherine's acquisition of Irish nationality. g

39. Moreover, it is not permissible for a member state to restrict the effects of the grant of the nationality of another member state by imposing an additional condition for recognition of that nationality with a view to the exercise of the fundamental freedoms provided for in the Treaty (see, in particular, *Micheletti's case* (para 10) and *García Avello's case* (para 28)). h

40. However, that would be precisely what would happen if the United Kingdom were entitled to refuse nationals of other member states, such as Catherine, the benefit of a fundamental freedom upheld by Community law i

- a merely because their nationality of a member state was in fact acquired solely in order to secure a right of residence under Community law for a national of a non-member country.

41. Accordingly, in circumstances like those of the main proceedings, art 18 EC and Directive 90/364 confer on a young minor who is a national of a member state, is covered by appropriate sickness insurance and is in the care of a parent who is a third-country national having sufficient resources for that minor not to become a burden on the public finances of the host member state, a right to reside for an indefinite period in that state.

*The right of residence of a person in Mrs Chen's situation*

- c 42. Article 1(2)(b) of Directive 90/364, which guarantees 'dependent' relatives in the ascending line of the holder of the right of residence the right to install themselves with the holder of the right of residence, regardless of their nationality, cannot confer a right of residence on a national of a non-member country in Mrs Chen's situation either by reason of the emotional bonds between mother and child or on the ground that the mother's right to enter and reside in the United Kingdom is dependent on her child's right of residence.

d 43. According to the case law of the court, the status of 'dependent' member of the family of a holder of a right of residence is the result of a factual situation characterised by the fact that material support for the family member is provided by the holder of the right of residence (see, to that effect, in relation to art 10 of Regulation 1612/68, *Centre Public d'Aide Sociale de Courcelles v Lebon* Case 316/85 [1987] ECR 2811 (paras 20–22)).

e 44. In circumstances such as those of the main proceedings, the position is exactly the opposite in that the holder of the right of residence is dependent on the national of a non-member country who is her carer and wishes to accompany her. In those circumstances, Mrs Chen cannot claim to be a 'dependent' relative of Catherine in the ascending line within the meaning of Directive 90/364 with a view to having the benefit of a right of residence in the United Kingdom.

f 45. On the other hand, a refusal to allow the parent, whether a national of a member state or a national of a non-member country, who is the carer of a child to whom art 18 EC and Directive 90/364 grant a right of residence, to reside with that child in the host member state would deprive the child's right of residence of any useful effect. It is clear that enjoyment by a young child of a right of residence necessarily implies that the child is entitled to be accompanied by the person who is his or her primary carer and accordingly that the carer must be in a position to reside with the child in the host member state for the duration of such residence (see, mutatis mutandis, in relation to art 12 of Regulation 1612/68, *Baumbast's case* (paras 71–75)).

h 46. For that reason alone, where, as in the main proceedings, art 18 EC and Directive 90/364 grant a right to reside for an indefinite period in the host member state to a young minor who is a national of another member state, those same provisions allow a parent who is that minor's primary carer to reside with the child in the host member state.

i 47. The answer to be given to the national court must therefore be that, in circumstances like those of the main proceedings, art 18 EC and Directive 90/364 confer on a young minor who is a national of a member state, is covered by appropriate sickness insurance and is in the care of a parent who is a third-country national having sufficient resources for that minor not to become



a  
a burden on the public finances of the host member state, a right to reside for an indefinite period in that state. In such circumstances, those same provisions allow a parent who is that minor's primary carer to reside with the child in the host member state.

#### COSTS

b  
48. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the court, other than the costs of those parties, are not recoverable.

On those grounds, the Court of Justice (sitting as a full court) hereby rules:  
c  
(1) In circumstances like those of the main proceedings, art 18 EC and Council Directive (EEC) 90/364 (on the right of residence confer on a young minor who is a national of a member state), is covered by appropriate sickness insurance and is in the care of a parent who is a third-country national having sufficient resources for that minor not to become a burden on the public finances of the host member state, a right to reside for an indefinite period in that state. In such circumstances, those same provisions allow a parent who is d  
that minor's primary carer to reside with the child in the host member state.

***a* European Commission (supported by the United Kingdom, intervening) v France**

***b* (Case C-262/02)**

**Bacardi France SAS v Télévision Française 1 SA (TF1) and others**

***c* (Case C-429/02)**

COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES (GRAND CHAMBER)

JUDGES SKOURIS (PRESIDENT), JANN (RAPPORTEUR), ROSAS, GULMANN, PUISSOCHET, CUNHA-RODRIGUES, SCHINTGEN, VON BAHR AND SILVA DE LAPUERTA

***d* ADVOCATE GENERAL TIZZANO**

25 NOVEMBER 2003, 11 MARCH, 13 JULY 2004

*European Community – Freedom of movement – Services – Television broadcasting – National legislation prohibiting indirect advertising of alcoholic beverages – Prohibition extending to retransmission of bi-national sporting events taking place in other member states where advertising visible on hoardings and sports shirts – Whether prohibition infringing freedom of transmission and reception of television broadcasts – Whether prohibition infringing freedom to provide services – Articles 46, 49 EC (formerly EC Treaty, arts 56, 59) – Council Directive (EEC) 89/552, art 2(2).*

- f*** It was a misdemeanor under French criminal law for a television company directly or indirectly to advertise alcoholic beverages. So far as relevant, that ban applied to the extent that it prohibited the retransmission in France of sporting events taking place in other member states in which advertising for alcoholic beverages was visible on advertising hoardings displayed within the sporting venue and on sports shirts. Pursuant to a code of conduct drawn up by the competent authorities and by French television channels, a distinction was drawn between bi-national sporting events (whose retransmission was specifically aimed at a French audience), and multinational sporting events (images of which were retransmitted in a large number of countries such that they were not to be regarded as being aimed principally at the French public).
- g***
- h*** In relation to the bi-national events, French broadcasters who had no control over filming conditions had to use all available means to prevent the appearance on their channels of brand names of alcoholic beverages, such that, in practice, they had to inform their partners of the national requirements, make inquiries in advance about the advertisements that were to be displayed, and use all technical means available to avoid showing advertisements for alcoholic beverages. In due course, two cases concerning the prohibition came before the Court of Justice of the European Communities. In the first case (Case C-262/02), the Commission of the European Communities sought a declaration under art 226 EC (formerly art 169 of the EC Treaty) that France had failed to fulfil its obligations under the EC Treaty and, in the second case (Case C-429/02), a national court had referred certain questions to the Court
- i***

under art 234 EC (formerly art 177 of the EC Treaty) in proceedings between a company that produced and marketed numerous alcoholic beverages and companies that negotiated retransmission rights for football matches. Accordingly, issues arose concerning the compatibility of the prohibition with: (i) the freedom to provide services guaranteed by arts 46<sup>a</sup> and 49<sup>b</sup> EC (formerly arts 56, 59 of the EC Treaty); and (ii) the freedom of reception and retransmission of television broadcasts under arts 1(b), 2(2), 10(1) and 11(2)<sup>c</sup> of Council Directive (EEC) 89/552 (on the co-ordination of certain provisions laid down by law, regulation or administrative action in member states concerning the pursuit of television broadcasting activities).

**Held** – In Cases C-262/02 and C-429/02—

(1) Article 46 EC did not preclude a member state from prohibiting television advertising for alcoholic beverages marketed in that state by way of indirect television advertising resulting from the appearance on screen of hoardings visible during the retransmission of bi-national sporting events taking place in other member states. Such a prohibition restricted the freedom to provide advertising services in so far as owners of advertising hoardings had to refuse, as a preventive measure, any advertising for alcoholic beverages if a sporting event was likely to be retransmitted in France. It also impeded the provision of broadcasting services for television programmes since French broadcasters had to refuse all retransmission of sporting events in which hoardings bearing advertising for alcoholic beverages marketed in France might be visible. Furthermore, the organisers of sporting events taking place outside France could not sell the retransmission rights to French broadcasters if the transmission of the television programmes of such events was likely to contain indirect television advertising for those alcoholic beverages. Moreover, although, technically, it was possible to mask the images in order selectively to conceal the hoardings showing advertising for alcoholic beverages, such techniques involved substantial additional costs for the French broadcasters. It followed that the national rules constituted a restriction on the freedom to provide services within the meaning of art 46 EC. However, measures restricting the advertising of alcoholic beverages in order to combat alcohol abuse reflected public health concerns and were justified under art 46 EC. Moreover, the prohibition at issue in the main proceedings did not go beyond what was necessary to achieve that objective. Although, in practice, the rules might mean that whole of a sporting event could not be broadcast, there were no other less restrictive measures available which might exclude or conceal the indirect television advertising. Since that advertising appeared on screen only sporadically and only for a few seconds, it was not possible either to control its content or to insert warnings at the same time as the appearance of the advertisement on the screen on the dangers resulting from an excessive consumption of alcohol (see judgment paras 22–40 in C-262/02 and judgment paras 30–41 in C-429/02, below).

<sup>a</sup> Article 46 EC provides, so far as material that: 'The provisions of this chapter and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health.'

<sup>b</sup> Article 49 EC provides, so far as material, that: '... restrictions on freedom to provide services within the Community shall be prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended.'

<sup>c</sup> Articles 1(b), 2(2), 10(1) and 11(1) are set out in the judgment in Case C-429/02 at paras 4–8, below



**a** In Case C-429/02—

(2) The provisions of the directive did not preclude a member state from prohibiting indirect television advertising for alcoholic beverages marketed in that state arising from the appearance on screen of hoardings visible during the retransmission of bi-national sporting events taking place in other member states. Television advertising for the purposes of the directive was any form of announcement broadcast in return for payment or similar consideration to promote goods or services. Further, such advertising had to be kept separate from other parts of the programme service and, in sports programmes, were only to be inserted between parts or in intervals. However, images on advertising hoardings appearing in the background of the pictures broadcast during sporting events appeared in a random and unpredictable fashion according to the requirements of the retransmission and they had no distinct character in the context of the directive. Therefore, such indirect television advertising was not to be regarded as being 'television advertising' for the purposes of the directive (see judgment paras 26–29, below).

**d** Notes

For European obligations in regard to broadcasting, see 45(1) *Halsbury's Laws* (4th edn reissue) 206.

For the EC Treaty, art 46, 49 EC (formerly arts 56, 59), see 50 *Halsbury's Statutes* (4th edn) Current Statutes Service (issue 88) 369, 370.

**e** Cases cited

*Alpine Investments BV v Minister van Financiën* Case C-384/93 [1995] All ER (EC) 543, [1995] ECR I-1141, ECJ.

*Aragonesa de Publicidad Exterior SA v Departamento de Sanidad y Seguridad Social de la Generalitat de Cataluña* Joined cases C-1/90 and C-176/90 [1991] ECR I-4151, ECJ.

*Arblade (Criminal proceedings against), Criminal proceedings against Leloup* Joined cases C-369/96 and C-376/96 [1999] ECR I-8453, ECJ.

*Bond van Adverteerders v Netherlands* Case 352/85 [1988] ECR 2085, ECJ.

*Canal Satélite Digital SL v Administración General del Estado* Case C-390/99 [2002] ECR I-607, ECJ.

**g** *Corsten (Criminal proceedings against)* Case C-58/98 [2000] ECR I-7919, ECJ.

*Djabali v Caisse d'Allocations Familiales de l'Essonne* Case C-314/96 [1998] All ER (EC) 426, [1998] ECR I-1149, ECJ.

*EC Commission v Belgium* Case 298/86 [1988] ECR 4343, ECJ.

*EC Commission v France* Case 152/78 [1980] ECR 2299, ECJ.

**h** *EC Commission v France* Case C-154/89 [1991] ECR I-659, ECJ.

*EC Commission v Greece* Case C-198/89 [1991] ECR I-727, ECJ.

*EC Commission v Italy* Case C-180/89 [1991] ECR I-709, ECJ.

*Gambelliand (Criminal proceedings against)* Case C-243/01 (2003) Transcript (opinion), 13 March, (2003) Transcript (judgment), 6 November, ECJ.

**i** *Konsumentombudsmannen (KO) v Gourmet International Products AB* Case C-405/98 [2001] All ER (EC) 308, [2001] ECR I-1795, ECJ.

*Luisi v Ministero del Tesoro* Joined cases 286/82 and 26/83 [1984] ECR 377, ECJ.

*Säger v Denemeyer & Co Ltd* Case C-76/90 [1991] ECR I-4221, ECJ.

*Zabala Erasun v Instituto Nacional de Empleo* Joined cases C-422–424/93 [1995] All ER (EC) 758, [1995] ECR I-1567, ECJ.

## Application and Reference

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*European Commission (supported by the United Kingdom, intervening) v France*  
Case C-262/02

By application lodged on 16 July 2002 the Commission of the European Communities brought an action under art 226 EC (formerly art 169 of the EC Treaty) for a declaration that, by making television broadcasting in France by French television channels of sporting events taking place in other member states conditional on the prior removal of advertising for alcoholic beverages, the French Republic has failed to fulfil its obligations under art 59 of the EC Treaty (now, after amendment, art 49 EC). By order dated 3 December 2002, the President of the Court of Justice of the European Communities gave leave to the United Kingdom of Great Britain and Northern Ireland to intervene in support of the forms of order sought by the Commission. The Commission was represented by H van Lier, acting as agent, with an address for service in Luxembourg. The United Kingdom of Great Britain and Northern Ireland was represented by K Manji, acting as agent, and K Beal, Barrister. France was represented by G de Bergues and R Loosli-Surrans, acting as agents. At the oral argument the Commission was represented by H van Lier and W Wils, acting as agent, the French Republic by G de Bergues and R Loosli-Surrans, and the United Kingdom by K Manji and P Harris, Barrister. The language of the case was French. The facts are set out in the opinion of the Advocate General.

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*Bacardi France SAS v Télévision Française 1 SA (TF1) and others*  
Case C-429/02

By decision of 19 November 2002, the French Cour de Cassation (Court of Cassation) referred to the Court of Justice of the European Communities for a preliminary ruling under art 234 EC (formerly art 177 of the EC Treaty) two questions (set out at judgment para 23, below) on the interpretation of Council Directive (EEC) 89/552 (on the co-ordination of certain provisions laid down by law, regulation or administrative action in member states concerning the pursuit of television broadcasting activities) and art 59 of the EC Treaty (now, after amendment, art 49 EC). Those questions were raised in proceedings between Bacardi France SAS, formerly Bacardi-Martini SAS (Bacardi), and Télévision Française 1 SA (TF1), Groupe Jean-Claude Darmon SA (Darmon) and Giro Sport SARL (Giro Sport), seeking an order that the latter three undertakings cease to put pressure on foreign clubs to refuse advertising for alcoholic beverages produced by Bacardi on advertising hoardings placed in venues hosting bi-national sporting events taking place in other member states. Written observations were submitted on behalf of: Bacardi, by C Niedzielski and JM Cot, Avocats; Télévision Française 1 SA (TF1), by L Bousquet and O Sprung, Avocats; the French government, by G de Bergues and R Loosli-Surrans, acting as agents; the United Kingdom government, by K Manji, acting as agent, and K Beal, Barrister; and the Commission by H van Lier, acting as agent. Oral observations were made on behalf of: Bacardi France SAS, represented by J-M Cot; the French government, represented by G de Bergues and R Loosli-Surrans; the United Kingdom government, represented by K Manji; and the Commission, represented by H van Lier and W Wils, acting as agent. The language of the case was French. The facts are set out in the opinion of the Advocate General.

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a 11 March 2004. **The Advocate General (A Tizzano)** delivered the following opinion<sup>1</sup>.

b 1. In Case C-262/02, brought by the Commission of the European Communities under art 226 EC (formerly art 169 of the EC Treaty), the Court of Justice of the European Communities is asked to rule whether the French legislation prohibiting on national territory the televising of sporting events taking place in other member states if hoardings displayed at those events promote alcoholic beverages, the television advertising of which is prohibited in France, is compatible with art 49 EC (formerly art 59 of the EC Treaty).

c 2. The same legislation is the subject of two questions submitted by the Cour de Cassation (Court of Cassation, France), by order of 19 November 2001, to the Court of Justice for a preliminary ruling in Case C-429/02. In particular, in that case the French court seeks to ascertain whether the legislation of a member state, such as the French legislation cited above, is compatible with Council Directive (EEC) 89/552 (on the co-ordination of certain provisions laid down by law, regulation or administrative action in member states concerning the pursuit of television broadcasting activities) (OJ 1989 L298 p 23) (the Television Without Frontiers Directive; hereinafter Directive 89/552) and with art 49 EC.

3. As can be seen, the two cases relate to the same national law and present characteristics that coincide to a very large extent. It is therefore appropriate to deal with them jointly.

e I—LEGAL BACKGROUND

A—Community law

4. So far as concerns Community law, as is well known, art 49 EC guarantees the freedom to provide services within the Community.

f 5. Regard should also be given to art 46 EC, which is applicable to the freedom to provide services within the meaning of art 55 EC; that article enables the applicability of provisions laid down by law, regulation or administrative action by the member states which, while limiting that freedom, are justified on grounds of public policy, public security or public health.

g Directive 89/552

6. Case C-429/02 also concerns Council Directive 89/552<sup>2</sup>.

h 7. In order to ensure freedom of transmission in television broadcasting within the Community, Directive 89/552 co-ordinates some fields of television activities, laying down minimum rules with which broadcasts emanating from and intended for reception within the Community must comply (see the 13th and 14th recitals).

i 8. Furthermore, to achieve that objective, the directive requires the member states first to ensure that television broadcasters under their jurisdiction comply with the provisions of the directive (art 3(2)) and secondly to ensure freedom of reception and not to restrict retransmission on their territory of television broadcasts from other member states for reasons which fall within the fields co-ordinated by the directive (art 2(2)).

1 Original language: Italian.

2 Set out in para 2, above.



9. The fields co-ordinated by the directive include that of 'television advertising', for which it lays down provisions defining the basic concepts involved and regulating the methods, limits and times of transmission of that form of advertising. a

10. In so far as relevant here, I would recall that art 1(b) and (c) provide that:

'(b) "television advertising" means any form of announcement broadcast in return for payment or for similar consideration by a public or private undertaking in connection with a trade, business, craft or profession in order to promote the supply of goods or services, including immovable property, or rights and obligations, in return for payment ...' b

(c) "surreptitious advertising" means the representation in words or pictures of goods, services, the name, the trade mark or the activities of a producer of goods or a provider of services in programmes when such representation is intended by the broadcaster to serve advertising and might mislead the public as to its nature. Such representation is considered to be intentional in particular if it is done in return for payment or for similar consideration ...' c

11. Article 10 lays down that: d

'1. Television advertising shall be readily recognizable as such and kept quite separate from other parts of the programme service by optical and/or acoustic means ...

4. Surreptitious advertising shall be prohibited.' e

12. Article 11 provides that:

'1. Advertisements shall be inserted between programmes. Provided the conditions contained in paragraphs 2 to 5 of this Article are fulfilled, advertisements may also be inserted during programmes in such a way that the integrity and value of the programme, taking into account natural breaks in and the duration and nature of the programme, and the rights of the rights holders are not prejudiced. f

2. In programmes consisting of autonomous parts, or in sports programmes and similarly structured events and performances comprising intervals, advertisements shall only be inserted between the parts or in the intervals.' g

13. Finally, art 15 lays down certain specific criteria with which television advertising for alcoholic beverages must comply.

14. Lastly, it should be noted that Directive 89/552 was amended by Directive 97/36<sup>3</sup> subsequent to the facts at issue and is not applicable in the present case. h

## *B—National law*

### *(a) The Loi Evin*

15. As regards national legislation, I would first recall French provisions on the television advertising of alcoholic beverages, beginning with Law 91-32 of 10 January 1991 on the campaign against tobacco and alcohol addiction<sup>4</sup> i

<sup>3</sup> EP and Council Directive (EC) 97/36 (amending Council Directive 89/552 on the co-ordination of certain provisions laid down by law, regulation or administrative action in member states concerning the pursuit of television broadcasting activities) (OJ 1997 L202 p 60).

<sup>4</sup> JORF of 12 January 1991 p 615.

a (hereinafter the Loi Evin), which amended art L. 17 of the Code des débits de boissons (Code of Licensed Premises, hereinafter the CDB)<sup>5</sup>.

16. The Loi Evin is based on the principle that all forms of advertising for alcoholic beverages (that is to say beverages with an alcohol content of more than 1.2°) are prohibited unless expressly authorised. In accordance with that principle, the television advertising of alcoholic beverages is therefore  
b prohibited as it is not expressly authorised by art L. 17 of the CDB.

17. That prohibition is expressly confirmed by art 8 of Decree 92-280 of 27 March 1992 on advertising and sponsorship in television<sup>6</sup>, which provides as follows:

c 'The advertising, first, of products whose advertising on television is prohibited by law and, secondly, of the following products and economic sectors:

beverages with an alcohol content of more than 1.2° ...  
is prohibited.'

d 18. Any infringement of the Loi Evin constitutes a 'délit' under French criminal law. Article L. 21 of the CDB provides that:

'Infringements of the provisions of Articles L. 17, L. 18, L. 19 and L. 20 shall be punishable by a fine of FRF 500 000. The maximum fine may be increased by 50% of the sum spent on illegal advertising.

e In the event of repeated offences, the court may prohibit the sale of the illegally advertised alcoholic beverage for a period of between one and five years.'

(b) *The measures adopted by the CSA*

f 19. Furthermore, an important supervisory role has been entrusted to the Conseil supérieur de l'audiovisuel (Authority for the Audiovisual Sector, hereinafter the CSA), which may impose administrative penalties on French broadcasters that fail to comply with the Loi Evin.

20. While performing that role, the CSA discovered that hoardings advertising alcoholic beverages were being shown during the televising in France of certain sporting events held abroad<sup>7</sup> and judged that this form of  
g television advertising contravened the Loi Evin. Accordingly, it warned some French broadcasters to comply with the law, to the extent of bringing a criminal complaint for infringement<sup>8</sup>.

21. The CSA then drew up a Code of Conduct to publicise the interpretation it intended to give to the provisions of the Loi Evin with regard to the  
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5 This subsequently became art L3323-2 of the Code de la santé publique (Public Health Code).

6 JORF of 28 March 1992 p 4313.

i 7 For example, during a friendly match between France and the Netherlands on 18 January 1995 in Utrecht (the Netherlands) the CSA noted the presence of advertising for eight different brands of alcoholic beverage.

8 On 23 January 1995 the CSA brought a complaint under art 40 of the French Code de procédure pénale (Code of Criminal Procedure) before the Procureur de la République at the Tribunal de Grande Instance (Regional Court) Nanterre. As a result of that complaint, the French broadcaster TF1 decided not to broadcast the football match between Auxerre and Arsenal played on 2 March 1995. Similarly, France 2 cancelled the transmission of the rugby matches between Ireland and Scotland and between Ireland and Wales scheduled for 18 March 1995.

broadcasting of sporting events at which advertising for alcoholic beverages was displayed (for example, hoardings positioned around the pitch)<sup>9</sup>. a

22. The Code, which bars all forms of discrimination between French and foreign alcoholic beverages, calls upon advertisers, agents, sporting federations and television broadcasters to exercise the maximum vigilance against similar advertising being shown during sporting events held abroad. In such cases, the broadcasters transmitting the images of the events in France must not be lenient with regard to advertising displayed at the venue of the event, by not acquiescing to the placing of advertisements and avoiding as far as possible their being filmed. b

23. That general rule is then further qualified by drawing a distinction between 'international events' and 'other events taking place abroad'. In the case of 'international events', the images of which are broadcast in a large number of countries and can therefore not be considered to be aimed primarily at the French public, the broadcasters cannot be accused of leniency when transmitting images, the filming of which they do not control, even if the advertising appears on the screen. 'Other events', the broadcasting of which is considered to be aimed specifically at the French public, are treated differently, however. Here, if the legislation of the host country authorises the advertising of alcoholic beverages at the venue of the competition, the parties negotiating with the holders of television rights must use 'all available means' to prevent the advertising of alcoholic beverages from appearing in France and must notify their foreign counterparts of the legislation applying there. c

*(c) The amendments to the Code of Conduct* d

24. Although not relevant for the purposes of the decision in the present case, it should be noted that the Code of Conduct has been amended several times since 1999. Principally, an annex was added listing 'binational events' (previously termed 'other events'). The list, which is subject to periodic review, comprised: friendly matches; qualifying matches; Inter-toto Cup football matches; and the early rounds (those preceding the fourth round) of the UEFA Cup in football. It was also laid down that matches on the list could nevertheless be classed as 'international events' if one of the teams or athletes participating in the competition was 'of special renown'<sup>10</sup>. Lastly, French broadcasters were enabled to ask the CSA for an opinion on the 'international' or 'binational' status of the sporting event to be broadcast. e

25. The case file shows that further amendments to the Code of Conduct were made in 2000 and 2001. In particular, the list of 'binational events' was reduced<sup>11</sup>; the procedure for consulting the CSA was extended and clarified, with all interested parties being given the right to ask that body about the conditions for applying the Code and to receive a reply within a maximum of three weeks; and finally the Code was widely disseminated by publication in the Bulletin officiel du Ministère de la jeunesse et des sports, in the periodic 'CSA newsletter' and on the CSA's website. f

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<sup>9</sup> The Code of Conduct was published in the Bulletin officiel du Ministère de la jeunesse et des sports of 31 March 1995. g

<sup>10</sup> In the version of the Code of Conduct notified to broadcasters on 9 October 1999, 'special renown' is defined as 'the fame enjoyed by a national team, a club or a French or foreign athlete outside his or its country of origin'. h

<sup>11</sup> As a result of that amendment, the list comprises: friendly matches, qualifying matches and the early rounds (those preceding the third round) of the UEFA Cup. i



## a II—FACTS AND PROCEDURE

## Case C-262/02

26. Since 1995 the Commission has received numerous complaints from individuals reporting the difficulties that the Loi Evin caused for the transmission in France of sporting events held in other member states and for the purchasing, by producers of alcoholic beverages, of space on advertising hoardings at the venues of such events.

27. As a result of those complaints, the Commission served formal notice on France on 21 August 1995. This was followed on 21 November 1996 by a reasoned opinion in which the Commission accused France of infringing art 59 of the EC Treaty (now art 49 EC).

28. As it was not satisfied by the reply from France or by the amendments made to the Code of Conduct after service of the reasoned opinion, the Commission lodged an application on 16 July 2002 asking the court to declare that—

‘by making the televised broadcasting in France by French television channels of sporting events taking place in the territory of other member states conditional upon the prior withdrawal of publicity promoting alcoholic beverages, the French Republic has failed to fulfil its obligations under Article 49 EC.’

29. By order of 3 December 2002, the court granted the United Kingdom leave to intervene in the case in support of the Commission in accordance with art 93(1) of the Rules of Procedure.

## Case C-429/02

30. The facts at the origin of the main proceedings involve four companies: Bacardi France SAS (hereinafter Bacardi), Télévision Française TF1 SA (hereinafter TF1), Groupe Jean-Claude Darmon SA (hereinafter Darmon) and Giroport SARL (hereinafter Giroport). Bacardi is a French company that produces and markets alcoholic beverages; TF1 is a French television broadcaster; Darmon and Giroport are two companies governed by French law whose activity consists in the negotiation of television rights for sporting events.

31. The documents before the court show that in order to comply with the Code of Conduct drawn up by the CSA, TF1 warned Darmon and Giroport to ‘use every means necessary to prevent the brand names of alcoholic beverages from appearing on television when purchasing the transmission rights [of sporting events] on behalf of TF1’<sup>12</sup>.

32. It also appears from the documents in the case that, in connection with sporting events taking place abroad and broadcast in France, some football clubs refused to place advertising for alcoholic beverages produced by Bacardi on the hoardings in the stadia.

33. Bacardi held that that refusal was due to pressure exerted on the foreign clubs by Darmon and Giroport at the request of TF1 and that such pressure was applied only when the advertising to be displayed concerned French

<sup>12</sup> See the judgment of the Cour d'Appel (Court of Appeal) de Paris of 27 May 1997, p 3 (annex No 42 to Bacardi's observations). That judgment states that ‘the sole purpose of the letter sent by TF1 to Mr Jean-Claude Darmon on 23 October 1995 with regard to second-round UEFA Cup matches not falling within the category of international events is to point out the French legislation’ (pp 10 and 11).

beverages. It therefore applied to the Tribunal de commerce (Commercial Court) de Paris for an order requiring the said companies to cease that discriminatory behaviour. a

34. As that application was dismissed both in the court of first instance and upon appeal, Bacardi made an application to the Cour de Cassation (Court of Cassation). The latter, having doubts as to the compatibility of the French legislation with Directive 89/552 and art 49 EC, submitted the following questions to the Court of Justice for a preliminary ruling under art 234 EC (formerly art 177 of the EC Treaty): b

‘(1) [Does] Directive 89/552/EEC of 3 October 1989 (“Television without Frontiers”) in the version prior to that of Directive 97/36/EC of 30 June 1997, [preclude] national legislation, such as Articles L. 17 to L. 21 of the French Code des débits de boissons and Article 8 of Decree No 92–280 of 27 March 1992, which prohibits, for reasons relating to the protection of public health and on pain of criminal penalties, advertising for alcoholic drinks, whether of national origin or from other Member States of the Union, on television, whether in the form of advertising spots within the meaning of Article 10 of the directive or of indirect advertising as a result of hoardings advertising alcoholic drinks appearing on television without constituting surreptitious advertising within the meaning of Article 1(c) of the directive[?]’ c

(2) [Are] Article 49 EC and the principle of the free movement of television broadcasts within the Union be interpreted as precluding a national provision such as that in Articles L. 17 to L. 21 of the French Code des débits de boissons and Article 8 of Decree No 92–280 of 27 March 1992 which prohibits, for reasons relating to the protection of public health and on pain of criminal penalties, advertising for alcoholic drinks, whether of national origin or from other Member States of the Union, on television, whether in the form of advertising spots within the meaning of Article 10 of the directive or of indirect advertising as a result of hoardings advertising alcoholic drinks appearing on television without thereby constituting surreptitious advertising within the meaning of Article 1(c) of the directive, from having the effect that operators responsible for the broadcasting and distribution of television programmes: (a) refrain from broadcasting television programmes, such as in particular retransmissions of sporting events, whether taking place in France or in other countries of the Union, where they show prohibited advertisements within the meaning of the French Code des débits de boissons, or (b) broadcast them on condition that prohibited advertisements within the meaning of the French Code des débits de boissons do not appear, thereby preventing the conclusion of advertising contracts concerning alcoholic drinks, whether of national origin or from other Member States of the Union[?]’ d  
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35. Bacardi, TF1, the French and United Kingdom governments and the Commission submitted written observations in the proceedings thus instituted.

36. A joint hearing was held for this case and for Case C-262/02 on 25 November 2003, which was attended by Bacardi, the French and United Kingdom governments and the Commission. i

## a III—LEGAL ASSESSMENT

## Introduction

37. As I have already indicated, the central questions in the two cases coincide to a large extent. I shall therefore examine them together; but first I must make a number of remarks with regard to the questions submitted for a preliminary ruling in Case C-429/02.

b 38. As has been stated, in that case two questions have been submitted to the court, asking whether Directive 89/552 and art 49 EC preclude a law, such as the French law, which prohibits the advertising of alcoholic beverages on television either directly in the form of advertising spots or indirectly as a result of the filming of advertising hoardings displayed during sporting events.

c 39. In my opinion, the wording of these questions calls for comment.

d 40. First, I must make clear that in order to provide a useful reply to the court of reference the assessment by the Court of Justice cannot be confined to arts L. 17 to L. 21 of the CDB and art 8 of Decree 92–280, which are explicitly mentioned by the national court, but must also of necessity extend to the measures taken by the CSA to implement those provisions. In particular, e consideration must be given to the Code of Conduct drawn up by that authority, which, as has been stated and as can be deduced from the documents of the case, requires the parties negotiating the purchase of television rights to sporting events that are to take place abroad but will not be broadcast ‘in a large number of countries’ and which concern ‘specifically French viewers’ (so-called ‘other events’) to use every ‘means available’ to prevent f advertisements for alcoholic beverages shown during such events from appearing in France.

41. Indeed, the conduct giving rise to the dispute in the main proceedings, namely that of TF1, Darmon and Girosport, and which is contested by Bacardi, is the result of the desire of those parties to conform to the practice embodied in the interpretation and application of arts L. 17 to L. 21 of the CDB and art 8 of Decree 92–280. I therefore believe that that practice—the relevance of which for the interpretation of the said articles is essentially acknowledged by the court making the reference and which is the main subject of the Commission’s complaints in Case C-262/02—must be taken into account when assessing the two questions from the national court. Furthermore, a reply from the court that did not take that practice into account would ultimately become a mere g advisory opinion unconnected with the reality of the dispute in the main proceedings and thus in clear contradiction with the function of the preliminary reference procedure<sup>13</sup>.

42. Secondly, I consider that in assessing that legislation the court should concentrate on evaluating whether the prohibition of the indirect advertising h during sporting events is compatible with Community law. As I have already said, the main proceedings turn on whether the conduct adopted by TF1, Darmon and Girosport in order to comply with that prohibition was lawful. On the other hand, the prohibition of direct television advertising, which is also

i 13 In this regard I would point out that according to settled case law ‘the justification for a preliminary reference, and hence for the jurisdiction of the Court, is not that it enables advisory opinions on general or hypothetical questions to be delivered ..., but rather that it is necessary for the effective resolution of a dispute’. See, among many others, *Zabala Erasun v Instituto Nacional de Empleo* Joined cases C-422–424/93 [1995] All ER (EC) 758, [1995] ECR I-1567 (para 29) and *Djabali v Caisse d’Allocations Familiales de l’Essonne* Case C-314/96 [1998] All ER (EC) 426, [1998] ECR I-1149 (paras 17–20).



a  
therefore seems to me that a reply from the court on the compatibility of the latter prohibition with Community law is not necessary for resolving the dispute in the main proceedings.

43. For those reasons I therefore consider that the questions submitted by the Cour de Cassation should be understood as requiring the Court of Justice to assess whether Directive 89/552 and art 49 EC preclude legislation of a member state, such as the French legislation, which prohibits the television broadcasting on national territory of sporting events taking place in other member states but which are not broadcast in a large number of countries but which specifically concern, rather, the viewers of that state, where advertising hoardings displayed at the venue of such events to promote products (in this case alcoholic beverages) that may not be advertised on television in the first state are shown. b c

44. Read in this way, the second question in Case C-429/02 and the application in the infringement proceedings brought by the Commission in Case C-262/02 end up by coinciding, because in both instances it is necessary to establish whether the said legislation, as interpreted and applied by the CSA, d  
is compatible with art 49 EC.

45. This is clearly the central issue in the two cases and, I repeat, it is common to both. Before beginning to examine it, however, I must mention an aspect that arises only in the case concerning a reference for a preliminary ruling. What is required is a determination of whether the French legislation in question can right away be deemed unlawful on the ground of infringement of e  
Directive 89/552.

#### *Directive 89/552*

46. I shall confine myself to only a few remarks on this matter, however, because I agree with all the parties to the proceedings for a preliminary ruling f  
(with the sole exception of TF1), who argue that the directive is not applicable to the case in question in that the filming of advertising hoardings displayed during sporting events cannot be considered 'television advertising' and cannot therefore fall within the scope of the directive.

47. That conclusion can be deduced clearly, in my view, from arts 1, 10 and 11 of the directive. g

48. Article 1(b) defines 'television advertising' as 'any form of announcement broadcast *in return for payment* or for similar consideration ... *in order to promote the supply of goods or services*'<sup>14</sup>.

49. That provision thus refers to the sequence of *television* images specifically intended as advertising, for which the television broadcaster receives payment. It does not, however, include other kinds of announcement, such as those exhibited on placards filmed during the transmission of a sporting event, for which the broadcasters receive no remuneration. h

50. Articles 10 and 11 lay down that advertising 'shall be ... kept quite separate from other parts of the programme service' (art 10(1)) and that in— i

'programmes consisting of autonomous parts, or in sports programmes and similarly structured events and performances comprising intervals, [it] shall only be inserted between the parts or in the intervals.' (Article 11(2).)

<sup>14</sup> My emphasis.

- a 51. As the United Kingdom and the Commission have rightly pointed out, only announcements intended to promote goods or services on television can meet the conditions for being inserted, in accordance with the directive, between the autonomous parts or in the intervals of sports programmes so that they are clearly separated from the programmes themselves.
- b 52. In contrast, images of advertising hoardings shown during the televising of a sporting event because they are placed alongside the playing area on which the competition is being conducted necessarily appear throughout the event without it being possible to separate them clearly from the images of the action on the field. It would therefore be illogical to consider that Directive 89/552 also governs that form of indirect advertising, which by its very nature cannot comply with the provisions of the directive.
- c 53. I therefore conclude in this regard that Directive 89/552 does not preclude legislation of a member state, such as the French legislation, which prohibits the television broadcasting on national territory of sporting events taking place in other member states, where advertising hoardings displayed at the venue of such events to promote products (in this case alcoholic beverages)
- d that may not be advertised on television in the first state are shown.

#### *Article 49 EC*

- e 54. As I have already remarked several times, the infringement proceedings instituted by the Commission and the second question submitted by the Cour de Cassation for a preliminary ruling raise the same issue. Essentially the court is asked to establish whether the French legislation, as interpreted and applied by the CSA, is compatible with art 49 EC.
- f 55. The Commission, the United Kingdom and Bacardi consider that the measures in question constitute a restriction on the provision of various cross-border services that is disproportionate in relation to the objectives of protecting public health and preventing evasion of the law. France, by contrast, while acknowledging that the legislation under examination entails a restriction on the freedom to provide services, considers that it is justified on grounds of public health and complies with the principle of proportionality.
- g (1) *Restriction on the freedom to provide services*
- i 56. The first matter to settle is therefore whether the measures adopted by the CSA, and in particular the original version of the Code of Conduct, constitute a restriction on the freedom to provide services under art 49 EC.
- h 57. In truth, there appears to be no genuine difference between the parties in the two proceedings as regards the existence of such a restriction, as France does not, actually, contest the argument put forward by Bacardi, the Commission and the United Kingdom on this point.
- i 58. In particular, it is not disputed that the measures taken by the CSA restrict the freedom to provide three different types of service across national borders: (i) the transmission by French broadcasters of 'binational' sporting events held abroad at which advertising for alcoholic beverages is present; (ii) the sale of the television rights by the organisers of such events to French broadcasters; and (iii) the sale by the operators of advertising hoardings displayed at such events of space to promote alcoholic beverages. In the infringement proceedings, the Commission also raised the possibility of a restriction on the sponsorship of teams taking part in 'binational' events (for example, through the display of the trademark of alcoholic beverages on the athletes' jerseys). As

the Commission itself has acknowledged, however, that objection was not contained in the reasoned opinion and cannot therefore be taken into account in Case C-262/02<sup>15</sup>.

59. That being so, it also seems to me that the legislation in question, although imposing requirements solely on French persons, directly impedes access to the market in the services in question by both French operators and those from other member states.

60. Indeed, as seen above, in the case of 'other events' the Code of Conduct requires the parties negotiating with the holders of television rights to use every 'means available' to prevent advertising for alcoholic beverages from appearing on French television screens.

61. It seems to me that the 'means' that the Code requires such persons to employ to achieve that outcome include an obligation not to purchase the television rights for the broadcasting of 'other events' if advertising for alcoholic beverages is not first removed. There can be no doubt that such a 'means' is also among those 'available' to persons negotiating television rights.

62. If that is the case, it would be difficult to deny that the legislation in question constitutes an obstacle to access to the above-mentioned services. Indeed, a request to remove the advertising in question may lead to one of the following two situations: if the organisers of the sporting event maintain the advertising, they will not be able to sell the television rights to the event and consequently it cannot be broadcast in France; alternatively, if they have such advertising removed or prohibit its placing on the playing area, the operators of the advertising hoardings will not be able to sell the available space to the producers of alcoholic beverages and, thus, the latter will not be able to buy it. In either case, the conduct that the Code imposes on those negotiating television rights prevents several parties from offering or benefiting from one or more services 'across Community frontiers'.

63. Furthermore, there is no merit in the argument that French broadcasters, rather than forgoing the transmission of 'binational events' owing to the presence of the advertising in question, could selectively obscure the placards advertising alcoholic beverages, thanks to modern image masking techniques. As the Commission has rightly maintained and as was admitted by France at the hearing, these are highly sophisticated techniques derived from missile guidance systems, which would be excessively costly for television broadcasters.

64. Neither can it be claimed that the national legislation under examination does not constitute a restriction prohibited under art 49 EC on the ground stated by the court of reference that it concerns without distinction all alcoholic beverages and is applied to such beverages by 'operators responsible for the broadcasting and distribution of television programmes', irrespective of whether they are of 'national origin or from other Member States of the Union'<sup>16</sup>.

<sup>15</sup> In this regard I would point out that the court has consistently held that, 'the subject-matter of an application under Article [226 EC] is limited to that defined during the pre-litigation procedure provided for by that article. Consequently, the Commission's reasoned opinion and the application must be based on the same arguments and submissions'. See *EC Commission v Belgium* Case 298/86 [1988] ECR 4343 (para 10).

<sup>16</sup> My emphasis. In this regard I note that the Cour de Cassation thus appears to share the opinion expressed by the Cour d'Appel in the judgment of 23 September 1997, in which Bacardi's claims regarding discrimination against French products were held to be unfounded (Annex No 42 to Bacardi's observations, pp 10 and 11).



a 65. It must be borne in mind that art 49 EC prohibits not only discrimination based on nationality but also more generally any restriction on the freedom to provide services by persons established in another member state<sup>17</sup>. The rule therefore also precludes national provisions which, even if they apply without distinction, are capable of directly affecting access to the market in services in the other member states<sup>18</sup>.

b 66. As I have just stated, this is precisely the situation in the present case.

67. I am therefore able to conclude on this point that the measures adopted by the CSA to implement the Loi Evin, requiring persons negotiating with the holders of television rights to 'other events' to employ every 'available means' to prevent advertising for alcoholic beverages from appearing in France constitutes a restriction on the freedom to provide services under art 49 EC.

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## (2) *The proportionality of the French legislation*

d 68. That said, it is necessary to ascertain whether the above-mentioned restriction can be justified in the light of the needs that Community law permits the member states to safeguard in derogation from even the principle of the freedom of movement.

e 69. In this regard, I note first that all the parties involved in the two proceedings acknowledge the findings of the court, according to which measures such as those under examination 'restricting the advertising of alcoholic beverages in order to combat alcoholism', despite constituting restrictions on the provision of services, '[reflect] public health concerns'<sup>19</sup> and may therefore be justified by this 'ground of general interest recognised by art [46 EC], which is applicable to the provision of services in accordance with Article [55 EC]'<sup>20</sup>.

f 70. Nevertheless, again according to the case law of the court, national provisions authorised by art 46 EC are lawful only on condition that they are not 'disproportionate to the intended objective'<sup>21</sup>. Hence, while it is true that, in the absence of Community rules governing the advertising of alcoholic beverages in general, in this field too 'it is for the member states to decide on the degree of protection which they wish to afford to public health and on the way in which that protection is to be achieved', it is equally true that they may do so only 'within the limits set by the Treaty and must, in particular, comply with the principle of proportionality'<sup>22</sup>, which requires that the provisions

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17 See *EC Commission v France* Case C-154/89 [1991] ECR I-659 (para 12), *EC Commission v Italy* Case C-180/89 [1991] ECR I-709 (para 15), *EC Commission v Greece* Case C-198/89 [1991] ECR I-727 (para 16) and *Säger v Denemeyer & Co Ltd* Case C-76/90 [1991] ECR I-4221 (para 12).

18 See *Alpine Investments BV v Minister van Financiën* Case C-384/93 [1995] All ER (EC) 543, [1995] ECR I-1141 (para 38).

i 19 See *EC Commission v France* Case 152/78 [1980] ECR 2299 (para 17), *Aragonesa de Publicidad Exterior SA v Departamento de Sanidad y Seguridad Social de la Generalitat de Cataluña* Joined cases C-1/90 and C-176/90 [1991] ECR I-4151 (para 15) and *Konsumentombudsmannen (KO) v Gourmet International Products AB* Case C-405/98 [2001] All ER (EC) 308, [2001] ECR I-1795 (para 27).

20 See the *Gourmet International Products* case (para 40), cited above.

21 See *Bond van Adverteerders v Netherlands* Case 352/85 [1988] ECR 2085 (para 36).

22 See the *Aragonesa* case (para 16), cited in footnote 19, above.

adopted 'must be appropriate for securing the attainment of the objective which they pursue and must not go beyond what is necessary in order to attain it'.<sup>23</sup> a

71. The real crux of the infringement proceedings instituted by the Commission against France and of the reference for a preliminary ruling from the Cour de Cassation is the very proportionality of the French legislation. In order to resolve both cases it is therefore necessary to establish whether that legislation (i) is appropriate for attaining the public health objective that it pursues and (ii) does not go beyond what is necessary to attain that objective. b

(i) The appropriateness of the French legislation for attaining the public health objective pursued c

72. According to the Commission and Bacardi, the French provisions in question are an inappropriate means of attaining the objective of protecting public health in that they are based on legislative choices and criteria that are inconsistent with that objective, for a number of reasons which I shall now examine individually.

73. Bacardi and the Commission identify a first inconsistency by comparing the rules on tobacco with those on alcoholic beverages. In the case of tobacco French legislation imposes a general prohibition on advertising, except for Formula 1 races. In that of alcoholic beverages, however, it permits various forms of advertising (for example in the printed press, on radio and on hoardings) but imposes a ban on television advertising which, under the Code of Conduct, is extended to the televising of hoardings advertising alcoholic beverages. d

74. According to the Commission, if I understand correctly, there is inconsistency between the two in that a general prohibition, such as that laid down for tobacco, is limited by means of a derogation, whereas a partial prohibition, such as that for alcoholic beverages, is broadened by its extensive application to television broadcasts. e

75. Bacardi and the Commission then find a second inconsistency in the fact that the Loi Evin permits advertising for alcoholic beverages consisting in the placing of advertising hoardings in sports stadia but prohibits the televising of such hoardings. From this point of view as well, according to these parties, there is inconsistency in that on the one hand consent is granted for advertising such as that on advertising hoardings that can be seen for the entire duration of the event by anyone present, while on the other the appearance of these same hoardings on television is prohibited, although they are captured occasionally by the television cameras and are therefore visible to television viewers only for a few instants. f

76. The French government replies to these objections by maintaining that it took legislative policy decisions which, in keeping with the objective of protecting public health, graduate the prohibition on advertising according to the harmfulness of the product marketed and the impact of the advertising method used. g

77. In particular, the French government claims that there is no contradiction in establishing derogations for tobacco advertising that are not provided for h

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<sup>23</sup> See *Canal Satellite Digital SL v Administración General del Estado* Case C-390/99 [2002] ECR I-607 (para 33). See also *Criminal proceedings against Arblade*, *Criminal proceedings against Leloup* Joined cases C-369/96 and C-376/96 [1999] ECR I-8453 (para 35) and *Criminal proceedings against Corsten* Case C-58/98 [2000] ECR I-7919 (para 39). i

a alcohol, a product with a different degree of harmfulness for human health. Moreover, according to the French government, it is entirely logical to permit the advertising of alcoholic beverages on hoardings that will be seen only by persons physically present at the venues of sporting competitions but to ban the appearance of the same hoardings on television, given that this medium reaches a far larger number of people.

b 78. For my part, I have no difficulty in conceding that some decisions of the French legislature may indeed appear questionable. There can be no doubt that to allow significant derogations from an advertising ban or to limit the appearance of images of advertising hoardings on television without prohibiting the placing of those hoardings in the stadia may reduce the effectiveness of the state's action to protect public health.

c 79. I am nevertheless of the view that these decisions fall within the freedom of the member states to 'decide on the degree of protection which they wish to afford to public health and on the way in which that protection is to be achieved'<sup>24</sup>, and are therefore among the options available to member states for attaining that objective. By contrast, what falls outside the discretion of the member states and thus within the purview of the court is, as we have seen, d the appropriateness and necessity of such decisions in relation to attainment of the declared objectives, given that only compliance with those conditions can justify the restrictions deriving from those decisions.

e 80. Accordingly, what must be ascertained is not which measures would be feasible and more effective in abstract terms but whether the *actual measures* adopted by France in the exercise of its discretionary power to impede the televising of binational sporting events at which advertising for alcoholic beverages is displayed are appropriate for achieving the degree of protection of public health pursued by that state.

f 81. It seems to me that, even subject to the limitations I have indicated, the appropriateness of the measures cannot be denied. The measures in question reduce the instances in which television viewers can see images of hoardings advertising alcoholic beverages, that is to say images displayed on pitches with the obvious aim of encouraging consumers to buy such products. It is therefore reasonable to maintain that by limiting the opportunities for propagating the message those measures may also reduce the instances in which television viewers consume alcoholic beverages in response to the g blandishments of advertising.

h 82. But the main objection of Bacardi and the Commission from the standpoint that is of interest here is really something other. It relates to the Code of Conduct, of which I have spoken above (paras 19 to 23), and in particular to the distinction between 'international events' and 'other events', on which is based the prohibition on the broadcasting of sporting events taking place abroad.

i 83. According to Bacardi and the Commission, that distinction is not only imprecise but also contradictory. They maintain that where there are hoardings advertising alcoholic beverages at the venues of sporting competitions it prohibits the broadcasting of 'other events', which have a smaller following among the French public, but not that of 'international events', which are more widely followed in France. As a result, it introduces a less strict regime precisely

24 See the *Aragonesa* case (para 16), cited in footnote 19, above (my emphasis).



for the broadcasting of events with a larger audience and which can therefore, thanks to the advertising, encourage a larger number of persons to consume alcohol. a

84. In my opinion, however, that objection cannot be endorsed, for the reasons that I shall explain below.

85. First, after the introduction of the ban on the television advertising of alcoholic beverages under the Loi Evin, the CSA, which was entrusted with ensuring compliance, found that in some cases producers of alcoholic beverages had evaded the prohibition by purchasing advertising space on hoardings displayed during sporting events broadcast in France which, although taking place abroad, did not have a particularly high international profile but in reality were of specific interest to the French public. b

86. As it considered that this conduct circumvented the prohibition on the television advertising of alcoholic beverages under the Loi Evin and hence undermined the objective of protecting public health pursued by that law, the CSA decided in 1995 to prohibit the transmission in France of 'other events' at which such advertising was present. In this way it extended the prohibition to cover the transmission even of events that are not broadcast 'in a large number of countries' and concern 'specifically the French public', which in the past had been the subject of misconduct. c

87. The logic underlying that decision appears to me to be even more obvious and consistent with the purpose of the French legislation if one considers that as 'other events' are aimed 'specifically at the French public', producers of alcoholic beverages and advertisers may, by choosing the product to promote and defining the message to display on the hoardings, arrange advertising at such events that is targeted at French television viewers, and for that reason more incisive and thus more harmful. d

88. Furthermore, the effectiveness of the prohibition in question appears to be greater in the case of 'other events'. As these are broadcast in a small number of countries, their transmission to a large audience such as public French viewing is particularly important to the holders of television rights and advertising agencies, which will therefore agree more easily to comply with the ban. e

89. I could also add that the distinction between 'international events' and 'other events' makes it easier to reconcile the objective of protecting public health with the principle of the freedom to provide services, because it reduces the number of instances in which it is forbidden for sporting events taking place abroad to be broadcast in France. As a result of that distinction the restriction is limited only to 'other events', which, as I have said, are not broadcast in a large number of countries and hold particular interest only for a French audience. f

90. It is true that a general prohibition on the broadcasting of all sporting events would have been more effective in the campaign against alcoholism and consequently a more appropriate means of protecting public health. It is clear, however, that this would have created a far greater obstacle to the provision of services than that caused by the legislation in question. g

91. As to the argument that a general prohibition would have better ensured legal certainty, I would observe that legal certainty can also be safeguarded by means of a prohibition targeted on 'other events'. These are identified on the basis of two precise criteria (the number of countries in which they are broadcast and their specific interest to French audiences), the combination of which, in my view, enables television broadcasters and other operators in the h

a sector to distinguish clearly between the cases in which the transmission of the sporting event is prohibited and those in which it is permitted<sup>25</sup>.

b 92. I would add that French broadcasters, the parties primarily interested in the televising of sports meetings, can dispel any uncertainty about an event's classification as international or binational by consulting the CSA, even informally. All the more so as the latter, being the authority responsible for applying the Loi Evin and supervising the television sector in general, maintains frequent and regular contacts with broadcasters<sup>26</sup>.

c 93. I note, moreover, that the objection of Bacardi and the Commission about the greater legal certainty and hence greater Community 'tolerability' of a total prohibition reveals a paradox that runs through several aspects of the application and the observations submitted in the cases under examination. It emerges from that objection that the French measure in question should be held to be incompatible with the Treaty because *it imposes too little restriction* on the advertising of alcoholic beverages; whereas a total ban on advertising, despite impeding the freedom to provide services to a far greater extent, is paradoxically deemed compatible with Community law.

d 94. In order to refute the appropriateness of the French legislation as a means of attaining the objective of protecting public health, in the infringement proceedings the Commission lastly criticises the actual manner in which the CSA allegedly applied the Loi Evin and the Code of Conduct. In the Commission's opinion, by adopting the contested measures the CSA impeded the transmission in France of sporting events only when hoardings promoting alcoholic beverages marketed in France were on display at the competition venues. If the CSA had wished to pursue consistently the objective of protecting public health, the Commission observes, it should have applied the prohibition if there were any advertising of alcoholic beverages, regardless of whether or not they were marketed in France.

f 95. The French government rebuts the accusation of discriminatory application of the Code of Conduct, maintaining instead that the French legislation was applied without making any distinction between products marketed in France and in other member states.

g 96. For my part, even leaving aside the peculiarity of an argument, which I have already dealt with, that once again criticises the French measures as *insufficiently restrictive*, I note that neither the Loi Evin nor the Code of Conduct limit the prohibition on the television advertising of alcoholic beverages to products marketed in France. Indeed, the former prohibits the advertising on television of all beverages with an alcohol content of more than 1.2%, while the latter explicitly requires 'equal monitoring ... of all alcoholic beverages, whether French or of foreign origin', specifying moreover that h 'French producers and advertisers may not be treated differently from their foreign competitors'.

97. Leaving that aside, I wish to observe that in its action the Commission has not even proved that the CSA applied the Loi Evin and the Code of Conduct only to the advertising of alcoholic beverages marketed in France.

i 25 In this regard I would point out that after service of the Commission's reasoned opinion the distinction between 'international events' and 'other events' was made clearer. In addition, an annex was added to the Code listing the events in the latter category (see paras 24, 25, above).

26 In this regard I would also point out that after service of the Commission's reasoned opinion the Code of Conduct was amended by allowing any interested party to ask the CSA about the conditions for applying the Code and entitling them to expect a reply within a maximum of three weeks (see paras 24, 25, above).

Indeed, the documents in the case contain no certain evidence to support the assertion that the application of the principle of non-discrimination laid down in the Code 'wavered, in the sense that primary consideration was given [only] to alcoholic beverages marketed in France'<sup>27</sup>, or was actually disregarded, permitting the appearance on French television of only 'advertising for certain foreign brands of alcohol'<sup>28</sup>. On the contrary, the documents that the Commission itself annexed to the application (which partly relate to events subsequent to those contested in the reasoned opinion) show that on several occasions the French legislation impeded the sale of advertising space for all alcoholic beverages and was therefore also applied to beverages produced in other member states<sup>29</sup>.

98. In concluding on this point, I therefore consider that the French legislation under examination is appropriate for attaining the objective of protecting public health that it pursues.

(ii) The necessity of the French legislation

99. In order to assess the proportionality of the French legislation in relation to its intended purpose of protecting public health, it must also be ascertained whether, as well as being appropriate, it does not go beyond what is necessary in order to attain that objective.

100. According to the Commission, this second requirement of the principle of proportionality is not met in the present case. It contends that in order to prevent the periodic appearance of hoardings advertising alcoholic beverages on television the French legislation impedes the televising of the entire sporting event at which they are displayed.

101. Bacardi and the United Kingdom reach the same conclusion, although for different reasons. They point out that the objective pursued by the legislation in question could be attained by means of less restrictive measures aimed at limiting the advertising content or warning the public of the harm caused by excessive alcohol consumption. In addition, the United Kingdom objects that the French legislation at issue applies to all beverages with an alcohol content of more than 1.2°, regardless of their alcoholic strength, and that it impedes the broadcasting in France of advertising that already complies with the law of another member state, thereby duplicating the controls already performed in that state.

102. In my opinion, such arguments cannot be accepted.

<sup>27</sup> Paragraph 6 of the application.

<sup>28</sup> Paragraph 9 of the application.

<sup>29</sup> See the letter of 20 December 1999 from the European Confederation of Spirits Producers (annex No 9 to the application), informing the Commission that at the time of the match between AEK and Monaco on 23 November 1999 in the third round of the UEFA Cup one of the Confederation's member companies was denied an opportunity to purchase advertising space on hoardings to promote ouzo because the Loi Evin prohibited the transmission in France of sporting events at which placards promoting alcoholic beverages were displayed. See also the statement made on 28 January 2000 by the Finance Director of Newcastle United Football Club in an English court (annex No 10 to the application) that 'the French law poses a real problem for football clubs playing French clubs in UEFA Cup matches. It limits the clubs' freedom to sell advertising space in their grounds. Indeed, CSI [the company selling broadcasting rights on behalf of the football clubs] advises English clubs not to accept advertising from *spirits producers* for such matches so that they can maximise their receipts from television' (my emphasis). This statement contradicts another document produced by the Commission (annex No 11 to the application) which asserts that 'CSI has consistently advised the English clubs among its clients that, if they want to maximise the television receipts from their matches in European competitions, they must not ... accept offers from *French spirits producers* for advertising in stadia during such matches' (my emphasis).



a 103. First, the Commission's objection cannot be accepted; as I have already mentioned above, television broadcasters do not at present have the technical means selectively to obscure hoardings advertising spirits during filming. Modern techniques for masking television images, which would permit this less restrictive solution, cannot be used by broadcasters on account of their excessive cost.

b 104. But the objections raised by Bacardi and the United Kingdom are not convincing either. France has—in my opinion, rightly—retorted that excessive consumption of alcoholic beverages is harmful to human health, regardless of their alcoholic strength, and that the type of advertising prohibited by the Code of Conduct (the televising of hoardings promoting alcoholic beverages) appears on screens unexpectedly and for only a few seconds, which means that it is not possible either to control the content of the advertising broadcast or to insert warnings about the dangers of excessive alcohol consumption at the same time as the advertising message.

c 105. As regards the risk of duplicating the control of advertising that is already compliant with the laws of another member state, France rightly argues that either the member state in which the sporting event is taking place prohibits the transmission of the images of advertising hoardings promoting alcoholic beverages, in which case the event can be broadcast in France without the need for controls, or no ban exists in that state, in which case the ban imposed by the French authorities will constitute the only control.

d 106. For my part, I would add that even if there were an overlap between the French legislation and the more permissive provisions of other member states, the French legislation could not be considered disproportionate on that ground and hence incompatible with Community law. Indeed, the court has already made clear that 'the fact that one member state imposes less strict rules than another member state does not mean that the latter's rules are disproportionate'<sup>30</sup>. The French rules can therefore not be held to infringe the principle of proportionality solely because another member state applies less strict provisions with regard to the advertising of alcoholic beverages.

e 107. I therefore feel able to conclude on this point that the French legislation under examination does not go beyond what is necessary in order to attain the objective of protecting public health which it pursues.

f 108. Lastly, I would observe that, since in my view the legislation under examination must be held to be justified by the objective of protecting public health and proportionate thereto, it is not necessary to determine whether that legislation is also justified by the overriding need to prevent evasion of the law, which was also raised by the parties in the course of the two proceedings.

g 109. In conclusion I consider that:

h —in Case C-429/02 the reply to the Cour de Cassation must be that Directive 89/552 and arts 46, 49 and 55 EC do not preclude legislation of a member state, such as the French legislation, which prohibits the television broadcasting on national territory of sporting events taking place in other member states but which are not broadcast in a large number of countries and which specifically concern national viewers, if advertising hoardings displayed at the venue of such events to promote products (in this case alcoholic beverages) that may not be advertised on television in the first state are shown;

i —the Commission's application in Case C-262/02 must be dismissed.

30 See the *Alpine Investments* case (para 51), cited in footnote 18, above.

## IV—COSTS IN CASE C-262/02

110. Under art 69(2) of the Rules of Procedure, in infringement proceedings the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since France applied for costs to be awarded against the Commission and the latter has been unsuccessful, it must be ordered to pay the costs.

111. Article 69(4) of the Rules of Procedure provides that the member states that intervene in the proceedings are to bear their own costs. Consequently, the United Kingdom is to bear its own costs.

## V—CONCLUSION

In the light of the foregoing conclusions, I propose that the Court of Justice should:

—rule in Case C-429/02 that Directive 89/552 and arts 46, 49 and 55 EC do not preclude legislation of a member state, such as the French legislation, which prohibits the television broadcasting on national territory of sporting events taking place in another member state but which are not broadcast in a large number of countries and which specifically concern the national public, if advertising hoardings displayed at the venue of such events to promote products (in this case alcoholic beverages) that may not be advertised on television in the first state are shown;

—in Case C-262/02:

- (1) dismiss the Commission's application;
- (2) order the Commission to pay the costs;
- (3) order the United Kingdom to bear its own costs.

13 July 2004. **The COURT OF JUSTICE (Grand Chamber)** delivered the following judgment in *European Commission (supported by the United Kingdom, intervening) v France* Case C-262/02.

1. By application lodged at the Registry of the Court of Justice of the European Communities on 16 July 2002, the Commission of the European Communities brought an action under art 226 EC (formerly art 169 of the EC Treaty) for a declaration that, by making television broadcasting in France by French television channels of sporting events taking place in other member states conditional on the prior removal of advertising for alcoholic beverages, the French Republic has failed to fulfil its obligations under art 59 of the EC Treaty (now, after amendment, art 49 EC).

## LEGAL BACKGROUND

*Substantive rules*

2. Law No 91-32 of 10 January 1991 on the campaign against smoking and alcoholism (Loi Evin) (JORF of 12 January 1991, p 6615) amended, inter alia, arts L.17 to L. 21 of the Code des débits de boissons et des mesures contre l'alcoolisme (Code of licensed premises and measures against alcoholism), which restrict advertising for certain alcoholic beverages, namely beverages whose alcoholic content exceeds 1.2°.

3. According to those provisions television advertising for alcoholic beverages, whether direct or indirect, is prohibited and that prohibition is repeated in art 8 of Decree No 92-280 of 27 March 1992, which was adopted to implement art 27 of the Law of 30 September 1986 on freedom of

a communication and laying down the general principles concerning the rules applicable to advertising and sponsorship (JORF of 28 March 1992, p 4313).

4. Other forms of advertising are, however, permitted by French legislation. Thus it is permissible, for example, to advertise alcoholic beverages in the press, on the radio (except at certain times) or in the form of posters and signboards, including on advertising hoardings placed in sports stadia, etc.

b 5. An infringement of the Loi Evin is classified as a 'délit' (misdemeanour) by French criminal law.

#### *Procedural rules*

c 6. According to the first paragraph of art 42 of Law No 86-1067 of 30 September 1986 on the freedom of communication, the 'Loi Léotard' (JORF of 1 October 1986, p 11755), it is for the Conseil supérieur de l'audiovisuel (the Audiovisual Authority; the CSA) to ensure the application of the Loi Evin. In that context, the CSA may call on the distributors of television services to comply with their obligations and, where they do not comply with the requirements imposed on them, it may order administrative penalties against them. Furthermore, the CSA may refer any infringements committed by distributors to the Procureur de la République (Public Prosecutor).

#### *Implementing measures*

e 7. In 1995 the French authorities, that is to say the CSA and the Ministry for Youth and Sports, and the French television channels drew up a Code of Conduct, published in the Bulletin Officiel du Ministère de la Jeunesse et des Sports, on the interpretation of the rules of the Loi Evin so far as concerns their application to television broadcasting of sporting events taking place abroad (that is, live broadcasts or retransmissions) in which advertising for alcoholic beverages is visible, for example on advertising hoardings or on sports shirts, and which are, accordingly, likely to contain indirect television advertising for alcoholic beverages within the meaning of that law.

f 8. Although it is not legally binding, the Code of Conduct states that in the case of bi-national events taking place abroad, which are described in the Code as 'other events', French broadcasters and any other party subject to French law (referred to collectively as 'French broadcasters'), who do not control filming conditions, must use all available means to prevent the appearance on their channels of brand names of alcoholic beverages. Thus, a French broadcaster must, at the time when it acquires the retransmission rights, inform its foreign partners of the requirements of French law and the rules laid down by the Code of Conduct. Likewise, it must make inquiries, so far as is materially possible and before the sporting event is broadcast, of the holder of the retransmission rights about the advertisements which will be displayed at the venue where that event is to take place. Finally, the French broadcaster must use all the technical means available to avoid showing hoardings advertising alcoholic beverages.

g 9. However, in the case of multinational events taking place abroad French broadcasters are not to be suspected of complicity with respect to advertising appearing on the screen where they have no control over the filming conditions of the pictures broadcast.

i 10. In the version applicable to the dispute in the main proceedings, the Code of Conduct defined multinational events as those 'in respect of which the images being retransmitted in a large number of countries cannot be regarded as being aimed principally at the French public'. Bi-national events were



defined as 'events taking place abroad other than those mentioned in the previous category, where the transmission is specifically aimed at a French audience'.

11. Besides drawing up the Code of Conduct, the CSA approached French broadcasters to persuade them to insist on the removal of such hoardings advertising alcoholic beverages or not to retransmit the event at all. In at least one case the CSA referred a case to the state Prosecutor for proceedings to be brought against a French broadcaster. However, since the Code was adopted the CSA has taken action against such a broadcaster only once, in 1996.

#### PRE-LITIGATION PROCEDURE

12. After inviting the French Republic to submit its observations the Commission sent it a reasoned opinion, on 21 November 1996, stating that the prohibition on television advertising for alcoholic beverages sold in France, in the case of indirect television advertising resulting from the appearance on screen of hoardings visible during the retransmission of bi-national sporting events taking place in other member states, appeared to be incompatible with the freedom to provide services. Furthermore, the French Republic was called on to take the measures necessary to comply with that reasoned opinion within a period of two months from the date of notification thereof.

13. Contact between the Commission and the French authorities continued thereafter, leading to various modifications of the Code of Conduct.

14. However, since it found that there were still practical problems with the application of the Loi Evin and that the amendments proposed by the French authorities were not sufficient to remedy them, the Commission decided to bring the present infringement proceedings.

15. By order of the President of the court of 3 December 2002 the United Kingdom of Great Britain and Northern Ireland was given leave, in accordance with the first paragraph of art 37 of the EC Statute of the Court of Justice and art 93(1) of the Rules of Procedure, to intervene in support of the forms of order sought by the Commission.

#### THE ACTION

16. In support of its action the Commission relies on a single plea in law, alleging that the French rules prohibiting television advertising for alcoholic beverages sold in France, in the case of indirect television advertising resulting from the appearance on screen of hoardings visible during the retransmission of bi-national sporting events held in other member states ('the television advertising rules at issue'), is incompatible with art 59 of the Treaty.

#### *Arguments of the parties*

17. The Commission and the United Kingdom government argue that the French rules on television advertising are contrary to art 59 of the Treaty.

18. They entail restrictions on the freedom to provide advertising services and television broadcasting services.

19. Furthermore, although they may in principle be justified for reasons relating to the protection of public health, as art 56(1) of the EC Treaty (now, after amendment, art 46(1) EC) read in combination with art 66 of the EC Treaty (now art 55 EC) permits, such rules are disproportionate.

20. The French government contends that the French rules on television advertising are not contrary to art 59 of the Treaty.

- a 21. Even if they entail a restriction within the meaning of art 59 of the Treaty, they are in any event justified by reasons relating to the protection of public health and the need to prevent evasion of the applicable rules. Furthermore, the French government submits that such rules are proportionate to the objectives pursued.
- b *Findings of the court*
22. Article 59 of the Treaty requires the elimination of any restriction on the freedom to provide services, even if it applies to national providers of services and to those of other member states alike, when it is liable to prohibit or otherwise impede the activities of a provider of services established in another member state where he lawfully provides similar services (see to that effect *Säger v Dennemeyer & Co Ltd* Case C-76/90 [1991] ECR I-4221 (para 12) and *Criminal proceedings against Corsten* Case C-58/98 [2000] ECR I-7919 (para 33)). Moreover, freedom to provide services is enjoyed by both providers and recipients of services (see to that effect *Luisi v Ministero del Tesoro* Joined cases 286/82 and 26/83 [1984] ECR 377 (para 16)).
- c
- d 23. The freedom to provide services may, however, in the absence of Community harmonisation measures, be limited by national rules justified by the reasons mentioned in art 56(1) of the EC Treaty, read together with art 66, or for overriding requirements of the general interest (see, to that effect, *Criminal proceedings against Gambelli* and Case C-243/01 (2003) Transcript (opinion), 13 March, (2003) Transcript (judgment), 6 November).
- e 24. In that context, it is for the member states to decide on the degree of protection which they wish to afford to public health and on the way in which that protection is to be achieved. They may do so, however, only within the limits set by the Treaty and must, in particular, observe the principle of proportionality (see *Aragonesa de Publicidad Exterior SA v Departamento de Sanidad y Seguridad Social de la Generalitat de Cataluña* Joined cases C-1/90 and C-176/90 [1991] ECR I-4151 (para 16)), which requires that the measures adopted be appropriate to secure the attainment of the objective which they pursue and not go beyond what is necessary in order to attain it (see, in particular, *Säger's* case (para 15), *Criminal proceedings against Arblade*, *Criminal proceedings against Leloup* Joined cases C-369/96 and C-376/96 [1999] ECR I-8453 (para 35), *Corsten's* case (para 39) and *Canal Satélite Digital SL v Administración General del Estado* Case C-390/99 [2002] ECR I-607 (para 33)).
- f
- g 25. In order to assess the merits of the Commission's plea in this case, since there are no Community harmonisation measures on the matter, three points must be examined in turn, namely, whether there is a restriction within the meaning of art 59 of the Treaty, whether there may be justification for French rules on television advertising such as those at issue in the main proceedings under art 56(1) of the Treaty, read together with art 66, and whether those rules are proportionate.
- h
- i 26. In the first place, it must be observed that the French rules on television advertising constitute a restriction on freedom to provide services within the meaning of art 59 of the Treaty. They entail a restriction on freedom to provide advertising services in so far as the owners of the advertising hoardings must refuse, as a preventive measure, any advertising for alcoholic beverages if the sporting event is likely to be retransmitted in France. They also impede the provision of broadcasting services for television programmes. French broadcasters must refuse all retransmission of sporting events in which hoardings bearing advertising for alcoholic beverages marketed in France may

be visible. Furthermore, the organisers of sporting events taking place outside France cannot sell the retransmission rights to French broadcasters if the transmission of the television programmes of such events is likely to contain indirect television advertising for those alcoholic beverages. a

27. In that regard, the arguments relied on by the French government against classing the rules as 'restrictive' within the meaning of art 59 cannot be accepted. b

28. Although it is true that it is technically possible to mask the images in order selectively to conceal the hoardings showing advertising for alcoholic beverages, the use of such techniques involves substantial additional costs for the French broadcasters, as the French government admitted at the hearing.

29. As regards the argument that the French rules on television advertising at issue concern, without discrimination, not only alcoholic beverages produced in France, but also alcoholic beverages regardless of their origin, so long as they are sold on French territory, it is sufficient to recall that in the context of the freedom to provide services it is only the origin of the service at issue which may be relevant to the case. c

30. Second, the French rules on television advertising pursue an objective relating to the protection of public health within the meaning of art 56(1) of the Treaty, as Advocate General Tizzano stated in para 69 of his opinion. Measures restricting the advertising of alcoholic beverages in order to combat alcohol abuse reflect public health concerns (see *EC Commission v France* Case 152/78 [1980] ECR 2299 (para 17), the *Aragonesa de Publicidad* case (para 15) and *Konsumentombudsmannen (KO) v Gourmet International Products AB* Case C-405/98 [2001] All ER (EC) 308, [2001] ECR I-1795 (para 27)). d

31. Third, the French rules on television advertising are appropriate to ensure their aim of protecting public health. Furthermore, they do not go beyond what is necessary to achieve such an objective. They limit the situations in which hoardings advertising alcoholic beverages may be seen on television and are therefore likely to restrict the broadcasting of such advertising, thus reducing the occasions on which television viewers might be encouraged to consume alcoholic beverages. e

32. In that regard, the arguments set out by the Commission and the United Kingdom to establish the disproportionate nature of those rules cannot be accepted. f

33. As far as concerns the argument that the French rules on television advertising are inconsistent, since they apply only to alcoholic beverages whose alcohol content exceeds 1.2°, concern only television advertising, and do not apply to advertising for tobacco, it is sufficient to reply that that option lies within the discretion of the member states to decide on the degree of protection which they wish to afford to public health and on the way on which that protection is to be achieved (see the *Aragonesa de Publicidad* case (para 16)). g

34. As regards the argument that the rules mean in practice that whole events cannot be broadcast, although there are less restrictive measures to ensure the protection of public health, it must be observed that, for the reasons given by Advocate General Tizzano in paras 103 and 104 of his opinion, having regard, first, to the technical means currently available and, second, to their excessive cost, there is not currently any measure which is less restrictive which can exclude or conceal indirect television advertising for alcoholic beverages resulting from hoardings visible during the retransmission of sporting events. Since that advertising appears on screen only sporadically and only for a few seconds, it is not possible either to control its content or to insert warnings at h  
i



a the same time as the appearance of the advertisement on the screen on the dangers resulting from an excessive consumption of alcohol.

35. As regards the argument that the French rules on television advertising have the result that television advertising for alcoholic beverages is authorised where the French audience is overall very high (multinational events), but prohibited where the French audience is not so high (bi-national events), it is sufficient to observe that by limiting the prohibition to indirect advertising broadcast during the retransmission of sporting events which specifically target a French audience and when the advertising is therefore capable of specifically targeting that audience alone, the rules can only make the measure less prejudicial to the freedom to provide services and, therefore, more proportionate to the objective pursued.

36. The same is true as regards the argument that the French rules on television advertising at issue are, in practice, only applied to advertising for alcoholic beverages marketed in France. Limiting the prohibition at issue to advertising for products which are marketed in France, and thus restricting the scope of that prohibition, reduces the impediment to the freedom to provide services and makes it therefore more proportionate to the objective pursued.

37. As regards the argument that advertising for alcoholic beverages is permitted in certain member states, it must be observed that, as Advocate General Tizzano stated in para 106 of his opinion, the fact that one member state imposes less strict rules than another member state does not mean that the latter's rules are disproportionate (see *Alpine Investments BV v Minister van Financiën* Case C-384/93 [1995] All ER (EC) 543, [1995] ECR I-1141 (para 51)).

38. As regards the argument that the application of the French rules on advertising might duplicate controls already carried out in the context of the procedures in force in another member state, it must be observed that, as Advocate General Tizzano states in para 105 of his opinion, if the member state in which the sporting event is taking place prohibits the transmission of the images of hoardings displaying advertising for alcoholic beverages, that event can be broadcast in France without the need for controls. If, on the other hand, such a ban does not exist in the member state in which the sporting event is taking place, the control imposed by the French authorities will be the only one.

39. Finally, as far as concerns the argument that some of the rules are ambiguous, it is sufficient to state that for the reasons stated by the Advocate General in para 91 of his opinion, the provisions in question are sufficiently clear and precise. The rules on television advertising at issue define with sufficient precision, for the broadcasters concerned, the cases in which the retransmission of sporting events is prohibited.

40. It is clear from all the foregoing considerations that in those circumstances the single plea relied on by the Commission in support of its action cannot be accepted and, therefore, it must be rejected.

#### COSTS

i 41. Under art 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the French Republic has applied for costs and the Commission has been unsuccessful, the Commission must be ordered to pay the costs. In accordance with the first subparagraph of art 69(4), the United Kingdom is to pay its own costs.

On those grounds, the Court of Justice (Grand Chamber) hereby:

- (1) Dismisses the action;
- (2) Orders the Commission of the European Communities to pay the costs;
- (3) Orders the United Kingdom of Great Britain and Northern Ireland to bear its own costs.

13 July 2004. **The COURT OF JUSTICE (Grand Chamber)** delivered the following judgment in *Bacardi France SAS v Télévision Française 1 SA (TF1)* Case C-429/02.

1. By decision of 19 November 2002, received at the Court of Justice of the European Communities on 27 November 2002, the French Cour de Cassation (Court of Cassation) referred to the court for a preliminary ruling under art 234 EC (formerly art 177 of the EC Treaty) two questions on the interpretation of Council Directive (EEC) 89/552 (on the co-ordination of certain provisions laid down by law, regulation or administrative action in member states concerning the pursuit of television broadcasting activities) (OJ 1989 L298 p 23) and art 59 of the EC Treaty (now, after amendment, art 49 EC).

2. Those questions were raised in proceedings between Bacardi France SAS, formerly Bacardi-Martini SAS (Bacardi), and Télévision Française 1 SA (TF1), Groupe Jean-Claude Darmon SA (Darmon) and Giro Sport SARL (Giro Sport), seeking an order that the latter three undertakings cease to put pressure on foreign clubs to refuse advertising for alcoholic beverages produced by Bacardi on advertising hoardings placed in venues hosting bi-national sporting events taking place in other member states.

#### LEGAL BACKGROUND

##### *Community legislation*

3. Directive 89/552 aims to abolish restrictions on the free movement of services in the broadcasting of television programmes. To that end, it lays down the principle of freedom to receive and transmit programmes across borders and co-ordinates the laws applicable thereto in the different member states in fields such as television advertising. According to the system put in place by that directive, it is for the originating member state to regulate and monitor broadcasts transmitted across borders while observing the minimum rules laid down by the directive. By contrast, in the fields co-ordinated by the directive the receiving member states are, generally, no longer competent.

##### *Definitions*

4. 'Television advertising' is defined in art 1(b) of Directive 89/552 as—

'any form of announcement broadcast in return for payment or for similar consideration by a public or private undertaking in connection with a trade, business, craft or profession in order to promote the supply of goods or services, including immovable property, or rights and obligations, in return for payment.'

##### *Substantive rules*

5. The first sentence of art 2(2) of Directive 89/552 provides:

'Member States shall ensure freedom of reception and shall not restrict retransmission on their territory of television broadcasts from other Member States for reasons which fall within the fields coordinated by this Directive.'

a 6. Article 10(1) of the directive states:

'Television advertising shall be readily recognizable as such and kept quite separate from other parts of the programme service by optical and/or acoustic means.'

b 7. The first sentence of art 11(1) of the directive provides that 'Advertisements shall be inserted between programmes'.

8. According to art 11(2) of Directive 89/552:

'In programmes consisting of autonomous parts, or in sports programmes and similarly structured events and performances comprising intervals, advertisements shall only be inserted between the parts or in the intervals.'

c

*National legislation*

*Substantive rules*

d 9. Law No 91-32 of 10 January 1991 on the campaign against smoking and alcoholism (Loi Evin) (JORF of 12 January 1991, p 6615) amended, inter alia, arts L. 17 to L. 21 of the Code des débits de boissons et des mesures contre l'alcoolisme (Code of licensed premises and measures against alcoholism), which restrict advertising for certain alcoholic beverages, namely beverages whose alcoholic content exceeds 1.2°.

e 10. According to those provisions television advertising for alcoholic beverages, whether direct or indirect, is prohibited and that prohibition is repeated in art 8 of Decree No 92-280 of 27 March 1992, which was adopted to implement art 27 of the Law of 30 September 1986 on freedom of communication and laying down the general principles concerning the rules applicable to advertising and sponsorship (JORF of 28 March 1992, p 4313).

f 11. Other forms of advertising are, however, permitted by French legislation. Thus it is permissible, for example, to advertise alcoholic beverages in the press, on the radio (except at certain times) or in the form of posters and signboards, including on advertising hoardings placed in sports stadia, etc.

12. An infringement of the Loi Evin is classified as a 'délit' (misdemeanour) by French criminal law.

g *Procedural rules*

h 13. According to the first paragraph of art 42 of Law No 86-1067 of 30 September 1986 on the freedom of communication, the 'Loi Léotard' (JORF of 1 October 1986, p 11755), it is for the Conseil supérieur audiovisuel (the Audiovisual Authority; the CSA) to ensure the application of the Loi Evin. In that context, the CSA may call on the distributors of television services to comply with their obligations and, where they do not comply with the requirements imposed on them, it may order administrative penalties against them. Furthermore, the CSA may refer any infringements committed by distributors to the Procureur de la République (Public Prosecutor).

i *Implementing measures*

14. In 1995 the French authorities, that is to say the CSA and the Ministry for Youth and Sports, and the French television channels drew up a Code of Conduct, published in the Bulletin Officiel du Ministère de la Jeunesse et des Sports, on the interpretation of the rules of the Loi Evin so far as concerns their application to television broadcasting of sporting events taking place



abroad (that is, live broadcasts or retransmissions) in which advertising for alcoholic beverages is visible, for example on advertising hoardings or on sports shirts, and which are, accordingly, likely to contain indirect television advertising for alcoholic beverages within the meaning of that law. a

15. Although it is not legally binding, the Code of Conduct states that in the case of bi-national events taking place abroad, which are described in the Code as 'other events', French broadcasters and any other party subject to French law (referred to collectively as 'French broadcasters'), who do not control filming conditions, must use all available means to prevent the appearance on their channels of brand names of alcoholic beverages. Thus, a French broadcaster must, at the time when it acquires the retransmission rights, inform its foreign partners of the requirements of French law and the rules laid down by the Code of Conduct. Likewise, it must make inquiries, so far as is materially possible and before the sporting event is broadcast, of the holder of the retransmission rights about the advertisements which will be displayed at the venue where that event is to take place. Finally, the French broadcaster must use all the technical means available to avoid showing hoardings advertising alcoholic beverages. b  
c  
d

16. However, in the case of multinational events taking place abroad French broadcasters are not to be suspected of complicity with respect to advertising appearing on the screen where they have no control over the filming conditions of the pictures broadcast.

17. In the version applicable to the dispute in the main proceedings, the Code of Conduct defined multinational events as those 'in respect of which the images being retransmitted in a large number of countries cannot be regarded as being aimed principally at the French public'. Bi-national events were defined as 'events taking place abroad other than those mentioned in the previous category, where the transmission is specifically aimed at a French audience'. e

18. Besides drawing up the Code of Conduct, the CSA approached French broadcasters to persuade them to insist on the removal of such hoardings advertising alcoholic beverages or not to retransmit the event at all. In at least one case the CSA referred a case to the state Prosecutor for proceedings to be brought against a French broadcaster. f

#### THE MAIN PROCEEDINGS AND THE QUESTIONS REFERRED g

19. Bacardi is a French company belonging to the international group Bacardi-Martini, which produces and markets numerous alcoholic beverages in most countries of the world, including Bacardi rum, Martini and Duval pastis.

20. Darmon and Girosport are companies which negotiate on behalf of TF1 for television retransmission rights for football matches. h

21. Relying on the alleged fact that Darmon and Girosport put pressure on foreign clubs to refuse to allow Bacardi's brand names to appear on advertising hoardings around sports stadia, Bacardi sought an order that Darmon, Girosport and TF1 should cease that conduct as being incompatible with art 59 of the Treaty.

22. After that application was rejected both at first instance and on appeal, Bacardi appealed on a point of law. i

23. As it was in doubt as to the compatibility with Community law of the French rules prohibiting television advertising for alcoholic beverages marketed in France, in the case of indirect television advertising resulting from the appearance on screen of hoardings visible during the retransmission of

a bi-national sporting events taking place in other member states ('the television advertising rules at issue in the main proceedings'), the Court of Cassation decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

b (1) [Does] Directive 89/552/EEC of 3 October 1989 ("Television without frontiers"), in the version prior to that of Directive 97/36/EC of 30 June 1997, [preclude] national legislation, such as Articles L.17 to L. 21 of the French Code des débits de boissons and Article 8 of Decree No 92-280 of 27 March 1992, which prohibits, for reasons relating to the protection of public health and on pain of criminal penalties, advertising for alcoholic drinks, whether of national origin or from other Member States of the Union, on television, whether in the form of advertising spots within the meaning of Article 10 of the directive [direct advertising] or of indirect advertising as a result of hoardings advertising alcoholic drinks appearing on television without constituting surreptitious advertising within the meaning of Article 1(c) of the directive[?]

d (2) [Are] Article 49 EC and the principle of the free movement of television broadcasts within the Union to be interpreted as precluding a national provision such as that in Articles L.17 to L. 21 of the French Code des débits de boissons and Article 8 of Decree No 92-280 of 27 March 1992 which prohibits, for reasons relating to the protection of public health and on pain of criminal penalties, advertising for alcoholic drinks, whether of national origin or from other Member States of the Union, on television, whether in the form of advertising spots within the meaning of Article 10 of the directive [direct advertising] or of indirect advertising as a result of hoardings advertising alcoholic drinks appearing on television without constituting surreptitious advertising within the meaning of Article 1(c) of the directive, from having the effect that operators responsible for the broadcasting and distribution of television programmes: (a) refrain from broadcasting television programmes, such as in particular retransmissions of sporting events, whether held in France or in other countries of the Union, where they show prohibited advertisements within the meaning of the French Code des débits de boissons, or (b) broadcast them on condition that prohibited advertisements within the meaning of the French Code des débits de boissons do not appear, thereby preventing the conclusion of advertising contracts concerning alcoholic drinks whether of national origin or from other Member States of the Union[?]

#### THE QUESTIONS REFERRED

h *The first question: the obligation to ensure freedom of reception and retransmission*

24. By its first question the national court asks, essentially, whether the first sentence of art 2(2) of Directive 89/552 precludes a member state from prohibiting television advertising for alcoholic beverages marketed in that state, in the case of indirect television advertising resulting from the appearance on screen of hoardings visible during the retransmission of bi-national sporting events taking place in other member states.

i In that context, the national court wishes to know whether such indirect television advertising must be classified as 'television advertising' within the meaning of arts 1(b), 10 and 11 of the directive.

25. The first sentence of art 2(2) of Directive 89/552 requires member states to ensure freedom of reception and not to restrict retransmission on their

territory of television broadcasts from other member states for reasons which fall within the fields co-ordinated by the directive. Articles 10 to 21 harmonise the rules on television advertising. a

26. By the definition given in art 1(b) of Directive 89/552, 'television advertising' comprises—

'any form of announcement broadcast in return for payment or for similar consideration by a public or private undertaking in connection with a trade, business, craft or profession in order to promote the supply of goods or services, including immovable property, or rights and obligations, in return for payment.' b

Under art 10(1) 'television advertising shall be readily recognisable as such and kept quite separate from other parts of the programme service by optical and/or acoustic means'. The first sentence of art 11(1) provides that 'advertisements shall be inserted between programmes' and art 11(2) states that 'in programmes consisting of autonomous parts, or in sports programmes and similarly structured events and performances comprising intervals, advertisements shall only be inserted between the parts or in the intervals'. c

27. In this case, for the reasons set out by Advocate General Tizzano in paras 48 to 52 of his opinion, the indirect television advertising for alcoholic beverages resulting from hoardings visible on screen during the retransmission of sporting events does not constitute a separate announcement broadcast in order to promote goods or services. For obvious reasons, it is impossible to show such advertising only during the intervals between the different parts of the television broadcast concerned. The images on the advertising hoardings which appear in the background of the pictures broadcast, in a random and unpredictable fashion according to the requirements of the retransmission, do not have any distinct character in that context. d

28. Such indirect television advertising cannot, therefore, be regarded as 'television advertising' within the meaning of Directive 89/552, and accordingly the directive is not applicable to it. e

29. Consequently, the answer to the first question must be that the first sentence of art 2(2) of Directive 89/552 does not preclude a member state from prohibiting television advertising for alcoholic beverages marketed in that state, in the case of indirect television advertising resulting from the appearance on screen of hoardings visible during the retransmission of bi-national sporting events taking place in other member states. f

That kind of indirect television advertising is not to be classed as 'television advertising' within the meaning of arts 1(b), 10 and 11 of the directive. g

### *Second question: freedom to provide services* h

30. By its second question, the national court asks, essentially, whether art 59 of the Treaty (now, after amendment, art 49 EC) precludes a member state from prohibiting television advertising for alcoholic beverages marketed in that state, in the case of indirect television advertising resulting from the appearance on screen of hoardings visible during the retransmission of bi-national sporting events taking place in other member states. i

31. Article 59 of the Treaty requires the elimination of any restriction on the freedom to provide services, even if it applies to national providers of services and to those of other member states alike, when it is liable to prohibit or otherwise impede the activities of a provider of services established in another member state where he lawfully provides similar services (see to that effect



a *Säger v Dennemeyer & Co Ltd* Case C-76/90 [1991] ECR I-4221 (para 12) and *Criminal proceedings against Corsten* Case C-58/98 [2000] ECR I-7919 (para 33)). Moreover, freedom to provide services is enjoyed by both providers and recipients of services (see to that effect *Luisi v Ministero del Tesoro* Joined cases 286/82 and 26/83 [1984] ECR 377 (para 16)).

b 32. The freedom to provide services may, however, in the absence of Community harmonisation measures, be limited by national rules justified by the reasons mentioned in art 56(1) of the EC Treaty (now, after amendment art 46(1) EC) read together with art 66 of the EC Treaty (now art 55 EC), or for overriding requirements of the general interest (see, to that effect, *Criminal proceedings against Gambelli* Case C-243/01 (2003) Transcript (opinion), 13 March, (2003) Transcript (judgment), 6 November).

c 33. In that context, it is for the member states to decide on the degree of protection which they wish to afford to public health and on the way in which that protection is to be achieved. They may do so, however, only within the limits set by the Treaty and must, in particular, observe the principle of proportionality (see *Aragonesa de Publicidad Exterior SA v Departamento de Sanidad y Seguridad Social de la Generalitat de Cataluña* Joined cases C-1/90 and C-176/90 [1991] ECR I-4151 (para 16)), which requires that the measures adopted be appropriate to secure the attainment of the objective which they pursue and not go beyond what is necessary in order to attain it (see, in particular, *Säger's* case (para 15), *Criminal proceedings against Arblade*, *Criminal proceedings against Leloup* Joined cases C-369/96 and C-376/96 [1999] ECR I-8453 (para 35), *Corsten's* case (para 39) and *Canal Satélite Digital SL v Administración General del Estado* Case C-390/99 [2002] ECR I-607 (para 33)).

d 34. In the main proceedings, since there are no Community harmonisation measures on the matter, three points must be examined in turn, namely, whether there is a restriction within the meaning of art 59 of the Treaty, whether there may be justification for rules on television advertising such as those at issue in the main proceedings under art 56(1) of the Treaty, read together with art 66, and whether those rules are proportionate.

e 35. In the first place, it must be observed that rules on television advertising such as those at issue in the main proceedings constitute a restriction on freedom to provide services within the meaning of art 59 of the Treaty. They entail a restriction on freedom to provide advertising services in so far as the owners of the advertising hoardings must refuse, as a preventive measure, any advertising for alcoholic beverages if the sporting event is likely to be retransmitted in France. They also impede the provision of broadcasting services for television programmes. French broadcasters must refuse all retransmission of sporting events in which hoardings bearing advertising for alcoholic beverages marketed in France may be visible. Furthermore, the organisers of sporting events taking place outside France cannot sell the retransmission rights to French broadcasters if the transmission of the television programmes of such events is likely to contain indirect television advertising for those alcoholic beverages.

f 36. In that context, as is clear from paras 28 and 29 of today's judgment in *European Commission (supported by the United Kingdom, intervening) v France* Case C-262/02 [2005] All ER (EC) 157, the arguments of the French government concerning, first, the technical possibility of masking images in order selectively to conceal the hoardings showing advertising for alcoholic beverages and, second, the non-discriminatory application of the rules on television advertising to all alcoholic beverages, whether they are produced in France or

abroad, cannot be accepted. Although it is true that such technical means exist, they involve substantial additional costs for the French broadcasters. Furthermore, in the context of the freedom to provide services, it is only the origin of the service at issue which may be relevant in the case in these proceedings. a

37. Second, rules on television advertising such as those at issue in the main proceedings pursue an objective relating to the protection of public health within the meaning of art 56(1) of the Treaty, as Advocate General Tizzano stated in para 69 of his opinion. Measures restricting the advertising of alcoholic beverages in order to combat alcohol abuse reflect public health concerns (see *EC Commission v France* Case 152/78 [1980] ECR 2299 (para 17), the *Aragonesa de Publicidad* case (para 15) and *Konsumentombudsmannen (KO) v Gourmet International Products AB* Case C-405/98 [2001] All ER (EC) 308, [2001] ECR I-1795 (para 27)). b  
c

38. Third, rules on television advertising such as those at issue in the main proceedings are appropriate to ensure their aim of protecting public health. Furthermore, they do not go beyond what is necessary to achieve such an objective. They limit the situations in which hoardings advertising alcoholic beverages may be seen on television and are therefore likely to restrict the broadcasting of such advertising, thus reducing the occasions on which television viewers might be encouraged to consume alcoholic beverages. d

39. In that regard, as is clear from paras 33 to 39 of today's judgment in *Commission v France*, the arguments set out by the Commission and the United Kingdom government to establish the disproportionate nature of that regime must be rejected. e

40. As far as concerns the one argument raised by Bacardi which was not considered in today's judgment in *Commission v France*, namely the argument that the rules on television advertising at issue in the main proceedings are not consistent because they do not cover advertising for alcoholic beverages visible in the background on film sets, that option lies within the discretion of the member states to decide on the degree of protection which they wish to afford to public health and on the way in which that protection is to be achieved (see the *Aragonesa de Publicidad* case (para 16)). f

41. Accordingly, the answer to the second question is that art 59 of the Treaty does not preclude a member state from prohibiting television advertising for alcoholic beverages marketed in that state, in the case of indirect television advertising resulting from the appearance on screen of hoardings visible during the retransmission of bi-national sporting events taking place in other member states. g

#### COSTS

42. The costs incurred by the French and United Kingdom governments and the Commission, which have submitted observations to the court, are not recoverable. Since these proceedings are, for the parties to the main action, a step in the proceedings before the national court, the decision on costs is a matter for that court. h

On those grounds, the Court of Justice (Grand Chamber), in answer to the questions referred to it by the Cour de Cassation by judgment of 19 November 2002, hereby rules: i

(1) The first sentence of art 2(2) of Council Directive (EEC) 89/552 (on the co-ordination of certain provisions laid down by law, regulation or

- a* administrative action in member states concerning the pursuit of television broadcasting activities) does not preclude a member state from prohibiting television advertising for alcoholic beverages marketed in that state, in the case of indirect television advertising resulting from the appearance on screen of hoardings visible during the retransmission of bi-national sporting events taking place in the territory of other member states.
- b* That kind of indirect television advertising is not to be classed as 'television advertising' within the meaning of arts 1(b), 10 and 11 of the directive.
- (2) Article 59 of the EC Treaty (now, after amendment, art 49 EC) does not preclude a member state from prohibiting television advertising for alcoholic beverages marketed in that state, in the case of indirect television advertising resulting from the appearance on screen of hoardings visible during the retransmission of bi-national sporting events taking place in other member states.
- c*



**R (on the application of Novartis  
Pharmaceuticals UK Ltd) v Licensing  
Authority and others**  
(Case C-106/01)

COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES (SIXTH CHAMBER)

JUDGES SKOURIS (ACTING FOR THE PRESIDENT OF THE SIXTH CHAMBER),  
GULMANN (RAPPORTEUR), CUNHA RODRIGUES, PUISOCHET AND SCHINTGEN  
ADVOCATE GENERAL JACOBS

7 NOVEMBER 2002, 23 JANUARY 2003, 29 APRIL 2004

*Medicine – Product licence – Generic product – Essential similarity – Demonstrating essential similarity – Use of originator's confidential information – Originator supplying details of research and testing in development of drug when applying to licensing authority for product licence – Originator granted product licence for similar generic product by reference to original product – Generic company subsequently applying for product licence for similar generic product by reference to originator's first product – Whether confidential information provided originator in course of product licencing procedure for second generic product to be accorded further period of protection – Council Directive (EEC) 65/65, art 4(8)(a).*

An applicant for a marketing authorisation for a medicinal product granted by the competent authorities of the United Kingdom was not required to provide the results of pharmacological and toxicological tests and of clinical trials of the medicinal product concerned where the abridged procedure under art 4(8)(a)<sup>a</sup> of Council Directive (EEC) 65/65 (on the approximation of provisions laid down by law, regulation or administrative action relating to medicinal products) applied. In order to rely on the abridged procedure, the applicant had to submit data in respect of another 'reference' product which had already been authorised and demonstrate either, pursuant to art 4(8)(a)(i), that the medicinal product was essentially similar to the reference product and that the person responsible for marketing that reference product had consented to the relevant data being used, or, pursuant to art 4(8)(a)(iii), that the medicinal product concerned was essentially similar to a reference product which had been authorised within the Community for not less than ten years. However, by way of a proviso, the abridged procedure did not apply where the medicinal product was intended for a different therapeutic use from that of the reference product and was to be administered by different routes or in different doses. The main proceedings concerned three immuno-suppressant medical products that contained the active ingredient cyclosporine. When diluted to form a solution to be drunk by a patient, those medical products reacted differently: Sandimmun formed a macroemulsion; Neoral formed a microemulsion; and SangCya underwent a process of nano dispersion. As a result of that differing dissolution, the bioavailability (the rate and extent of absorption into the body and transfer to the site of action) of the products differed, which was important because cyclosporine had a narrow therapeutic

<sup>a</sup> Article 4(8)(a) is set out at judgment para 4, below

- a* index (the dose within which clinical efficacy was observed with an acceptable safety profile). The claimant's product, Sandimmun, had been the first cyclosporine product to have been authorised within the Community. Thereafter, in order to overcome that product's problems of absorption and administration, the claimant had developed Neoral, marketing authorisation for which had been granted by the competent authorities in the United
- b* Kingdom under art 4(8)(a)(i) of the directive as a hybrid abridged application cross-referred to the data relating to Sandimmun. However, after the ten-year period of protection granted in respect of Sandimmun had expired, the competent authorities had granted marketing authorisations in respect of the defendant's product, SangCya, under art 4(8)(a)(iii) of the directive, and by reference to Sandimmun. The defendant had included with its application data
- c* studies showing the bioequivalence between SangCya and Neoral. In due course, the claimant brought judicial review proceedings challenging the decision to grant the marketing authorisation to SangCya, contending that the competent authorities had cross-referred unlawfully to the Neoral file, had erred in finding that SangCya was essentially similar to Sandimmun, and
- d* had infringed the principle of non-discrimination. On an appeal, the national court decided to stay the proceedings and refer to the Court of Justice of the European Communities a number of questions concerning whether the dispensation from providing the pharmacological, toxicological and clinical documentation laid down by art 4(8)(a)(iii) applied in conjunction with the proviso, or whether the documentation provided by the claimant in the course
- e* of the marketing authorisation procedure for Neoral had to be accorded a further period of protection of ten years, so that it could not be used by the claimant in assessing the application for marketing authorisation for SangCya.

**Held** – (1) Products were not to be regarded as essentially similar for the purposes of the application of art 4(8)(a)(i) or (iii) of the directive where they

*f* were not bioequivalent (see judgment paras 33, 35, below); *R v Licensing Authority established by the Medicines Act 1968, ex p Generics (UK) Ltd (ER Squibb & Sons Ltd, intervener)* Case C-368/96 (1998) 48 BMLR 161 applied.

(2) For the purposes of the procedure laid down by art 4(8)(a)(i) and (iii) of the directive, in determining the pharmaceutical form of a medicinal product, account had to be taken of the form in which it was presented and the form in which it was administered, including the physical form (according to the list of reference terms of the European Pharmacopoeia). In the main proceedings, the fact that the three products formed, when mixed for administering to a patient, respectively, a macroemulsion, a microemulsion and a nanodispersion, did not preclude those products being treated as having the same

*g* pharmaceutical form, provided that the differences in the form of

*h* administration were not significant in scientific terms (see judgment paras 39, 41, 42, below).

(3) The proviso in the form of the hybrid abridged procedure laid down by the final subparagraph of art 4(8)(a) applied to applications for marketing authorisation based on art 4(8)(a)(i) or (iii). If it was ethically and scientifically

*i* inappropriate to repeat all tests for an application which otherwise satisfied all the requirements under art 4(8)(a)(iii), it was also inappropriate to repeat those tests for an application which otherwise satisfied the requirements set out in art 4(8)(a)(i) (see judgment paras 46, 47, below).

(4) An application for marketing authorisation for a medicinal product might be made under the proviso with reference to an authorised medicinal product

provided that the medicinal product in respect of which marketing authorisation was sought was essentially similar to the authorised medicinal product, unless one or more of the differences set out in the proviso applied. If recourse to the proviso were only possible where the medicinal product in question was essentially similar to the reference medical product and, therefore, inter alia, bioequivalent to it, the proviso would be largely effective in the case of medicinal products to be administered by different routes or in different doses from those of other medicinal products on the market. Where those differences existed, the purpose of the applicant's obligation under the proviso to provide the results of appropriate pharmacological and toxicological tests and clinical trials was to prove the safety and efficacy of that medicinal product (see judgment paras 52, 54, 55, below); *R v Licensing Authority established by the Medicines Act 1968, ex p Generics (UK) Ltd (ER Squibb & Sons Ltd, intervenor)* Case C-368/96 (1998) 48 BMLR 161 applied. a  
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(5) When considering an application for marketing authorisation for a new product C under art 4(8)(a)(iii) by reference to a product A (which had been authorised for more than six or ten years), the competent authority of a member state was entitled, with a view to granting marketing authorisation, to refer without the consent of the person responsible for marketing to data submitted in support of a product B (which had been authorised within the previous six or ten years under the hybrid abridged procedure laid down by art 4(8)(a), by reference to product A), where those data consisted of clinical trials provided in order to demonstrate that product B, though suprabioavailable to product A when administered in the same dose, was safe. A medicinal product that was to be administered by a different route or in a different dose to a medicinal product on the market was a development of that latter reference medicinal product in the same way as was a medicinal product intended for a different therapeutic use from that of the original or reference medicinal product. If product B resulting from the development of the reference product A was essentially similar to that reference product, apart from its bioavailability, since that difference was nevertheless not attributable to a difference in the route of administration or the dose, the applicant for marketing authorisation for product C was entitled to refer to the clinical documentation in respect of product B. Further, if, the applicant for marketing authorisation for product C might refer to the pharmacological, toxicological and clinical documentation in respect of product B, which was the product of the development of the reference product A and essentially similar thereto, apart from the route of administration or the dose, since the differences in those two factors generally implied that products A and B were not bioequivalent, it had to be able to do so where products A and B were distinguishable only by their different bioavailability, even though the route of administration and dose remain unchanged (see judgment paras 60, 63–67, below). d  
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(6) In considering two hybrid applications for marketing authorisation for products B and C brought under art 4(8) of the directive and referring to product A, the competent authority of a member state did not infringe the principle of non-discrimination where, as a precondition for the grant of marketing authorisation, it had required full clinical data on the bioavailability of product B, but, having examined the data filed in support of product B, did not require the same data for product C. The situation of the applicant for marketing authorisation for product B was not comparable to that of the applicant for marketing authorisation for product C because, when the latter i



- a applicant had applied for marketing authorisation, product B was authorised and the authorities were assured of the safety and efficacy of that product (see judgment paras 70, 72, below).

### Notes

- b For supplementary protection for medicinal products, see Supp to 35 *Halsbury's Laws* (4th edn reissue) 347.

### Cases cited

- AstraZeneca A/S v Lægemeddelstyrelsen Case C-223/01 (2003) Transcript (opinion), 23 January, (2003) Transcript (judgment), 16 October, ECJ.
- c R v Licensing Authority established by the Medicines Act 1968, ex p Generics (UK) Ltd (ER Squibb & Sons Ltd, intervener) Case C-368/96 (1998) 48 BMLR 161, [1998] ECR I-7967, ECJ.
- R v Licensing Authority of the Dept of Health, ex p Scotia Pharmaceuticals Ltd Case C-440/93 (1995) 34 BMLR 171, [1995] ECR I-2851, ECJ.
- d R (on the application of Milk Marque Ltd) (Dairy Industry Federation, third party) v Competition Commission Case C-137/00 [2004] All ER (EC) 410, [2004] QB 442, [2004] 2 WLR 374, [2003] ECR I-7975, ECJ.
- Sermide SpA v Cassa Conguaglio Zuccheri Case 106/83 [1984] ECR 4209, ECJ.

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### Reference

- By order of 22 February 2001, the Court of Appeal (Civil Division) of England and Wales referred to the Court of Justice of the European Communities for a preliminary ruling under art 234 EC (formerly art 177 of the EC Treaty) six questions (set out at judgment para 23, below) on the interpretation of art 4(8)(a) of Council Directive (EEC) 65/65 (on the approximation of provisions laid down by law, regulation or administrative action relating to medicinal products), as amended. Those questions were raised in proceedings between Novartis Pharmaceuticals UK Ltd (Novartis) and the Medicines Control Agency (MCA) concerning the issue by the MCA of two marketing authorisations in respect of a medicinal product to SangStat UK Ltd, another pharmaceuticals company, and Imtix-SangStat UK Ltd, its distributor in the United Kingdom, in respect of two medicinal products, SangCya Oral Solution and Acceptine Oral Solution. Written observations were submitted on behalf of: Novartis, by I Dodds-Smith and R Hughes, Solicitors, D Anderson QC, and J Stratford, Barrister; SangStat UK Ltd and Imtix-SangStat UK Ltd, by T Cook and J Mutimear, Solicitors; the United Kingdom government, by JE Collins, acting as agent, P Sales, Barrister and R Singh QC; the Danish government, by J Molde, acting as agent; the French government, by G de Bergues and R Loosli-Surrans, acting as agents; the Portuguese government, by LI Fernandes, acting as agent; the Commission of the European Communities, by HC Støvlbæk and R Wainwright, acting as agents. Oral observations were made on behalf of: Novartis, SangStat UK Ltd and Imtix-SangStat UK Ltd, the United Kingdom government, represented by K Manji, acting as agent, and P Sales; the Danish government, the Netherlands government, represented by JGM van Bakel, acting as agent; and the Commission, represented by HC Støvlbæk and M Shotter, acting as agent. The language of the case was English. The facts are set out in the opinion of the Advocate General.
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23 January 2003. **The Advocate General (FG Jacobs)** delivered the following opinion<sup>1</sup>. a

1. In the present case the Court of Appeal (Civil Division) of England and Wales asks the Court of Justice of the European Communities six questions concerning the conditions which must be met under Community law before the competent authority in a member state may authorise the marketing of a medicinal product in that member state. b

2. In particular, the proceedings raise three issues relating to art 4 of Council Directive (EEC) 65/65 (on the approximation of provisions laid down by law, regulation and administrative action relating to medicinal products)<sup>2</sup>, as amended by Council Directive (EEC) 87/21<sup>3</sup>. They allow the court to consider further the interpretation of that article which it developed in *R v Licensing Authority established by the Medicines Act 1968, ex p Generics (UK) Ltd (ER Squibb & Sons Ltd, interveners)*<sup>4</sup>. The first issue concerns the circumstances in which a national licensing authority, processing an application for the marketing authorisation of a medicinal product pursuant to point (8)(a)(iii) of the third paragraph<sup>5</sup> of art 4 of Directive 65/65 (point (8)(a)(iii)), may make use of data submitted to it by a different applicant in respect of another product authorised within the six or ten year period specified in that provision. The second issue is whether, in order to obtain authorisation of a new product in reliance on the proviso contained in the final subparagraph of point (8)(a) (the proviso) in conjunction with point (8)(a)(i) of the third paragraph of art 4 (point (8)(a)(i)) or point (8)(a)(iii), it is necessary to demonstrate the essential similarity of the new product to the reference product specified pursuant to those latter provisions. The third issue relates to the circumstances in which one product can be said to be 'essentially similar' to another for the purposes of points (8)(a)(i) and (iii). c  
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#### LEGAL FRAMEWORK f

3. Given the obvious need to regulate the marketing of medicinal products in the interests of public health, and in order to reduce obstacles to the free movement of such products within the Community resulting from divergences between national systems of control, the Community institutions have adopted numerous rules to harmonise controls on the marketing of medicinal products. g

4. The primary method for verifying whether a medicinal product conforms with the requirements associated with the protection of public health is the marketing authorisation, of which there are two types: Community-wide authorisations<sup>6</sup> and national authorisations. h

1 Original language: English

2 OJ English Sp Edn 1965–1966 p 20.

3 OJ 1987 L15 p 36.

4 Case C-368/96 (1998) 48 BMLR 161, [1998] ECR I-7967.

5 The paragraph in question was originally the second of art 4, but became the third in consequence of an amendment effected by art 1(2) of Council Directive (EEC) 93/39 (OJ 1993 L214 p 22).

6 Community-wide authorisations are governed by Council Regulation (EEC) 2309/93 (laying down Community procedures for the authorisation and supervision of medical products for human and veterinary use and establishing a European Agency for the Evaluation of Medicinal Products) (OJ 1993 L214 p 1).

- a* 5. The present proceedings are concerned exclusively with the Community rules relating to national authorisations, which at the material time<sup>7</sup> were primarily contained in Ch II of Directive 65/65 as amended, in particular, by Directive 87/21. Article 3 of the directive provides that, in the absence of a Community-wide authorisation, a medicinal product may be marketed in a member state only after authorisation has been obtained from the competent authority in that member state.
- b* 6. Article 4 defines in detail the procedure, documents and information needed in order to obtain a marketing authorisation from the competent authority of a member state. In effect, it creates several possible procedural routes for obtaining a national marketing authorisation. Under the full procedure, an application for a marketing authorisation must, by point (8) of the third paragraph of that article (point (8)), be accompanied by the results of:
- c* —physico-chemical, biological or microbiological tests;  
—pharmacological and toxicological tests;  
—clinical trials.
- d* 7. Point (8)(a) of the third paragraph of art 4 (point (8)(a)) provides for an alternative, abridged procedure, whereby, in certain specified circumstances, an applicant for a marketing authorisation may be relieved of the obligation to provide the results of pharmacological and toxicological tests and of clinical trials ordinarily required by point (8), and may rely instead on data submitted in respect of another 'reference' product which has already been authorised.
- e* The obligation to provide full particulars of the physico-chemical nature of the product is not affected. In order to avail itself of the 'abridged procedure' an applicant must demonstrate:
- f* (i) either that the medicinal product is essentially similar to a product authorised in the country concerned by the application and that the person responsible for the marketing of the original medicinal product has consented to the pharmacological, toxicological or clinical references contained in the file on the original medicinal product being used for the purpose of examining the application in question ...
- g* (iii) or that the medicinal product is essentially similar to a product which has been authorised within the Community, in accordance with Community provisions in force, for not less than six years and is marketed in the Member State for which the application is made ... a Member State may ... extend this period to 10 years by a single Decision covering all the products marketed on its territory where it considers this necessary in the interests of public health.'
- h* 8. The final subparagraph of point (8)(a) contains the following proviso to the abridged procedure established by that provision:
- i* 'However, where the medicinal product is intended for a different therapeutic use from that of the other medicinal products marketed or is to be administered by different routes or in different doses, the results of appropriate pharmacological and toxicological tests and/or of appropriate clinical trials must be provided.'

<sup>7</sup> The Community legislative framework for medicinal products has with effect from 18 December 2001 been codified and consolidated in EP and Council Directive (EC) 2001/83 (on the Community code relating to medicinal products for human use) (OJ 2001 L311 p 67).



9. The proviso thus has the effect of establishing a further procedure for obtaining marketing authorisation, often termed and hereafter referred to as the hybrid abridged procedure. a

10. Under that procedure, the applicant is required to provide only the results of such pharmacological and toxicological tests and clinical trials as are appropriate in the light of the difference in therapeutic use, route of application or dose from the other medicinal products marketed. Otherwise, the applicant relies upon the data relating to the reference product which it is required to specify under point (8)(a)(i) or (iii). b

11. The hybrid abridged procedure is therefore intermediate between the abridged and the normal procedure as regards the evidential burden which it imposes on the applicant. The fresh data which an applicant is required to submit pursuant to the hybrid abridged procedure are referred to as bridging data. c

12. Guidance as to the nature of the tests and trials required in order to satisfy the various procedures laid down by art 4 of the directive is set out in the annex to Council Directive (EEC) 75/318 (on the approximation of the laws of member states relating to analytical, pharmacotoxicological and clinical standards and protocols in respect of the testing of proprietary medicinal products)<sup>8</sup> as amended by Council Directive (EEC) 91/507<sup>9</sup>. The annex to Directive 75/318 requires the particulars and documents accompanying an application for marketing approval to take account of the guidance published by the European Commission in 'The Rules governing Medicinal Products in the European Community', including vol 2 (known as the notice to applicants) and vol 3 (known as the Community guidelines). d

13. The 1993 version of the notice to applicants (vol 2A, at para 3.3) explained the hybrid abridged procedure in the following terms: e

'After 6 or 10 years' knowledge and experience with a medicinal product, it would be inappropriate for ethical and scientific reasons to require a second applicant to repeat all tests, studies and trials, which are already known to the authorities. For a medicinal product which does not fall within the strict requirements of essential similarity, and therefore does not benefit from the exception from providing results of pharmacological, toxicological and clinical trials, [the proviso] requires results of appropriate pharmacological and toxicological tests and/or appropriate clinical trials.' f

That passage has, however, been omitted from subsequent editions of the notice to applicants. g

14. The purposes underlying art 4 are apparent from the preambles to the directive and to Directive 87/21, which introduced the abridged procedures in their current form. The first recital of the preamble to the directive makes clear that the primary purpose underlying all the rules governing the marketing authorisation of medicinal products is the protection of public health. As appears from the second and fourth recitals of the preamble to Directive 87/21, point (8)(a)(iii) is also aimed at ensuring that innovative firms are not placed at a disadvantage and at avoiding unnecessary medical testing on humans and animals. h

15. Article 5 of Directive 65/65 provides that an application for a marketing authorisation must be refused— i

<sup>8</sup> OJ 1975 L147 p 1.

<sup>9</sup> OJ 1991 L270 p 32.

- a* 'if, after verification of the particulars and documents listed in Article 4, it proves that the medicinal product is harmful in the normal conditions of use, or that its therapeutic efficacy is lacking or is insufficiently substantiated by the applicant, or that its qualitative or quantitative composition is not as declared.'
- b* Authorisation must likewise be refused if 'the particulars and documents submitted in support of the application do not comply with Article 4'.
16. Annex II to Commission Regulation (EC) 541/95 (concerning the examination of variations to the terms of a marketing authorisation granted by a competent authority of a member state)<sup>10</sup> provides that certain changes to a marketing authorisation, a list of which is set out in that annex, are to be considered fundamentally to alter the terms of that authorisation and therefore to require an application to vary the terms of the marketing authorisation. The types of change identified in the annex in respect of medicinal products for human use are changes to the active substance(s) of a product, changes to the therapeutic indications, and changes to dose, pharmaceutical form and route of administration.
- d* 17. In the United Kingdom, the licensing authority established by the Medicines Act 1968 is designated as the competent authority for the purposes of Directive 65/65. It operates administratively through an executive agency of the Department of Health, the Medicines Control Agency (the MCA), and it is the MCA which processes applications for marketing authorisations on behalf of the licensing authority. Point (8) is implemented in the United Kingdom by the Medicines for Human Use (Marketing Authorisations etc) Regulations 1994, SI 1994/3144. By reg 4(6), the United Kingdom has exercised its option, pursuant to point (8)(a)(iii), to extend the period specified in that provision from six to ten years.
- e* 18. The Court of Justice was called upon to consider the interpretation of point (8)(a)(iii) in *Ex p Generics*<sup>11</sup>, which arose out of a challenge brought by several pharmaceutical companies against the decisional practice of the MCA when considering applications for authorisation to market generic copies of existing medicinal products pursuant to that provision. The MCA had been granting authorisations not only for such indications, dosage schedules, doses or dosage forms as had been authorised in respect of the reference product for at least ten years, but also for additions or changes authorised more recently. The MCA would only decline to authorise a generic product for such additions or changes if they were deemed to constitute major therapeutic innovations, such as would necessitate a new application for marketing authorisation under annex II to Regulation 541/95.
- g* 19. The High Court referred various questions as to when two products would be considered essentially similar under point (8)(a) and as to how extensive an authorisation a competent authority was entitled to grant following an application made under point (8)(a)(iii).
- h* 20. As regards the meaning of essential similarity, the Court of Justice held (para 36) that one medicinal product is essentially similar to another—
- i* 'where it satisfies the criteria of having the same qualitative and quantitative composition in terms of active principles, of having the same pharmaceutical form and of being bioequivalent, unless it is apparent in

10 OJ 1995 L55 p 7.

11 Cited above in footnote 4, above.

the light of scientific knowledge that it differs significantly from the original product as regards safety or efficacy.’ a

21. As the court explained, two products are regarded as being bioequivalent if they are pharmaceutical equivalents or alternatives and if their bioavailabilities (ie the rate and extent of their absorption into the body and transfer to the site of action) after administration in the same molar dose are similar to such a degree that their effects, with respect to both efficacy and safety, will be essentially the same<sup>12</sup>. b

22. As regards the extent of any authorisation granted under the abridged procedure provided for in point (8)(a)(iii), the court held that a medicinal product which is essentially similar to a product which has been authorised for not less than six or ten years in the Community and is marketed in the member state for which the application is made may be authorised under that provision for all therapeutic indications, dosage forms, doses and dosage schedules already authorised for the reference product, including those authorised for less than six or ten years. c

#### FACTS d

23. In the present case, Novartis Pharmaceuticals Ltd (Novartis) challenges the validity of marketing authorisations granted by the MCA to SangStat UK Ltd, another pharmaceuticals company, and Imtix-SangStat UK Ltd, its distributor in the United Kingdom, in respect of two medicinal products, SangCya Oral Solution and Acceptine Oral Solution (for present purposes identical, and henceforward referred to collectively as SangCya). e

24. SangCya competes on the market with two of Novartis’ products, Sandimmun and Neoral. All three products are immuno-suppressants, and contain the same active ingredient, cyclosporine, used to prevent rejection of organs or tissue in patients who have undergone transplant surgery, and in the treatment of various auto-immune diseases. f

25. Each of the three products is administered orally, in the form of a solution. There are, however, differences between Novartis’ first product, Sandimmun, its second product, Neoral, and SangStat’s products, SangCya. When diluted for administration to the patient, they react differently. Whereas Sandimmun forms a macroemulsion in an aqueous environment, Neoral forms a microemulsion, and SangCya undergoes a nanodispersion process. As a consequence, the three products are not bioequivalent: they vary in their bioavailability, that is, the rate and extent of their absorption into the body and transfer to the site of action. This is significant because cyclosporine has a narrow therapeutic index. If the patient receives too much or too little of it, it will not be effective, and may be detrimental to health. As a consequence, the actual level of cyclosporine in the blood of a patient has to be monitored and the dosage adjusted as necessary. g

26. Sandimmun was the first cyclosporine product to be authorised within the European Union. It was authorised in the United Kingdom in 1983 following submission by Sandoz Pharmaceuticals (UK) Ltd, now Novartis, of the complete dossier of information required under the full procedure. h

27. Neoral was first authorised for marketing within the European Union in Germany in 1994. A United Kingdom marketing authorisation was granted in 1995, following what was apparently a hybrid abridged procedure, made i

<sup>12</sup> Paragraph 31 of the judgment.



- a pursuant to point (8)(a)(i) in conjunction with the proviso, using Sandimmun as the reference product. The application therefore partly rested upon data filed in respect of the Sandimmun application, consent having been given (by Novartis as the developer of Sandimmun to itself as the developer of Neoral), and partly on bridging data prepared specifically in relation to Neoral. During the application process, and following meetings between Novartis and the MCA at which the MCA indicated that authorisation would not be granted without the submission of long-term clinical trial data, Novartis extended its clinical trials so as to be able to provide more substantial bridging data. Neoral was approved for all of the same indications as Sandimmun, and in 1997 received approval for a further set of indications. Sandimmun remains on the market in the United Kingdom but represents only a small percentage of the total cyclosporine market as compared with Neoral.

- c 28. The authorisations in respect of SangCya, which are at issue in the present proceedings, were also granted under the hybrid abridged procedure, pursuant to point (8)(a)(iii) in conjunction with the proviso. The reference product identified by SangStat in its application was Sandimmun, which had been authorised more than ten years previously.

- d 29. The MCA granted marketing authorisations to SangCya in January 1999. It based its decisions on the essential similarity of SangCya to Sandimmun. However, it relied not only upon the data submitted by Novartis in respect of Sandimmun, but also upon the data which Novartis had supplied five years previously in respect of Neoral. It did not require SangStat to submit further and more extensive bridging data regarding SangCya equivalent to the data which Novartis had been required to submit regarding Neoral.

#### NATIONAL PROCEEDINGS AND QUESTIONS REFERRED

30. Novartis has brought proceedings for judicial review in the United Kingdom courts, seeking an annulment of the MCA's decisions to authorise SangCya on the basis that they are in breach of Community law on one or more of the following three grounds. First, it argues that the MCA was not entitled under point (8)(a)(iii) to have regard to data submitted in respect of Neoral prior to the tenth anniversary of Neoral's first authorisation within the EU (the cross-reference issue). Secondly, it argues that the MCA was precluded, as a matter of law, from finding that SangCya was essentially similar to Sandimmun, thereby excusing SangStat from the requirement to demonstrate that its product was safe notwithstanding its lack of bioequivalence with Sandimmun (the essential similarity issue). Thirdly, it argues that, even if otherwise lawful, the contested decisions should be annulled because they infringe the general principle of non-discrimination, that similar situations (in this case, the assessment of Neoral and SangCya) should not be treated differently in terms of the data required for authorisation unless such differentiation is objectively justified (the non-discrimination issue).

- h 31. At first instance, Novartis' application for judicial review was dismissed. On appeal, however, the Court of Appeal has decided to stay the national proceedings and refer a number of questions to the Court of Justice. The first two questions, which relate to the cross-reference issue, are as follows:

i (1) In considering a marketing authorisation for a new product (C) under [point (8)(a)(iii)], referencing a product (A) authorised more than 6/10 years ago, is a national competent authority ever entitled to cross-refer, without consent, to data submitted in support of a product (B) which was authorised within the last 6/10 years?

(2) If so, may such cross reference be made in circumstances where: a  
(a) product B was authorised under the [point (8)(a)] hybrid abridged procedure, referencing product A; and (b) the data to which reference is made consists of clinical trials which the national competent authority indicated would be necessary if the marketing authorisation was to be granted and which were submitted in order to demonstrate that product B, though supra-bioavailable to product A when administered in the same dose, is safe? b

32. As regards the first of those two questions, the Court of Appeal notes in the order for reference that under art 5 of Directive 65/65, a competent authority, when deciding upon an application, must consider both whether the medicinal product is safe and efficacious, and whether the applicant has submitted all the particulars and documents required by art 4 of Directive 65/65. In the Court of Appeal's view, when considering the former issue, it should be open to the competent authority to consider all the data in its possession, regardless of their source. The Court of Appeal therefore requests that, if the Court of Justice concurs, the answer to the first question referred should indicate that any restriction on the data to which the authority may make reference relates only to the latter part of art 5. c  
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33. The third question relates to the proper interpretation of the proviso, and is as follows:

'(3)(a) Does the final subparagraph of [point (8)(a)] ("the proviso") apply only to applications made under [point (8)(a)(iii)] or to applications made under point [8(a)(i)] also? (b) Is essential similarity a prerequisite for the use of the proviso?' e

34. Questions (4) and (5) seek clarification of the meaning of essential similarity:

'(4) Can products ever be essentially similar for the purposes of [points (8)(a)(i) and (iii)] when they are not bioequivalent, and if so in what circumstances? f

(5) What is the meaning of the term pharmaceutical form, as used by the Court in its judgment in [*Ex p Generics*]? In particular, do two products have the same pharmaceutical form when they are administered to the patient in the form of a solution diluted to a macro-emulsion, micro-emulsion and nano-dispersion respectively?' g

35. The sixth and final question relates to the non-discrimination issue, and asks whether it is consistent with the general principle of non-discrimination for a national competent authority, faced with hybrid applications for marketing authorisations under point (8)(a) referencing product A for two other products, neither of which is bioequivalent to product A: h

'(i) to indicate that it is necessary for a marketing authorisation to be granted for product B to be supported by full clinical data of the type required by Part 4(F) of the Annex to Directive 75/318/EEC; but

(ii) having considered the data filed in support of product B, to grant a marketing authorisation for product C if that application is supported by trials not meeting the requirements of Part 4(F) of the Annex to Directive 75/318/EEC.' i

36. The court has received written observations from Novartis, SangStat, the United Kingdom, French, Danish and Portuguese governments and from

- a the Commission of the European Communities. Novartis, SangStat, the United Kingdom, Danish and Netherlands governments and the Commission made oral submissions at the hearing.

#### ASSESSMENT

b *Questions (1) and (2) the cross-reference issue*

37. The first two questions raise the issue of when, if at all, a competent authority, considering an application made under point (8)(a) in respect of a new product (product C), referencing a product (product A) which has been licensed for at least the six- or ten-year period specified in point (8)(a)(iii), may have regard without consent to data provided in respect of another product (product B) which has been licensed for less than six or ten years.

- c 38. The parties agree that a competent authority may have regard to all data in its possession, regardless of their source, when assessing the safety and efficacy of a medicinal product. The various approaches suggested by the submissions are therefore all consistent with Directive 65/65's overriding objective of promoting public health.

- d 39. Where the parties differ is as to whether, as the Court of Appeal suggests in the order for reference, a competent authority must also assess whether the applicant has submitted sufficient evidence to demonstrate that the product is safe and efficacious having regard to the requirements of art 4, and, if so, whether the competent authority may at that stage take account of data provided in respect of product B. Three approaches can be distinguished.

- e 40. On the first approach, advanced by the United Kingdom government, a competent authority need not consider the adequacy of the evidence submitted in support of an application when deciding whether to grant a marketing authorisation. That is because, the United Kingdom argues, the expert assessors employed by a competent authority cannot realistically be expected, having used all available data to verify that a product is safe and efficacious, then to put those data out of their minds in order to determine whether the applicant has itself sufficiently demonstrated safety and efficacy.

- f 41. In the United Kingdom's view, a competent authority may therefore rely on data submitted in respect of product B in order to authorise product C, a conclusion which accords with Directive 65/65's primary objective of safeguarding public health, as well as with the objective of minimising unnecessary testing on humans and animals. It thus proposes that the first and second questions should both receive affirmative answers.

- g 42. According to the second approach, favoured by Novartis, the competent authority must verify the adequacy of the evidence submitted by the applicant, and in so doing, may not cross-refer to data submitted in respect of product B, or in the alternative may do so only where products A and B are essentially similar.

- h 43. Novartis' primary submission is that such cross-reference is never permitted, on the basis that it would be contrary to the wording of point (8)(a)(iii), under which only data relating to a reference product authorised for at least six or ten years maybe used, and also that it would be inconsistent with the balance of objectives underlying Directive 65/65, and in particular, the aim of ensuring that innovative firms are not placed at a disadvantage. Novartis therefore submits that the first question should be answered in the negative, with the consequence that the second question does not arise.

- i 44. As an alternative submission, Novartis suggests that cross-reference is permitted only where products A and B meet in full the requirements of



essential similarity to one another. Novartis derives support for its alternative submission from para 55 of the court's judgment in *Ex p Generics*, in which the court held that the authorisation of a generic product could extend to additions or changes to the authorisation of its reference product as regards dosage form, dose and dosage schedule granted within the six- or ten-year period 'assuming that the terms dosage form, dose and dosage schedule as used by the national court do not preclude essential similarity between the medicinal products'.

45. Novartis' alternative submission would support an affirmative answer to the first question, but a negative response to the second, given that a difference of bioavailability between products A and B would, in the light of Novartis' proposed solution to question (4), necessarily result in a finding that those two products lacked essential similarity.

46. The third approach, like the second, attributes to the competent authority an obligation to assess the adequacy of the particulars and documents submitted in support of the application. In contrast with the second approach, however, it allows the competent authority, when performing the latter assessment, to take account of data relating to product B even where that product does not meet in full the requirements of essential similarity in relation to product A, provided that any lack of similarity relates to pharmaceutical form, therapeutic indication or dose, in other words the types of difference permitted under the proviso where appropriate bridging data have been supplied. In such circumstances, it is argued, products A and B should still be regarded as essentially the same reference product for the purposes of an application under the abridged procedures.

47. The third approach is favoured by SangStat, the Danish, French, and Netherlands governments and the Commission. However, those parties differ somewhat in how they formulate the approach.

48. The Danish government suggests that the judgment in *Ex p Generics* should extend not only to all additions or changes to therapeutic indications, dosage forms, doses and dosage schedules authorised in respect of an essentially similar version of product A, but also to such additions and changes to product A which result in a variant product B lacking essential similarity with the original product.

49. The French government, SangStat and the Commission prefer instead a formulation whereby cross-reference is permitted if product B constitutes a 'line extension' of product A. They draw in that regard on the most recent version of the notice to applicants<sup>13</sup> (in vol 2A, ch 1, at para 4.2.2), which states that—

'the requirement for authorisation for at least six/ten years in the Community does not apply to line extensions used as reference products beyond the six/ten years data exclusivity period of the original medicinal product.'

50. A line extension is defined by the notice to applicants (in vol 2A, ch 1, at para 5.2) as any variation on an original product which would fall within the

<sup>13</sup> At the time when the submissions were prepared, the most recent version was that of May 2001. A subsequent version has since been introduced in November 2002, but the text has not been amended in any respect material to the present proceedings.

a scope of annex II of Regulation 541/95<sup>14</sup> and Commission Regulation (EEC) 542/95<sup>15</sup>, except in so far as the variation involves the introduction of a new active substance.

b 51. The difference between the two formulations of the third approach is more apparent than real. The types of variation which are listed in annex II to Regulations 541/95 and 542/95, and which would not involve the insertion of a new active substance, are changes to the therapeutic indication, changes to dose, pharmaceutical form and route of administration. The 'line extension' formulation would therefore permit cross-reference in the same circumstances as those specified by the Danish government.

c 52. Similarly, both formulations in my view necessitate an acceptance that products A and B need not be essentially similar for cross-reference to be made to product B's data. This is because, with the exception of changes relating to therapeutic indication, the types of change by which product B may be differentiated from product A without preventing cross-reference to product B's data will exceed the limits of essential similarity as defined in *Ex p Generics*, given that variations to dosage will result in changes to the quantitative composition of a drug, that alterations to the form of dosage may affect pharmaceutical form, and that both types of change may have implications for bioequivalence. The Danish government acknowledged as much in its written observations, whilst the Commission and SangStat accepted the point in their oral submissions before the court.

53. It appears to me that the third approach is the correct one.

e 54. In my view, the Court of Appeal and the parties to the present case are right to assert that a competent authority may have regard to all available data, irrespective of their source, when verifying that a product is safe and efficacious. A competent authority must clearly be permitted to decline an application on the strength of data showing a product to be unsafe or lacking in efficacy even if those data were submitted in respect of another product and continue to enjoy protection pursuant to point (8)(a)(iii).

f 55. However, it is in my opinion untenable to assert, as the first approach does, that, as a consequence of the freedom to refer to all data in verifying safety and efficacy, a competent authority cannot also perform a separate and independent assessment of an application in order to verify the adequacy of the documents and particulars submitted in support of that application. Such an approach would remove any element of data protection from the authorisation procedure and is therefore contrary to point (8)(a)(iii).

g 56. It is also incompatible with the wording of art 5, which requires the competent authority to verify the adequacy of the particulars and documents submitted in support of the application in accordance with art 4. There is in my opinion no practical reason why a competent authority should not be able to perform that task after having first satisfied itself as to the safety and efficacy of a product.

h 57. I find the second approach equally unconvincing. On its primary submission, Novartis would deny the possibility of cross-referring to data submitted in respect of product B even when products A and B are essentially similar to one another. That submission appears to me flatly inconsistent with the court's conclusions in *Ex p Generics*, which were based on the notion that

14 Cited in footnote 10, above.

15 Concerning the examination of variations to the terms of a marketing authorisation falling within the scope of Regulation 2309/93 (OJ 1995 L55 p 15).

the essential similarity of the original reference product and its subsequent variants rendered them the same product for the purposes of point (8)(a)(iii). Following *Ex p Generics*, therefore, cross-reference to product B's data would undoubtedly be possible where product B was essentially similar to product A. To exclude the application of the *Ex p Generics* decision whenever a subsequently authorised variant of a reference product had been given a new designation would elevate form over substance, and would create an easy route for applicants to gain additional data protection in circumvention of *Ex p Generics*. a

58. Novartis' alternative submission, which would allow cross-reference to product B's data only if products A and B were essentially similar, is consistent with *Ex p Generics*, but none the less appears to me to be unsatisfactory for the following reasons. b

59. First, whether a modification of a reference product resulted in a new variant which remained within the bounds of essential similarity would not appear to correlate with the cost or difficulty involved in developing the modification and testing the variant. To accord access to data only where the limits of essential similarity had not been surpassed would therefore introduce an arbitrary distinction into the marketing authorisation regime. c

60. Moreover, to limit the application of the *Generics* decision to cases where essential similarity could be shown between the original and the variant product would in practice largely confine it to new therapeutic indications, given the impact of dosage change on quantitative composition, dosage form on pharmaceutical form, and both such changes on bioequivalence. d

61. The third approach therefore seems to me the most compatible with the scheme of Directive 65/65 as interpreted in *Ex p Generics*. It best succeeds in balancing the conflicting objectives of data protection and the avoidance of unnecessary testing on humans and animals by reserving additional data protection for the most significant modifications to an original product, namely those which involve the introduction of a new active substance. That approach is also consistent with, and supportive of, my opinion delivered in *AstraZeneca A/S v Lægemiddelstyrelsen*<sup>16</sup>. e

### Question (3)

62. The third question referred consists of two parts. Question (3)(a) asks whether the proviso applies only to applications made under point (8)(a)(iii) or to applications under point 4(8)(a)(i) also. Question (3)(b) asks whether essential similarity is a prerequisite for the use of the proviso. f

63. It is not clear whether question (3)(a) raises an issue of any practical significance. An applicant who had consent to use data relating to an essentially similar product would be able to submit and to rely on the probative value of those data as part of a new application under the normal procedure even if there were no possibility of making a hybrid abridged application with consent under point (8)(a)(i). g

64. In any event, I agree with France, the United Kingdom, SangStat and Novartis that the proviso can be relied upon in combination with either point (8)(a)(i) or (iii). First and foremost, it is separated by a paragraph break from the text of point (8)(a)(iii). Nor, furthermore, has any policy argument been advanced as to why it should not apply in combination with both provisions. h

<sup>16</sup> Case C-223/01 (2003) Transcript (opinion), 23 January, (2003) Transcript (judgment), 16 October; see in particular para 66 of the opinion. i



a 65. As to question (3)(b), the Commission, the Danish and the United Kingdom governments, Novartis and SangStat (having modified its position in its oral submissions) submit that the requirement for essential similarity is relaxed in the case of the hybrid abridged procedure laid down in the proviso. Only the French government clearly maintains that essential similarity is a requirement under the proviso.

b 66. In my view, essential similarity in all respects is not required in order for an application to proceed under the proviso.

c 67. The purpose of the proviso is to allow an applicant whose product is essentially similar to an existing product except insofar as it differs in one or more of the respects stipulated by the proviso to submit additional or bridging data only with regard to that difference. The relaxation of the criterion of essential similarity in respect of the differences specified in the proviso is possible precisely because the proviso then requires additional bridging data to be submitted, thereby assuring that the safety and efficacy of the new product can none the less be assessed.

d 68. The interpretation of the proviso which I propose here accords with that adopted by the 1993 version of the notice to applicants<sup>17</sup>. Whilst subsequent versions of the notice to applicants have not explicitly endorsed such an interpretation, nor would they appear to have said anything to contradict it.

e 69. Any other reading of the proviso would render largely inapplicable two of the three categories of difference which it identifies given the definition of essential similarity laid down by the court's judgment in *Ex p Generics*. A change to the dose of a medicinal product will preclude essential similarity, given that it will constitute a change to the quantitative composition of the product. Similarly, an alteration to the route of administration will in many instances amount to a modification of pharmaceutical form.

f *Questions (4) and (5) the essential similarity issue*

g 70. The fourth and fifth questions concern the meaning of essential similarity in point (8). Question (4) asks whether bioequivalence is always required for a finding that two products are essentially similar. Question (5) asks what is meant by pharmaceutical form, and more particularly whether products have the same pharmaceutical form where they are administered to the patient in the form of a solution diluted to a macroemulsion, microemulsion and nano dispersion respectively.

h 71. The questions relating to the essential similarity issue remain relevant to the resolution of the present proceedings despite the proposed answers to questions (1) and (2), given that even assuming the possibility of cross-referring to the data submitted in respect of Neoral, the validity of SangCya's marketing authorisation would none the less depend on its being shown either that SangCya is essentially similar to Neoral or Sandimmun or that appropriate bridging data have been submitted in accordance with the proviso.

i 72. As is clear from the court's previous case law, the starting point when interpreting the meaning of essential similarity, as with the other requirements laid down by point (8)(a), must be to ensure that the requirements of safety and efficacy are at all times maintained in respect of applications pursuant to point

<sup>17</sup> See the passage reproduced at para 13.

(8)(a)(i) and (iii)<sup>18</sup> through the specification of standards which are sufficiently precise and detailed to ensure a harmonised level of protection. a

73. To that end, the court in *Ex p Generics* adopted a definition of essential similarity drawn from the minutes of the meeting of the Council in December 1986 at which Directive 87/21 was adopted. As set out in the operative part of the judgment, its definition specifies bioequivalence together with pharmaceutical form and qualitative and quantitative composition as criteria which the competent authority of a member state may not disregard when determining whether two products are essentially similar. Novartis, the Danish and Portuguese governments, and the Commission accordingly submit that bioequivalence is a necessary requirement for essential similarity. b

74. It is true, as the United Kingdom and SangStat point out, that the formulation contained in the council's minutes and reproduced at para 25 of the judgment in *Ex p Generics* states that— c

‘the criteria determining the concept of essential similarity between medicinal products are that they have the same qualitative and quantitative composition in terms of active principles and the same pharmaceutical form, and, where necessary, bioequivalence of the two products has been established by appropriate bioavailability studies.’<sup>19</sup> d

In reliance on the italicised passage, the United Kingdom and SangStat assert that bioequivalence is not an invariable requirement for a finding of essential similarity. I do not accept their interpretation of that passage. In my view, it is intended only to indicate that bioavailability studies will not always be required in order to demonstrate bioequivalence in cases where bioequivalence is in any event clear. e

75. The United Kingdom government and SangStat submit also that bioequivalence will not always be a relevant criterion in order to determine whether two products are equally safe and efficacious, and that therefore it should not constitute an inflexible requirement of essential similarity. Such is the case, they suggest, with cyclosporine products, given that doctors must regularly measure the levels of cyclosporine in a patient's blood and adjust doses accordingly. I am unconvinced, however, that it would not be necessary, at least when fixing for a patient the initial dosage of a new product claiming essential similarity to an existing product, to be confident of the two products' bioequivalence. f

76. The United Kingdom further submits that in respect of certain types of product, the criterion of bioequivalence is inapplicable because they owe their therapeutic effect to topical application rather than transmission via systemic circulation. I find that submission equally unconvincing. It appears from the Community guidelines relating to the investigation of bioavailability and bioequivalence that whilst the approach commonly used to determine systemic bioavailability cannot be employed in such cases, local availability may still be assessed using measurements quantitatively reflecting the presence of the g

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<sup>18</sup> See the judgment in *Ex p Generics* (para 22), cited in footnote 4, above. See also *R v Licensing Authority of the Dept of Health, ex p Scotia Pharmaceuticals Ltd* Case C-440/93 (1995) 34 BMLR 171, [1995] ECR I-2851 (para 17). h

<sup>19</sup> My emphasis. i

a active substance at the site of action, arrived at by methods specially chosen for the particular combination of active substance and localisation in question<sup>20</sup>.

77. It is therefore my opinion that bioequivalence is a necessary requirement of essential similarity.

b 78. As regards the proper meaning of pharmaceutical form, Advocate General Ruiz-Jarabo Colomer in *Ex p Generics* defined it, in my view correctly, as the combination of the form in which a pharmaceutical product is presented by a manufacturer (the form of presentation) and the form in which it is administered (the form of administration)<sup>21</sup>. He drew the definition from the European Pharmacopoeia, inaugurated by the Council of Europe in 1964 for the purposes of laying down common standards for the composition and preparation of substances used in the manufacture of medicines. Applicants are required in a number of respects by the annex to Directive 75/318 to prepare the particulars and documents for submission pursuant to art 4 of Directive 65/65 in accordance with the standards laid down by the European Pharmacopoeia.

c 79. The definition supplied by the European Pharmacopoeia does not, however, indicate with what degree of specificity the form of presentation and the form of administration must be described. It therefore does not in itself resolve the disagreement between the parties to the present proceedings as to whether the products in question may all be given the label of oral solution or whether it is instead necessary to qualify them as solutions diluted for oral administration to a macroemulsion, a microemulsion and nano dispersion respectively.

d 80. As the notice to applicants indicates, further guidance may be obtained regarding the appropriate level of detail required by Community law from the European Pharmacopoeia list of standard terms<sup>22</sup>. It would appear from the file that the list does not distinguish between oral liquids depending upon whether on dilution they undergo a macroemulsion, microemulsion or nano dispersion process. On that basis, to insist upon such a level of detail would appear to exceed the requirements of Community law. Of the parties who address the issue, only Novartis asserts otherwise.

e 81. Such a conclusion appears consistent with the purpose of ensuring safety and efficacy which underlies the notion of essential similarity. Thus, the Commission submits that the pharmacokinetics (the time course of the absorption, distribution and excretion of the medicinal product) of oral liquid pharmaceutical forms is generally so similar that they deserve to be regarded as a single pharmaceutical form.

f 82. Novartis disagrees with the Commission, pointing out that differences between products resulting from their respective processes of dispersion or emulsion may affect their comparative bioavailability and may therefore impact upon their safety and efficacy. I am not, however, convinced of the relevance of Novartis' argument. Given that bioequivalence is in any event an independent requirement of essential similarity, it seems to me that the interpretation of pharmaceutical form need not be influenced by a concern to ensure bioequivalence.

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20 See the 'Guideline on Investigation of Bioavailability and Bioequivalence' at para 1, in vol 3C of the Community Guidelines.

21 At para 37 of the opinion.

22 In vol 2A, ch 1, para 4.2.



83. In my opinion, therefore, the pharmaceutical form of a given product is the combination of the form of presentation and the form of administration of that product. Products administered orally in the form of a solution are to be regarded as having the same pharmaceutical form irrespective of whether they are diluted to a macroemulsion, microemulsion or nano dispersion.

*Question (6) the non-discrimination issue*

84. By its sixth question, the Court of Appeal seeks to ascertain whether there is any breach of the general principle of non-discrimination for a competent authority, considering two hybrid applications referencing product A for two products, B and C, neither of which is bioequivalent to product A, to require full clinical data relating to bioavailability in respect of product B as a condition of authorisation, but, having considered the data filed in support of product B, not to require the same data in respect of product C.

85. In my view, the sixth question does not raise any issue independent of those already discussed in relation to the preceding five questions. If the competent authority were otherwise entitled as a matter of Community law to rely on the data submitted in support of product B when considering the application in respect of product C, the applicant seeking authorisation of product C would not be similarly situated to the applicant seeking authorisation of product B, and the general principle of non-discrimination would be of no application. If, however, the competent authority were not otherwise entitled as a matter of Community law to rely on the data submitted in support of product B, the holder of the authorisation for product B could challenge any authorisation of product C on that basis, without resort to the principle of non-discrimination. Accordingly, in my opinion, an answer to the sixth question is not required in order to enable the referring court to proceed to a determination of the case.

CONCLUSION

86. I am therefore of the opinion that the questions referred for a preliminary ruling by the Court of Appeal (Civil Division) of England and Wales should be answered as follows:

(1) In considering whether to grant a marketing authorisation in respect of a new product under art 4 of Council Directive (EEC) 65/65 (on the approximation of provisions relating to medicinal products), a competent authority may refer to all available data when assessing the safety and efficacy of that product. If the application pertains to a new product C and is made under point (8)(a)(iii) of the third paragraph of art 4, making reference to a product A which is authorised more than six/ten years previously, a competent authority is entitled, when verifying that the documents and particulars submitted in support of the application comply with art 4, to cross-refer to data submitted in support of product B which was authorised within the previous six/ten years, without consent of the person responsible for the marketing of product B, provided that products A and B are essentially similar or differ only in respect of their pharmaceutical form, dose, or therapeutic use.

(2) The proviso in the final subparagraph of point (8)(a) of the third paragraph of art 4 of Directive 65/65 applies to applications made under point (8)(a)(i) and (iii) of that paragraph. In order for an application to be made under the proviso in respect of a new product C making reference to

*a* a product A, product C must be essentially similar to product A except insofar as it differs in one or more of the respects specified by the proviso.

(3) For two products to be essentially similar within the meaning of point (8)(a) of the third paragraph of art 4 of Directive 65/65, they must be bioequivalent.

*b* (4) Pharmaceutical form is the combination of the form in which a pharmaceutical product is presented by the manufacturer and the form in which it is administered, including the physical form. Products administered orally to the patient in the form of a solution diluted to a macroemulsion, microemulsion or nano dispersion are all to be regarded as having the same pharmaceutical form.

*c* 29 April 2004. **THE COURT OF JUSTICE (Sixth Chamber)** delivered the following judgment.

1. By order of 22 February 2001, received at the Court of Justice of the European Communities on 5 March 2001, the Court of Appeal (Civil Division) of England and Wales referred to the Court of Justice for a preliminary ruling under art 234 EC (formerly art 177 of the EC Treaty) six questions on the interpretation of art 4(8)(a) of Council Directive (EEC) 65/65 (on the approximation of provisions laid down by law, regulation or administrative action relating to medicinal products) (OJ, English Sp Edn 1965–1966 p 20), as amended by Council Directive (EEC) 87/21 (OJ 1987 L15 p 36), Council Directive (EEC) 89/341 (OJ 1989 L142 p 11), and Council Directive (EEC) 93/39 (OJ 1993 L214 p 22) (hereinafter Directive 65/65, as amended).

*e* 2 Those questions were raised in proceedings between Novartis Pharmaceuticals UK Ltd (Novartis) and the Medicines Control Agency (MCA) concerning the issue by the MCA of two marketing authorisations in respect of a medicinal product.

*f* LAW

3. Article 3 of Directive 65/65, as amended, requires a marketing authorisation to be obtained before a medicinal product may be placed on the market in a member state.

4. Article 4 of the same directive provides:

*g* 'In order to obtain an authorisation to place a medicinal product on the market as provided for in Article 3, the person responsible for placing that product on the market shall make application to the competent authority of the Member State concerned ...

*h* The application shall be accompanied by the following particulars and documents ...

8. Results of:

—physico-chemical, biological or microbiological tests,

—pharmacological and toxicological tests,

—clinical trials. However, and without prejudice to the law relating to the protection of industrial and commercial property:

*i* (a) The applicant shall not be required to provide the results of pharmacological and toxicological tests or the results of clinical trials if he can demonstrate:

(i) either that the medicinal product is essentially similar to a product authorised in the country concerned by the application and that the person responsible for the marketing of the original medicinal product has

consented to the pharmacological, toxicological or clinical references contained in the file on the original medicinal product being used for the purpose of examining the application in question ... a

(iii) or that the medicinal product is essentially similar to a product which has been authorised within the Community, in accordance with Community provisions in force, for not less than six years and is marketed in the Member State for which the application is made; this period shall be extended to 10 years in the case of high-technology medicinal products within the meaning of Part A in the Annex to Directive 87/22/EEC or of a medicinal product within the meaning of Part B in the Annex to that directive for which the procedure laid down in Article 2 thereof has been followed; furthermore, a Member State may also extend this period to 10 years by a single decision covering all the products marketed on its territory where it considers this necessary in the interest of public health. Member States are at liberty not to apply the abovementioned six-year period beyond the date of expiry of a patent protecting the original product. b  
c

However, where the medicinal product is intended for a different therapeutic use from that of the other medicinal products marketed or is to be administered by different routes or in different doses, the results of appropriate pharmacological and toxicological tests and/or of appropriate clinical trials must be provided.' d

5. The procedures established by art 4(8)(a)(i), (ii) and (iii) of Directive 65/65, as amended, are commonly known as 'abridged procedures'. The specific procedure for obtaining marketing authorisation laid down by the last subparagraph of art 4(8)(a) (the proviso) is known as the 'hybrid' abridged procedure. e

6. The United Kingdom has exercised the option conferred on member states by art 4(8)(a)(iii) of Directive 65/65, as amended, to extend the period referred to therein to ten years. f

7. Lastly, art 5 of Directive 65/65, as amended, provides:

'The authorisation provided for in Article 3 shall be refused if, after verification of the particulars and documents listed in Article 4, it proves that the medicinal product is harmful in the normal conditions of use, or that its therapeutic efficacy is lacking or is insufficiently substantiated by the applicant, or that its qualitative and quantitative composition is not as declared. g

Authorisation shall likewise be refused if the particulars and documents submitted in support of the application do not comply with Article 4.'

THE DISPUTE IN THE MAIN PROCEEDINGS AND THE QUESTIONS REFERRED FOR A PRELIMINARY RULING h

8. Sandimmun, Neoral, SangCya and Acceptine are all immuno-suppressants containing the active ingredient cyclosporine. Sandimmun and Neoral are produced by Novartis. SangCya and Acceptine, which may be regarded as identical for the purposes of the present proceedings and are hereinafter referred to collectively as SangCya, are produced by SangStat UK Ltd and Imtix-SangStat UK Ltd (hereinafter, collectively, SangStat). i

9. Cyclosporine is primarily used to prevent rejection of organs or tissues in transplantation surgery. It is also used in the treatment of autoimmune diseases, including severe psoriasis, severe active rheumatoid arthritis, severe nephrotic syndrome and eczema.



*a* 10 Sandimmun, Neoral and SangCya are administered to patients orally. They are presented in their final form as a solution, and are taken by the patient in a drink. There are, however, differences between the products. They react differently when diluted for administration to the patient. Sandimmun forms a macroemulsion in an aqueous solution, whilst Neoral forms a microemulsion and SangCya undergoes a process of nano dispersion. That, in turn, has an effect on their bioavailability, that is, the rate and extent of their absorption into the body and of their transfer to the site of action.

*b* 11. Bioavailability is important because cyclosporine has a narrow therapeutic index (the dose range within which clinical efficacy is observed with an acceptable safety profile). If the blood levels of cyclosporine in a transplant patient are too low, the risk of acute and chronic organ rejection increases. Conversely, if the levels are too high there is the risk of deteriorating kidney function and the patient's immune system may be suppressed and the patient prone to the development of opportunistic infections and possibly lymphoma. For each of the products, after an initial dose at recommended levels has been given, the actual level of cyclosporine in the blood is monitored in individual patients and the maintenance dosage to be administered to the individual on a long-term basis may be adjusted accordingly to ensure that the level remains within the therapeutic index.

*c* 12. Sandimmun was the first cyclosporine product to be authorised within the Community. It was approved in 1983 following the submission by Sandoz Pharmaceuticals (UK) Ltd, now Novartis, of the full file of information required under Directive 65/65, as amended. Consequently, more than ten years have elapsed since the first marketing authorisation for Sandimmun in the Community, and the ten-year period of data protection afforded to Novartis under the directive has expired. Patent protection in respect of Sandimmun has also expired.

*d* 13. Novartis embarked on a research and development programme with a view to producing a more powerful cyclosporine-based product than Sandimmun which would overcome Sandimmun's problems of absorption and administration.

*e* 14. Novartis therefore developed the product called Neoral and obtained a patent for the cyclosporine formulation in that product. Neoral first received marketing authorisation within the European Union in Germany on 3 May 1994. Marketing authorisation in the United Kingdom was granted on 29 March 1995. The application made to the MCA as a 'hybrid' abridged application cross-referred, with the consent of the person responsible, to the data relating to Sandimmun, under art 4(8)(a)(i) of Directive 65/65, as amended. However, it also included, under the proviso, data from further studies and clinical trials, in recognition of the fact that Neoral differed in some respects from the reference product. The approved indications for Neoral include all those approved for Sandimmun. In addition, as from January 1997 Neoral has been authorised for the treatment of steroid-dependent or steroid-resistant nephrotic syndrome in adults and children. Sandimmun and Neoral are both available on the market in the United Kingdom, but the former product represents only a small percentage of the total cyclosporine market, as compared with Neoral.

*f* 15. Neoral is absorbed into the bloodstream of patients more quickly and consistently than Sandimmun. The influence of concomitant food intake

and other variable factors is significantly reduced in Neoral as compared with Sandimmun. Tests have shown that Neoral has approximately 29% higher bioavailability than Sandimmun. a

16. On 27 January 1999, the MCA granted two marketing authorisations to SangStat in respect of SangCya by the hybrid abridged procedure under art 4(8)(a)(iii) of Directive 65/65, as amended. The reference product was Sandimmun, which, unlike Neoral, had been authorised in the Community for more than ten years. b

17. SangCya, which was not developed as a copy of Sandimmun or Neoral, is not identical to the latter. It is covered by patent applications and patents granted in the United States of America.

18. SangStat included with its application data to demonstrate the suprabioavailability of SangCya by comparison with Sandimmun and the essential similarity of those products. Studies showing bioequivalence between SangCya and Neoral sold in the United States were also included with the application. c

19. For the purposes of granting marketing authorisations for SangCya the MCA also relied on data submitted by Novartis in support of its Neoral application. d

20. The national proceedings concern the marketing authorisations granted to SangStat by the MCA in respect of SangCya on 27 January 1999. Novartis applied for judicial review of the decision of the MCA to grant those marketing authorisations, but its application was dismissed.

21. Novartis lodged an appeal before the Court of Appeal seeking to have the contested marketing authorisations set aside. In support of its appeal Novartis submitted that the MCA had: (a) cross-referred unlawfully to the Neoral file (the cross-reference issue); (b) erred in finding that SangCya was essentially similar to Sandimmun, thereby exempting SangStat from the requirement to demonstrate that its product was safe notwithstanding its lack of bioequivalence with Sandimmun (the essential similarity issue); (c) infringed the principle of non-discrimination between Novartis and SangStat in terms of the authorisation procedure (the non-discrimination issue). e

22. The MCA contended that: (a) it was entitled to cross-refer to all information in its possession in assessing whether a product for which marketing authorisation was sought was safe; (b) questions of essential similarity were inherently questions of fact, degree and expert opinion for the competent national authorities, which enjoy a margin of discretion in deciding issues such as whether two products have the same pharmaceutical form. In any event, bioequivalence is not always required in order to demonstrate essential similarity; (c) there was no infringement of the principle of non-discrimination since Novartis and SangStat were not in the same position and, in any event, there was an objective and reasonable basis for distinguishing them. f

23. In those circumstances the Court of Appeal (Civil Division) of England and Wales decided to stay the proceedings and to seek a preliminary ruling from the Court of Justice on the following questions: g

(1) In considering a marketing authorisation for a new product (C) under Article 4.8(a)(iii) of Directive 65/65, referencing a product (A) authorised more than 6/10 years ago, is a national competent authority ever entitled to cross-refer, without consent, to data submitted in support of a product (B) which was authorised within the last 6/10 years? h

*i*

a (2) If so, may such cross-reference be made in circumstances where:  
(a) product B was authorised under the Article 4.8(a) hybrid abridged procedure, referencing product A; and (b) the data to which reference is made consists of clinical trials which the national competent authority indicated would be necessary if the marketing authorisation was to be granted and which were submitted in order to demonstrate that product B, though suprabioavailable to product A when administered in the same dose, is safe?

b (3)(a) Does the final subparagraph of Article 4.8(a) of Directive 65/65 ("the proviso") apply only to applications made under Article 4.8(a)(iii) or to applications made under Article 4.8(a)(i) also? (b) Is essential similarity a prerequisite for the use of the proviso?

c (4) Can products ever be essentially similar for the purposes of Article 4.8(a)(i) and (iii) of Directive 65/65 when they are not bioequivalent, and if so in what circumstances?

d (5) What is the meaning of the term pharmaceutical form, as used by the Court in its judgment in [*R v Licensing Authority established by the Medicines Act 1968, ex p Generics (UK) Ltd (ER Squibb & Sons Ltd, intervener)* Case C-368/96 (1998) 48 BMLR 161, [1998] ECR I-7967]? In particular, do two products have the same pharmaceutical form when they are administered to the patient in the form of a solution diluted to a macroemulsion, microemulsion and nanodispersion respectively?

e (6) Is it consistent with the general principle of non-discrimination for a national competent authority, faced with hybrid applications for marketing authorisations under Article 4.8(a) of Directive 65/65 referencing product A for two products, neither of which is bioequivalent to product A: (i) to indicate that it is necessary for a marketing authorisation to be granted for product B to be supported by full clinical data of the type required by Part 4(F) of the Annex to Directive 75/318/EEC; but (ii) having considered the data filed in support of product B, to grant a marketing authorisation for product C if that application is supported by trials not meeting the requirements of Part 4(F) of the Annex to Directive 75/318/EEC?

#### PRELIMINARY REMARKS

g 24. Pursuant to art 4(8)(a)(iii) of Directive 65/65, as amended, the applicant is not required to provide the results of pharmacological and toxicological tests or of clinical trials if it is demonstrated that the medicinal product is essentially similar to a product which has been authorised within the Community for at least six or ten years and marketed in the member state in respect of which the application is made. According to the final subparagraph of that provision—

h 'where the medicinal product is intended for a different therapeutic use from that of the other medicinal products marketed or is to be administered by different routes or in different doses, the results of appropriate pharmacological and toxicological tests and/or of appropriate clinical trials must be provided.'

i 25. The dispute in the main proceedings concerns, inter alia, the question whether the MCA was entitled by that provision to exempt SangStat from providing such results by basing its decision on the results already provided by Novartis in the course of the procedures resulting in the grant to that company of marketing authorisations for Sandimmun and Neoral.



26. The following factors should be taken into account in relation to that question: a

- Neoral and SangCya are not bioequivalent since their bioavailability differs;
- Neoral had been authorised for less than ten years;
- Neoral is a development of Sandimmun since Novartis obtained marketing authorisation for Neoral under the hybrid abridged procedure.

27. The questions referred for a preliminary ruling ask, more particularly, whether in such circumstances the dispensation from providing the pharmacological, toxicological and clinical documentation applies, as laid down by art 4(8)(a)(iii) of Directive 65/65, as amended, in conjunction with the proviso, or whether the documentation provided by Novartis in the course of the marketing authorisation procedure for Neoral must be accorded a further period of protection of six or ten years, so that it cannot be used by SangStat in assessing the application for marketing authorisation for SangCya. b  
c

28. In *R v Licensing Authority established by the Medicines Act 1968, ex p Generics (UK) Ltd (ER Squibb & Sons Ltd, intervener)* Case C-368/96 (1998) 48 BMLR 161, [1998] ECR I-7967, the court interpreted art 4(8)(a)(iii) of Directive 65/65, as amended, ruling inter alia that: d

—the procedure established by that provision enables a second applicant for marketing authorisation for a given product to save the time and expense necessary in order to gather the pharmacological, toxicological and clinical data. In accordance with the fourth recital in the preamble to Directive 87/21, it also avoids, on public policy grounds, the repetition of tests on humans or animals where not absolutely necessary (see *Ex p Generics* (para 4)); e

—under the abridged procedure, the obligation to carry out pharmacological, toxicological and clinical tests is replaced by an obligation to show that the medicinal product is so similar to a product which has been authorised for not less than six or ten years in the Community and is marketed in the member state for which the application is made that it does not differ significantly from that product as regards safety and efficacy, and that it is therefore essentially similar to the product already authorised (see *Ex p Generics* (para 24)); f

—a medicinal product is essentially similar, within the meaning of art 4(8)(a)(iii) of Directive 65/65, as amended, to an original medicinal product where it satisfies the criteria of having the same qualitative and quantitative composition in terms of active principles, of having the same pharmaceutical form and of being bioequivalent, unless it is apparent in the light of scientific knowledge that it differs significantly from the original product as regards safety or efficacy (see *Ex p Generics* (para 36)); g

—a medicinal product that is essentially similar to a product which has been authorised for not less than six or ten years and is marketed in the member state for which the application is made may be authorised, under the abridged procedure, for all therapeutic indications already authorised for that product, even if those indications have been authorised for less than six or ten years (see *Ex p Generics* (para 53)). The court stated in this connection that it is, where appropriate, for the Community legislature to adopt measures to reinforce the rules for the protection of innovating undertakings in the harmonised area with which the case is concerned (see *Ex p Generics* (para 52)). h  
i

29. It should be added that the Court of Appeal rightly points out in the order for reference that the competent authority of a member state in making a decision on an application for marketing authorisation must examine the safety and efficacy of the medicinal product, and that it is therefore permissible

- a for that authority to take account of all data in its possession, from whatever source, to the extent that such data demonstrate that the product is harmful or that it lacks efficacy.

30. As stated in the first recital in the preamble to Directive 65/65, as amended, the primary purpose of any rules concerning the production and distribution of medicinal products must be to safeguard public health.

- b 31. Accordingly, and pursuant to the first subparagraph of art 5 of Directive 65/65, as amended, an application for marketing authorisation must be refused, inter alia, where, on the basis of data in the possession of the competent authority, it appears that a medicinal product is harmful or lacks efficacy. Clearly that authority is not precluded from basing its refusal on data submitted by other applicants, even if that data is protected within the meaning of art 4(8)(a)(iii) of Directive 65/65, as amended.

c 32. Finally, the court considers it appropriate to reply, first, to the fourth and fifth questions; second, to the third question; third, to the first and second questions and, lastly, to the sixth question.

- d THE FOURTH AND FIFTH QUESTIONS

*The fourth question*

33. Pursuant to art 4(8)(a)(iii) of Directive 65/65, as amended, as interpreted by the court, a medicinal product cannot be regarded as essentially similar to an original medicinal product if it does not satisfy the criteria of having the same qualitative and quantitative composition in terms of active principles, of having the same pharmaceutical form and of being bioequivalent (see *Ex p Generics* (paras 36, 37)).

- e 34. The same applies in respect of art 4(8)(a)(i) of Directive 65/65, as amended. The two abridged procedures in question are only distinguishable by the fact that the right to refer to the pharmacological, toxicological or clinical documentation contained in the file on the reference medicinal product is dependent, in the first case, on the consent of the person responsible for the marketing of that medicinal product and, in the second case, on the elapse of six or ten years from the date on which the medicinal product was authorised in the Community.

- f 35. Consequently, the reply to the fourth question must be that products cannot be regarded as essentially similar for the purposes of the application of art 4(8)(a)(i) or (iii) of Directive 65/65, as amended, where they are not bioequivalent.

*The fifth question*

- h 36. Neither Directive 65/65, as amended, nor, more generally, the Community legislation on medicinal products in force at the time of the facts in the main proceedings, defines the concept of pharmaceutical form.

- i 37. According to the list of reference terms of the European Pharmacopoeia, drawn up under the auspices of the Council of Europe, pharmaceutical form is defined as the combination of the form in which a pharmaceutical product is presented by the manufacturer and the form in which it is administered, including the physical form.

38. Pursuant to the annex to Commission Directive (EEC) 91/507 (modifying the annex to Council Directive (EEC) 75/318 on the approximation of the laws of member states relating to analytical, pharmacotoxicological and clinical standards and protocols in respect of the testing of medicinal products) (OJ 1991 L270 p 32), applicants for marketing authorisation are required in

several respects to prepare the documentation and information to be submitted pursuant to art 4 of Directive 65/65, as amended, in accordance with the requirements set out in the European Pharmacopoeia. In particular, in Pt 2, section E, point 1 of that annex, it is provided, inter alia, that the provisions of the monographs of the European Pharmacopoeia on pharmaceutical forms apply to the products defined therein.

39. In those circumstances, the list of reference terms of the European Pharmacopoeia is capable of providing useful guidelines for the purpose of defining the concept of the pharmaceutical form of a medicinal product in order to address the question whether the medicinal products in question are essentially similar.

40. Consequently, for that purpose, account must be taken of the form in which the pharmaceutical product is presented by the manufacturer and the form in which it is administered, including the physical form.

41. Sandimmun, Neoral and SangCya are presented in the form of a solution to be mixed in a drink for administration to the patient. The fact that, when mixed, these three products form, respectively, a macroemulsion, a microemulsion and a nano dispersion, may provide information as to the form of administration but does not preclude their being treated as having the same pharmaceutical form for the purposes of addressing the question whether they are essentially similar within the meaning of art 4(8)(a)(i) or (iii) of Directive 65/65, as amended, provided that, as the United Kingdom government and the Commission of the European Communities essentially submit, the differences in the form of administration are not significant in scientific terms.

42. The reply to the fifth question must therefore be that, for the purposes of the procedure laid down by art 4(8)(a)(i) and (iii) of Directive 65/65, as amended, in determining the pharmaceutical form of a medicinal product, account must be taken of the form in which it is presented and the form in which it is administered, including the physical form. In that context, medicinal products such as those at issue in the main proceedings, which are presented in the form of a solution to be mixed in a drink for administration to the patient and which, after mixing, form, respectively, a macroemulsion, a microemulsion and a nano dispersion, are to be treated as having the same pharmaceutical form, provided that the differences in the form of administration are not significant in scientific terms.

### THE THIRD QUESTION

#### *The first part of the third question*

43. SangStat and Novartis, and the French and United Kingdom governments, submit that the proviso applies not only to applications made under art 4(8)(a)(iii) but also to those made under art 4(8)(a)(i).

44. That argument must be upheld.

45. It does not appear that the difference between those two abridged procedures, as identified at para 34 of the present judgment, is such as to justify restricting the hybrid abridged procedure provided for under the proviso to the situation covered by art 4(8)(a)(iii) of Directive 65/65, as amended.

46. It should be noted in this connection that, according to the fourth recital in the preamble to Directive 87/21, there are reasons of public policy for not repeating tests on humans or animals without imperative need. If it is ethically and scientifically inappropriate to repeat all tests for an application which otherwise satisfies all the requirements under art 4(8)(a)(iii) of Directive 65/65,



a as amended, it is also inappropriate to repeat those tests for an application which otherwise satisfies the requirements set out in art 4(8)(a)(i).

47. Consequently, the reply to the first part of the third question must be that the proviso, that is, the hybrid abridged procedure laid down by the final subparagraph of art 4(8)(a) of Directive 65/65, as amended, applies to applications for marketing authorisation based on art 4(8)(a)(i) or (iii).

b  
*The second part of the third question*

48. SangStat, the Danish and United Kingdom governments and the Commission submit that recourse to the proviso is not restricted to cases in which the medicinal product in respect of which marketing authorisation is sought is essentially similar to an authorised product.

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49. It should be noted in this regard that according to the express wording of art 4(8)(a)(iii) of Directive 65/65, as amended, relating to the abridged procedure, read in conjunction with the proviso, the essential similarity between the medicinal product in respect of which marketing authorisation is sought and the reference medicinal product is, as the Commission submits, the trigger for the application of the proviso.

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50. Thus, the situation covered by the proviso, in which the new medicinal product differs from the reference medicinal product only in terms of its therapeutic indications, covers essentially similar medicinal products, that is, medicinal products having the same qualitative and quantitative composition in terms of active principles and the same pharmaceutical form and which are bioequivalent (see *Ex p Generics* (paras 36, 42)).

e  
51. By contrast, as SangStat, the Danish and United Kingdom governments and the Commission stated, the same does not apply in respect of a medicinal product which is to be administered by routes or in doses different from those of the reference medicinal product, since the former generally does not have the same bioavailability as the latter and is not therefore bioequivalent to the reference medicinal product.

f  
52. Accordingly, if recourse to the proviso were only possible where the medicinal product in question is essentially similar to the reference medicinal product and therefore, inter alia, bioequivalent to that product, the proviso would be largely ineffective in the case of medicinal products to be administered by routes or in doses different from those of other medicinal products on the market.

g  
53. Moreover, in the notice to applicants for marketing authorisation for medicinal products for human use in the member states of the European Community, published by the Commission in 1993, it was expressly stated that the proviso could be applied where the new medicinal product did not satisfy the strict criteria for essential similarity when compared with the reference medicinal product.

h  
54. Where the new medicinal product must be administered by routes or in doses different from those of the reference medicinal product, the purpose of the applicant's obligation under the proviso to provide the results of appropriate pharmacological and toxicological tests and clinical trials is to prove the safety and efficacy of that medicinal product (see, to that effect, *Ex p Generics* (para 23)).

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55. In the light of the foregoing, the reply to the second part of the third question must be that an application for marketing authorisation for a medicinal product may be made under the proviso with reference to an authorised medicinal product provided that the medicinal product in respect of

which marketing authorisation is sought is essentially similar to the authorised medicinal product, unless one or more of the differences set out in the proviso apply, as the case may be. a

#### THE FIRST AND SECOND QUESTIONS

56. By these two questions, which should be read together, the referring court asks essentially whether, in considering an application for marketing authorisation for a new product C under art 4(8)(a)(iii) of Directive 65/65, as amended, with reference to a product A authorised for more than six or ten years, the competent authority of a member state is entitled, with a view to granting marketing authorisation, to refer, without the consent of the person responsible for marketing, to data submitted in support of a product B which was authorised within the previous six or ten years under the hybrid abridged procedure of art 4(8)(a) of Directive 65/65, as amended, with reference to product A, where those data consist of clinical trials provided in order to demonstrate that product B, though suprabioavailable to product A when administered in the same dose, is safe. b  
c

57. It should be noted that an applicant for marketing authorisation for a medicinal product essentially similar to a product authorised for at least six or ten years in the Community and marketed in the member state for which the application is made is not required, under art 4(8)(a)(iii) of Directive 65/65, as amended, to supply pharmacological, toxicological and clinical documentation for any of the therapeutic indications to which the documentation for the original medicinal product relates, including those authorised for less than six or ten years (see, to that effect, *Ex p Generics* (paras 43, 44)). d  
e

58. Thus, the pharmacological, toxicological and clinical documentation covering the new therapeutic indications of a medicinal product already authorised cannot be accorded a further period of protection of six or ten years.

59. The same applies in respect of pharmacological, toxicological and clinical documentation which is to be administered by routes or in doses different from those of other medicinal products on the market. f

60. In the light of the proviso, such a medicinal product is a development of the original or reference medicinal product in the same way as a medicinal product intended for a different therapeutic use from that of the original or reference medicinal product. g

61. In that context, as stated at para 51 of the present judgment, it is not decisive that a medicinal product to be administered by routes or in doses different from those of the reference medicinal product does not, unlike a medicinal product intended for a therapeutic use different from that of the reference medicinal product, generally satisfy all the criteria for essential similarity. h

62. It should be noted in that connection that whether or not the product resulting from the development of the reference medicinal product satisfies all the criteria for essential similarity to the latter product does not necessarily bear any relationship to the cost or difficulty involved in that development.

63. Moreover, if the applicant for marketing authorisation for a medicinal product were only permitted to refer to the pharmacological, toxicological and clinical documentation relating to products resulting from the development of the reference medicinal product where all the criteria for essential similarity are met, it would largely be prevented from referring to that documentation where those products are to be administered by routes or in doses different from those i

a of the reference medicinal product, whilst such reference is permitted where the product is intended for a therapeutic use different from that of the reference medicinal product.

64. Therefore, the applicant for marketing authorisation for a medicinal product may refer to that documentation where the products resulting from the development of the reference medicinal product and the reference medicinal product are essentially similar, apart from the route of administration or the dose, as the case may be.

65. If product B resulting from the development of the reference product A is essentially similar to that reference product, apart from its bioavailability, since that difference is nevertheless not attributable to a difference in the route of administration or the dose, the applicant for marketing authorisation for product C is entitled to refer to the clinical documentation in respect of product B.

66. If, as stated at para 64 of the present judgment, the applicant for marketing authorisation for product C may refer to the pharmacological, toxicological and clinical documentation in respect of product B, which is the product of the development of the reference product A and essentially similar thereto, apart from the route of administration or the dose, as the case may be, since the differences in those two factors generally imply that products A and B are not bioequivalent (see para 51 of the present judgment), it must, a fortiori, be able to do so where products A and B are distinguishable only by their different bioavailability, even though the route of administration and dose remain unchanged.

67. It follows that, in considering an application for marketing authorisation for a new product C under art 4(8)(a)(iii) of Directive 65/65, as amended, with reference to a product A authorised for more than six or ten years, the competent authority of a member state is entitled, with a view to granting marketing authorisation, to refer without the consent of the person responsible for marketing to data submitted in support of a product B which was authorised within the previous six or ten years under the hybrid abridged procedure laid down by art 4(8)(a) of Directive 65/65, as amended, with reference to product A, where those data consist of clinical trials provided in order to demonstrate that product B, though suprabioavailable to product A when administered in the same dose, is safe.

#### THE SIXTH QUESTION

68. By this question, the Court of Appeal asks whether, in considering two hybrid applications for marketing authorisation for products B and C brought under the proviso and referring to product A, the competent authority of a member state infringes the principle of non-discrimination if, as a precondition for the grant of marketing authorisation, it requires full clinical data on the bioavailability of product B, but, having examined the data filed in support of product B, does not require the same data for product C.

69. According to settled case law, the principle of non-discrimination requires that comparable situations not be treated differently and different situations not be treated in the same way unless such treatment is objectively justified (see, inter alia, *Sermide SpA v Cassa Conguaglio Zuccheri* Case 106/83 [1984] ECR 4209 (para 28) and *R (on the application of Milk Marque Ltd) (Dairy Industry Federation, third party) v Competition Commission* Case C-137/00 [2004] All ER (EC) 410, [2003] ECR I-7975 (para 126)).



70. The situation of the applicant for marketing authorisation for product B is, in any event, not comparable to that of the applicant for marketing authorisation for product C. When the latter applicant applies for marketing authorisation, product B is authorised and the authorities are assured of the safety and efficacy of that product. a

71. That finding does not prejudice the question whether the competent authority of a member state is entitled to base its decision on the data filed in support of product B when considering the application for marketing authorisation for product C. b

72. Consequently, the reply to the sixth question must be that, in considering two hybrid applications for marketing authorisation for products B and C brought under the proviso and referring to product A, the competent authority of a member state does not infringe the principle of non-discrimination where, as a precondition for the grant of marketing authorisation, it requires full clinical data on the bioavailability of product B, but, having examined the data filed in support of product B, does not require the same data for product C. c

#### COSTS d

73. The costs incurred by the United Kingdom, Danish, French, Netherlands and Portuguese governments and by the Commission, which have submitted observations to the court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. e

On those grounds, the Court of Justice (Sixth Chamber), in answer to the questions referred to it by the Court of Appeal (Civil Division) of England and Wales by order of 22 February 2001, hereby rules:

(1) Products cannot be regarded as essentially similar for the purposes of the application of art 4(8)(a)(i) or (iii) of Council Directive (EEC) 65/65 (on the approximation of provisions laid down by law, regulation or administrative action relating to medicinal products), as amended by Council Directives (EEC) 87/21, 89/341, and 93/39, where they are not bioequivalent. f

(2) For the purposes of the procedure laid down by art 4(8)(a)(i) and (iii) of Directive 65/65, as amended, in determining the pharmaceutical form of a medicinal product, account must be taken of the form in which it is presented and the form in which it is administered, including the physical form. In that context, medicinal products such as those at issue in the main proceedings, which are presented in the form of a solution to be mixed in a drink for administration to the patient and which, after mixing, form, respectively, a macroemulsion, a microemulsion and a nano dispersion, are to be treated as having the same pharmaceutical form, provided that the differences in the form of administration are not significant in scientific terms. g

(3) The proviso, that is, the hybrid abridged procedure laid down by the final subparagraph of art 4(8)(a) of Directive 65/65, as amended, applies to applications for marketing authorisation based on art 4(8)(a)(i) or (iii). An application for marketing authorisation for a medicinal product may be made under the proviso, that is, by the abridged hybrid procedure provided for in the final subparagraph of art 4(8)(a) of Directive 65/65, as amended, with reference to an authorised medicinal product provided that the medicinal product in respect of which marketing authorisation is sought is essentially similar to the authorised medicinal product, unless one or more of the differences set out in the proviso apply, as the case may be. h

i

- a* (4) In considering an application for marketing authorisation for a new product C under art 4(8)(a)(iii) of Directive 65/65, as amended, with reference to a product A authorised for more than six or ten years, the competent authority of a member state is entitled, with a view to granting marketing authorisation, to refer without the consent of the person responsible for marketing to data submitted in support of a product B which was authorised within the previous six or ten years under the hybrid abridged procedure laid down by art 4(8)(a) of Directive 65/65, as amended, with reference to product A, where those data consist of clinical trials provided in order to demonstrate that product B, though suprabioavailable to product A when administered in the same dose, is safe.
- b*
- c* (5) In considering two hybrid applications for marketing authorisation for products B and C brought under the final subparagraph of art 4(8)(a) of Directive 65/65, as amended, and referring to product A, the competent authority of a member state does not infringe the principle of non-discrimination where, as a precondition for the grant of marketing authorisation, it requires full clinical data on the bioavailability of product B,
- d* but, having examined the data filed in support of product B, does not require the same data for product C.

# Weber's Wine World Handels-GmbH and others v Abgabenberufungskommission Wien (Case C-147/01)

COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES (FIFTH CHAMBER)

JUDGES WATHELET (RAPPORTEUR) (PRESIDENT), TIMMERMANS, LA PERGOLA, JANN  
AND VON BAHR

ADVOCATE GENERAL JACOBS

12 DECEMBER 2002, 20 MARCH, 2 OCTOBER 2003

*European Community – Taxation – Internal taxation – Recovery of sums paid but not due – Procedural requirements for bringing proceedings for reimbursements – Court of Justice finding national levying of duty on alcoholic beverages contrary to Community law but limiting retroactivity of judgment – National provisions precluding reimbursement where economic burden of duty passed on by taxable person to final consumer – National provisions making claims for reimbursement based on domestic constitutional law more favourable – Whether national provisions compatibility with principle of sincere co-operation – EC Treaty, art 5 (now art 10 EC).*

In a dispute in Austria concerning the compatibility with Community law of duty levied on certain beverages, the Court of Justice of the European Communities had ruled on a reference for preliminary ruling pursuant to art 177 of the EC Treaty (now art 234 EC) in Case C-437/97 (see [2001] All ER (EC) 735) that Community law precluded the maintenance of the national duty in so far as it had been applied to alcoholic beverages. However, recognising the existence of the overriding grounds of legal certainty which precluded any retroactive application of its finding, the temporal effects of the judgment were limited by precluding the possibility of repayment of duty that had been paid and not challenged before the date of the judgment<sup>a</sup>. Shortly before delivery of that judgment, and after delivery of the Advocate General's opinion, the national tax code had been amended so that duty levied though not due was not to be repaid or set off where its economic burden had been passed on to third parties. By way of derogation, that amendment did not apply to a taxable person whose case had given rise to a declaration by a national court that the national tax code was unconstitutional, and any other taxable person whose case had been pending before the national court before the declaration of unconstitutionality. In relation to all other taxable persons who had paid duty levied though not due, the tax code was not to be annulled with retroactive effect and it was to remain applicable to the facts that had arisen before the declaration of unconstitutionality. In the main proceedings, although the taxable persons were not precluded from seeking repayment of duty by the temporal effects of the judgment of the Court of Justice, their claims in that regard were rejected on the basis of the amendment to the tax code, namely

<sup>a</sup> The material paragraph of the operative part of the judgment in Case C-437/97 is set out at judgment para 4, below



*a* that the relevant duty had been passed on to the consumer. On appeal, the taxable persons maintained their right to repayment of the duty, claiming, in particular, that the amendments to tax code infringed the duty of co-operation laid down by art 5<sup>b</sup> of the Treaty (now art 10 EC). The national court decided to stay the proceedings and refer to the Court of Justice for preliminary ruling a question in that regard<sup>c</sup>.

*b*

**Held** – (1) Community law, and more particularly art 5 of the Treaty, precluded the adoption by a member state of rules fixing more restrictive procedural rules on recovery of sums levied though not due, in order to forestall the effects of a judgment of the Court of Justice holding that Community law precluded the maintenance of that duty, but only in so far as the national legislation was specifically aimed at that duty, a point which fell to be determined by the national court. In the main proceedings, it was clear that the purpose of the amendment to the tax code was to preclude the effects of the judgment should the duty on alcoholic beverages be deemed to be incompatible with Community law and should that judgment not limit its temporal effects. However those circumstances did not suffice to determine whether the national legislation impugned sought specifically to reduce the possibilities of bringing proceedings for the duty which had been levied though not due (see judgment paras 86–92, 118, below).

*c*

(2) Community law precluded a refusal to repay a charge levied though not due as the result of incompatibility with Community law on the sole ground that the charge had been passed on to third parties, without requiring the establishment of the degree of unjust enrichment that repayment of the charge would entail for the taxable person. The only exception to the obligation of a member state to repay charges levied contrary to Community law was where the national authorities had established that the charge had been borne by someone other than the taxable person and that reimbursement would constitute unjust enrichment to the latter. Such an exception had to be interpreted restrictively, taking into account the fact that passing on a charge to a consumer did not necessarily neutralise the economic effects of the tax on the taxable person. The actual passing on of taxes, either in whole or in part, depended on various factors in each commercial transaction and, even where the charge had been wholly incorporated in the price of goods, a trader might none the less suffer as a result of a fall in the volume of his sales. Accordingly, the existence and the degree of unjust enrichment that repayment of a charge which had been levied though not due might only be established following an economic analysis in which all relevant circumstances were taken into account (see judgment paras 93–102, 118, below).

*e*

*f*

*g*

(3) The principle of equivalence precluded national rules that laid down more favourable procedural rules for claims for repayment of a charge that had been levied though not due than those applicable to similar actions based on certain provisions of domestic law. It was for the national court to determine whether the rules governing repayment of charges held to be incompatible with domestic constitutional law were more favourable than those applicable to actions relating to taxes held to be contrary to Community law (see judgment paras 103–108, 118, below).

*i*

*b* Article 5, so far as is material, is set out at judgment para 3, below

*c* The question referred to the Court of Justice, so far as is material, is set out at judgment para 34, below

(4) The principle of effectiveness precluded national legislation or a national administrative practice which made the exercise of the rights conferred by the Community legal order impossible in practice or excessively difficult by establishing a presumption of unjust enrichment on the sole ground that the duty was passed on to third parties. In the main proceedings, the conclusion by the national authorities that the economic burden of the duty had not been borne by the taxable persons simply because the price invoiced to consumers had included the duty, might constitute a such a presumption, and it was for the national court to make a determination in that regard. It was also for the national court to determine to what extent the co-operation required on the part of taxable persons in establishing that the economic burden of the duty on had not been passed on to a third party amounted in practice to a presumption that the had been passed on, which presumption was only rebutted where the evidence was adduced to the contrary (see judgment paras 103, 109–118, below).

### Notes

For the scope of the EC Directive on excise duty, see 12(2) *Halsbury's Laws* (4th edn reissue) para 404.

### Cases cited

- Amministrazione delle Finanze dello Stato v Essevi SpA* Joined cases 142/80 and 143/80 [1981] ECR 1413, ECJ.
- Amministrazione delle Finanze dello Stato v SpA San Giorgio* Case 199/82 [1983] ECR 3595, ECJ.
- Aprile Srl (in liq) v Amministrazione delle Finanze dello Stato (No 2)* Case C-228/96 [2000] 1 WLR 126, [1998] ECR I-7141, ECJ.
- Banks & Co Ltd (HJ) v The Coal Authority* Case C-390/98 [2001] ECR I-6117, ECJ.
- BP Supergas Anonimos Etairia Geniki Emporiki-Viomichaniki kai Antiprossopeion v Greece* Case C-62/93 [1995] All ER (EC) 684, [1995] ECR I-1883, ECJ.
- Courage Ltd v Crehan* Case C-453/99 [2001] All ER (EC) 886, [2001] ECR I-6297, ECJ.
- Déville v Administration des Impôts* Case 240/87 [1988] ECR 3513, ECJ.
- Dilexport Srl v Amministrazione delle Finanze dello Stato* Case C-343/96 [2000] All ER (EC) 600, [1999] ECR I-579, ECJ.
- Edilizia Industriale Siderurgica Srl (Edis) v Ministero delle Finanze* Case C-231/96 [1998] ECR I-4951, ECJ.
- Evangelischer Krankenhausverein Wien v Abgabenberufungskommission Wien, Wein & Co Handelsgees mbH v Oberösterreichische Landesregierung* Case C-437/97 [2001] All ER (EC) 735, [2000] ECR I-1157, ECJ.
- Falck SpA v European Commission* Joined cases C-74/00 P and C-75/00 P [2002] ECR I-7869, ECJ.
- Firma A Racke v Hauptzollamt Mainz* Case 98/78 [1979] ECR 69, ECJ.
- Grundig Italiana SpA v Ministero delle Finanze* Case C-255/00 [2003] All ER (EC) 176, [2002] ECR I-8003, ECJ.
- Hans Just I/S v Danish Ministry for Fiscal Affairs* Case 68/79 [1980] ECR 501, ECJ.
- Kapniki Mikhailidis AE v Idryma Kinonikon Asphaliseon (IKA)* Joined cases C-441 and C-442/98 [2000] ECR I-7145, ECJ.
- Les Fils de Jules Bianco SA v Directeur Général des Douanes et Droits Indirects* Joined cases 331/85, 376/85 and 378/85 [1988] ECR 1099, ECJ.

- a Marks & Spencer plc v Customs and Excise Comrs* Case C-62/00 [2002] STC 1036, [2003] QB 866, [2003] 2 WLR 665, [2002] ECR I-6325, ECJ.
- Metallgesellschaft Ltd v IRC, Hoechst AG v IRC* Joined cases C-397/98 and C-410/98 [2001] All ER (EC) 496, [2001] Ch 620, [2001] 2 WLR 1497, [2001] ECR I-1727, ECJ.
- b Peterbroeck Van Campenhout & Cie (SCS) v Belgium* Case C-312/93 [1996] All ER (EC) 242, [1995] ECR I-4599, ECJ.
- Roquette Frères SA v Direction des Services Fiscaux du Pas-de-Calais* Case C-88/99 [2000] ECR I-10465, ECJ.
- Santex SpA v Unità Socio Sanitaria Locale n. 42 di Pavia (SCA Mölnlycke SpA, intervening)* Case C-327/00 [2004] All ER (EC) 640, [2003] ECR I-1877, ECJ.
- c Société Comateb v Directeur général des douanes et droits indirects* Joined cases C-192–218/95 [1997] STC 1006, [1997] ECR I-165, ECJ.

### Reference

- By order of 23 March 2001, the Verwaltungsgerichtshof (Administrative Court) referred to the Court of Justice of the European Communities for a preliminary ruling under art 234 EC (formerly art 177 of the EC Treaty)
- d* a question (set out at judgment para 43, below) on the interpretation of art 5 of the EC Treaty (now art 10 EC) and of para (3) of the operative part of the judgment of the court in *Evangelischer Krankenhausverein Wien v Abgabenberufungskommission Wien, Wein & Co Handelsges mbH v Oberösterreichische Landesregierung* Case C-437/97 [2001] All ER (EC) 735. That
- e* question was been raised in proceedings between Weber's Wine World Handels-GmbH, Ernestine Rathgeber, Karl Schlosser and Beta-Leasing GmbH (the claimants in the main proceedings) and the Abgabenberufungskommission Wien (Tax Appeals Commission for the City of Vienna (Austria)) (the tax authority) concerning the retroactive nature of art 185 of the Wiener Abgabenordnung (Vienna Tax Code; the WAO), which makes a claim for
- f* repayment of the duty on alcoholic beverages declared incompatible with Community law in the *EKW* case subject to the condition that the duty has not been passed on to third parties. Written observations were submitted on behalf of: Mr Schlosser by T Jordis, Rechtsanwalt; Beta-Leasing by W Arnold, Rechtsanwalt; the Abgabenberufungskommission Wien by K Pauer, acting as
- g* agent; the Austrian government by H Dossi, acting as agent; the Italian government by IM Braguglia, acting as agent, with G De Bellis, Avvocato dello Stato; the Commission of the European Communities by E Traversa and V Kreuschitz, acting as agents. Oral observations were made on behalf of Ms Rathgeber, represented by W Ilgenfritz, Prozeßbevollmächtigter; Mr Schlosser, represented by T Jordis and G Stefan, Rechtsanwalt; Beta-
- h* Leasing GmbH, represented by W Arnold; the Abgabenberufungskommission Wien, represented by L Pramer, Rechtsanwalt; the Austrian government, represented by H Dossi; and the Commission, represented by E Traversa and V Kreuschitz. The language of the case was German. The facts are set out in the opinion of the Advocate General.
- i* 20 March 2003. **The Advocate General (FG Jacobs)** delivered the following opinion<sup>1</sup>.

1. On 9 March 2000, in response to questions from the Austrian Verwaltungsgerichtshof (Administrative Court), the Court of Justice of the

<sup>1</sup> Original language: English



European Communities ruled in *Evangelischer Krankenhausverein Wien v Abgabenberufungskommission Wien, Wein & Co Handelsges mbH v Oberösterreichische Landesregierung*<sup>2</sup> that art 3(2) of Council Directive (EEC) 91/12<sup>3</sup> precluded the maintenance of certain local and regional beverage taxes in Austria, in so far as they applied to alcoholic beverages. However, it limited the effect of that ruling, as regards claims for reimbursement of tax paid or chargeable before the date of the judgment, to claimants who had already initiated legal proceedings or raised an equivalent administrative claim.

2. A week before the judgment, the Wiener Landtag (Vienna regional legislature) had amended the rules governing reimbursement of tax credits. Under that amendment, which applied also to situations which had arisen before its promulgation, tax wrongfully levied could no longer be recovered by the taxable person if the economic burden of the tax had been borne by a third party.

3. The Verwaltungsgerichtshof now wishes to know whether it is compatible with the *EKW* ruling, and with Austria's duty of co-operation under art 10 EC (formerly art 5 of the EC Treaty), to apply such an amendment to claims raised before the date of that judgment.

#### BACKGROUND AND PROCEEDINGS

4. Until 2000<sup>4</sup>, various taxes, all apparently comparable in their effects and domestic legal basis, were levied on retail sales of ice cream and beverages by regional and municipal authorities in Austria. They provided a significant proportion of those authorities resources. It appears that (at least in Vienna where the taxes with which the present case is concerned were levied) they were self-assessed: traders calculated the amount as a percentage of their taxable sales and declared it to the authorities.

5. In 1997, following objections by traders casting doubt on the compatibility of those taxes with Community law—specifically with the VAT rules, the excise duty directive and the rules on state aid—the Verwaltungsgerichtshof sought guidance from the court on that aspect in the *EKW* case, which concerned a hospital cafeteria in Vienna and a wine trader in a municipality in Upper Austria.

6. On 1 July 1999, Advocate General Saggio delivered his opinion in that case, concluding that the court should find the tax incompatible with the excise duty directive and the state aid rules.

7. He also examined the Austrian governments request for a limitation of the temporal effects of the judgment in the event of a finding of incompatibility, but reached the view that there were no exceptional circumstances justifying such a limitation.

8. At paras 66 to 68 of his opinion, he dealt with the argument that to allow claims for reimbursement of tax wrongfully levied in the past would unjustly enrich traders who had in fact passed the tax on to consumers. In that regard, he pointed out that (in accordance with the case law) in order to resist claims for reimbursement the authorities would have to prove that the burden of the

<sup>2</sup> Case C-437/97 [2001] All ER (EC) 735, [2000] ECR I-1157 (the *EKW* case), at paras (2) and (3) of the operative part.

<sup>3</sup> On the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products (OJ 1992 L76 p 1) (the excise duty directive).

<sup>4</sup> According to the order for reference, local authorities no longer levy such taxes but receive in compensation a larger share of an amended rate of turnover tax.

a tax had indeed been transferred to consumers. However, not only would such proof be difficult to provide, but it might well be the case that traders had not in fact passed on the burden of the tax and had been obliged to assume it themselves<sup>5</sup>.

b 9. The Advocate General's opinion gave rise to considerable concern that very large sums would have to be reimbursed, seriously compromising local and regional finances. Before the court, the Austrian government had asserted that ATS 22,000m, equivalent to some 0.9% of gross national product, would be due for repayment for the years 1995 to 1998.

c 10. According to the order for reference in the present case, all the Austrian Länder amended their regional tax codes so that tax wrongfully levied need no longer be reimbursed or set off where the burden had been passed on to another person. In all cases those amendments were made after the delivery of the opinion in the *EKW* case and in all cases but one before the delivery of the judgment, but at a time when the date for the latter had been announced.

d 11. Under para 162 of the Wiener Abgabenordnung (Vienna tax code), tax credits must first be set off against tax debts, then any surplus must be reimbursed. Until 2 March 2000, para 185 read as follows:

'(1) The taxable person may apply for the repayment of credits (Paragraph 162(2)). Repayment may also take place of the authority's own motion.

e '(2) Liabilities to duty whose amount has been determined, and which the taxable person will have to pay not later than three months from the making of the application for repayment, may be set off against the amount of repayment.

12. On 2 March 2000, the following subparagraphs were added by art I of amending Law 9/2000:

f '(3) No entitlement to repayment exists where the economic burden of the duty was borne by someone other than the taxable person ... Where a duty which has thus been passed on has not yet been paid, the tax authority must prescribe this by a separate decision.

g '(4) Paragraph 3 is not applicable to taxable persons who are able to rely on the "Anlaßfallwirkung" as regards the tax provisions held by the Verfassungsgerichtshof [Constitutional Court] to be unlawful.

h 13. The concept of *Anlaßfallwirkung* relates to the fact that in Austria a law which is declared unconstitutional by the Verfassungsgerichtshof is not immediately or retroactively annulled but remains in force (for a maximum period laid down by that court) pending the enactment of new rules. Essentially, only those who brought proceedings to challenge it (the proceedings giving rise to the declaration of unconstitutionality—the *Anlaßfall*—or other proceedings having the same object and pending before the same court at the time of judgment) may benefit directly and immediately from the finding of unconstitutionality, unless the Verfassungsgerichtshof decides otherwise.

<sup>5</sup> The possible existence of such a situation, he pointed out, had been accepted by the court in *Société Comateb v Directeur général des douanes et droits indirects* Joined cases C-192-218/95 [1997] STC 1006, [1997] ECR I-165 (paras 31, 32).

14. Subsequently, on 20 February 2001, the phrase 'nor does the reduction of the determination of duty by self-assessment or an assessment decision result in a credit in this respect' was added to the end of the first sentence of sub-para (3). a

15. Article II of the amending Law stated:

'Article I is applicable also to tax liabilities which arose before promulgation of this Law.' b

16. The explanatory memorandum to the draft amending Law presented to the Vienna regional legislature for adoption referred to Advocate General Saggio's opinion in the *EKW* case and pointed out that, if the court were to follow his view, refunds amounting to some ATS 3,800m might be claimed in Vienna. Consideration of that possibility had drawn attention to the fact, of general relevance, that the tax code as then worded could allow the unjust enrichment of a taxpayer who had incorporated the amount of an indirect tax in the price of his supplies, by allowing him to recover that amount when the burden of it had in fact been borne by consumers. The proposed art I was intended to deal with that general problem, and not specifically with the possibility that very large sums of beverage tax might have to be reimbursed. c

17. The explanatory memorandum made no mention of the retroactive effect proposed in art II. d

18. The draft Law was given a first reading in the regional legislature on 16 December 1999, when it was strongly criticised by several opposition members who described it as an attempt to circumvent Community law and in itself undoubtedly contrary to that law. The retroactive effect was also criticised, as was the absence of any clear statement that the burden of proof must lie with the authorities since, inter alia, the burden of the tax could not be presumed to have been passed on to customers, and traders could not have been expected to provide themselves with evidence that in fact it had not. It was further asserted that the lawfulness of the tax had been questioned as from Austria's joining the European Union in 1995. e

19. One week after the final adoption of the amendment to the Vienna tax code, the Court of Justice gave judgment in the *EKW* case. As stated above, it found a tax such as that in issue to be incompatible with art 3(2) of the excise duty directive, but limited the retrospective effect of the ruling to claims—legal proceedings or 'equivalent administrative claims'—raised before the date of the judgment. That limitation was based, according to para 58 of the judgment, on the facts that (i) art 3(2) had not previously been interpreted by the court and (ii) the Commission of the European Communities' conduct might have led the Austrian government reasonably to believe that the tax was in conformity with Community law. f

20. It appears that a large number of claims had in fact been raised, in one form or another, before the date of the judgment in the *EKW* case (when the court had been informed of a total which might have to be reimbursed if all claims were to succeed, but not of the number of claims estimated to have been brought already). In its observations in the present case, the Austrian government states that 16,000 such claims, representing some ATS 3,000m, are pending for Vienna alone, and suggests that their number is due at least in part to the fact that the Verwaltungsgerichtshof has decided that the concept of 'equivalent administrative claims', used by the court in the *EKW* judgment, must be given a broad interpretation. g

*i*



a 21. At least some of those claims have been refused by the tax authorities in Vienna, and at least four of those refusals have been challenged on appeal before the Verwaltungsgerichtshof. They concern two restaurants, a Gasthaus and a wine merchant. It may be assumed that those four cases, which have given rise to the present request for a preliminary ruling, are test cases the result of which will determine the fate of a very large number of other claims  
 b not only in Vienna but throughout Austria<sup>6</sup>. It appears that the taxes in issue here were initially self-assessed and paid, and that the claimants then withdrew their original assessments and claimed reimbursement.

22. The Verwaltungsgerichtshof has decided to stay the proceedings in those appeals and seek a preliminary ruling on the following question:

c 'Do Article 10 EC (formerly Article 5 of the EC Treaty) and point 3 of the operative part of [the EKW judgment]... according to which  
 d Article 3(2) of Directive 92/12/EEC may not be relied on in support of claims relating to a tax such as the duty on alcoholic beverages paid or chargeable prior to the date of that judgment, except by claimants who before that date initiated legal proceedings or raised an equivalent  
 e administrative claim, preclude the application of the provision, created by the amendment to the Wiener Abgabenordnung (Vienna Tax Code, WAO) of 2 March 2000, LGBI. No 9/2000, and applicable also to tax liabilities which arose before promulgation of that amendment, in Article 185(3) of the WAO, under which there is no claim to repayment where the economic burden of the duty was borne by a person other than the taxable person?'<sup>7</sup>

23. Article 10 EC, to which the Verwaltungsgerichtshof refers, requires member states in particular to take all appropriate measures to ensure fulfilment of the obligations arising out of the EC Treaty, to facilitate the achievement of the Community's tasks, and to abstain from any measure  
 f which could jeopardise the attainment of the objectives of the Treaty.

24. Written and oral observations have been submitted by two of the claimants in the main proceedings—Karl Schlosser and Beta Leasing Gesellschaft mbH, both of whom operate restaurants in Vienna—by the Abgabenberufungskommission der Stadt Wien (Vienna Tax Appeals Board), whose decisions are contested, by the Austrian government and by the  
 g Commission. The Italian government has submitted written observations and a third claimant—Ernestine Rathgeber, who runs a Gasthaus—submitted oral argument at the hearing.

#### ASSESSMENT

25. As a preliminary point, I consider it appropriate to examine all the aspects  
 h of the disputed amendment referred to in the national courts question, and not only the issue of retroactivity which is stressed both in the question itself and in the Verwaltungsgerichtshof's reasoning. The question whether the substantive rule is compatible with Community law logically precedes—and may affect the answer—to the question whether its retroactive effect is compatible.

i 26. Bearing that in mind, there is, as has been pointed out by the referring court and all those who have submitted observations, much in the courts consistent case law which is relevant to the various aspects of the present case.

6 The order for reference mentions at least 300 similar appeals which are pending.

7 The emphasis is that of the referring court.

27. On the one hand, it is established that individuals are entitled to reimbursement of national charges levied in breach of Community law, as a consequence and complement of the rights conferred on them by Community provisions as interpreted by the Court of Justice; member states are therefore required in principle, as a matter of Community law, to repay such charges<sup>8</sup>. a

28. However, in the absence of Community rules on such reimbursement, it is for the domestic legal system of each member state to lay down the detailed procedural rules applicable, provided that they are not less favourable than those governing similar domestic situations (the principle of equivalence) and do not render the exercise of the rights conferred by Community law in practice impossible or excessively difficult (the principle of effectiveness)<sup>9</sup>. b

### *The principle of equivalence*

29. National rules on actions for the recovery of charges which are found to be incompatible with Community law may not be less favourable than those governing similar domestic actions, nor may such a charge be specifically targeted by more restrictive rules adopted following such a finding of incompatibility<sup>10</sup>. c

30. First of all in that regard, nothing in the wording of the amendment explicitly distinguishes between claims based on national law and those based on Community law. Both the Abgabenberufungskommission and the Austrian government have asserted that claims for reimbursement of a range of other taxes which they cite could be affected by the disputed amendment if those taxes were found to be contrary to national law. d

31. Nor do I consider the circumstances of the adoption of the amendment to be of decisive importance in themselves. Whilst it is clear that the imminent likelihood of a judgment of the Court of Justice finding the beverage tax to be incompatible with Community law was an important factor in the genesis and timing of the amendment, that does not mean that it applies or was intended to apply solely to claims for reimbursement of that tax or in general of taxes levied contrary to Community law. e

32. The national court must none the less satisfy itself that the rule in issue does not in fact apply solely to a particular kind of charge declared incompatible with Community law but to 'a whole range of internal charges and taxes'<sup>11</sup>. f

33. In that regard, it is important to verify that factual or procedural circumstances do not transform a prima facie neutral rule, applicable without

8 For recent examples referring to earlier case law, see the judgments in *Metallgesellschaft Ltd v IRC*, *Hoechst AG v IRC* joined cases C-397/98 and C-410/98 [2001] All ER (EC) 496, [2001] ECR I-1727 (para 84) and *Marks & Spencer plc v Customs and Excise Comrs* Case C-62/00 [2002] STC 1036, [2002] ECR I-6325 (para 30). g

9 See, for example, the *Metallgesellschaft* case (para 85 and the case law cited there), cited in footnote 8, above, and, most recently, *Grundig Italiana SpA v Ministero delle Finanze* Case C-255/00 [2003] All ER (EC) 176, [2002] ECR I-8003 (para 33). h

10 See for example, with regard to specific targeting, *Deville v Administration des Impôts* Case 240/87 [1988] ECR 3513 and, more recently, the judgments in *Dilexport Srl v Amministrazione delle Finanze dello Stato* Case C-343/96 [2000] All ER (EC) 600, [1999] ECR I-579 (paras 38, 39) and also the *Marks & Spencer* case (para 36), cited in footnote 8, above. i

11 See the judgment in *Aprile Srl (in liq) v Amministrazione delle Finanze dello Stato (No 2)* Case C-228/96 [2000] 1 WLR 126, [1998] ECR I-7141 (para 29).

a distinction, into one which in fact affects one type of claim much more significantly than another. Each rule must be examined in its procedural context<sup>12</sup>.

34. In the present case, Beta Leasing points out that the amendment in issue excludes from its scope claimants 'who are entitled to benefit from Anlaßfallwirkung in respect of a tax provision which has been held by the Verfassungsgerichtshof to be unlawful', but that there is no equivalent exclusion as regards findings of illegality by other national courts following a ruling of the Court of Justice. Thus, it contends, if the Verfassungsgerichtshof had held the beverage tax to be unlawful and had limited its judgment in the same way, the amendment could not have had any effect.

c 35. The Commission explains that, since the effects of a finding that a tax is contrary to national constitutional law extend only to a limited number of parties<sup>13</sup>, problems of massive repayment such as those referred to in the present case cannot arise. There had thus previously been no serious need for any rule precluding unjust enrichment in the manner specified in the disputed amendment.

d 36. In that light, the Commission originally considered that the rules governing reimbursement of taxes found incompatible with national law were not more favourable than in the case of taxes incompatible with Community law. At the hearing however it changed its view and argued that there was a difference in treatment favouring those who claimed reimbursement of a tax found to be unlawful by the Verfassungsgerichtshof; in such cases alone, where e the claimant could benefit from Anlaßfallwirkung, the possibility of unjust enrichment was no longer examined.

37. This aspect has not been discussed before the court in great detail, and it would not be appropriate to express a definitive view which should be based on a full appreciation of national circumstances. However, the contested amendment appears to mean that the rule precluding reimbursement where f the burden of the tax has been passed on applies to all categories of claimant but one: those who have brought proceedings before the Verfassungsgerichtshof challenging a tax declared unconstitutional by that court.

38. If it is the case that entitlement to benefit from Anlaßfallwirkung is g confined to those bringing challenges under national constitutional law, then the rules governing reimbursement of taxes found incompatible with national law might be more favourable, in that regard, than in the case of taxes found incompatible with Community law.

39. For the amendment to comply with the principle of equivalence, it would be necessary either for the benefit of the exception to be extended to all those h who have challenged a tax found to be incompatible with Community law or for the exception to be abolished entirely.

### *The principle of effectiveness*

i 40. The principle of effectiveness—that is to say of the effective enforcement of Community law in national courts and the effective protection by those

<sup>12</sup> See, for example, the judgments in *SCS Peterbroeck Van Campenhout & Cie v Belgium* Case C-312/93 [1996] All ER (EC) 242, [1995] ECR I-4599 (para 13) and most recently *Santex SpA v Unità Socio Sanitaria Locale n. 42 di Pavia (SCA Mölnlycke SpA, intervening)* Case C-327/00 [2004] All ER (EC) 640, [2003] ECR I-1877 (paras 56, 57).

<sup>13</sup> See para 13, above.



courts of rights conferred by Community law—has been asserted by the court in many areas, and may be seen as an expression of the generally recognised right to an effective judicial remedy.

41. As the court has consistently expressed the principle, it is for the courts or tribunals of the member states, pursuant to the principle of co-operation laid down by art 10 EC, to ensure the legal protection arising for individuals from the direct effect of Community law<sup>14</sup>. Although the detailed procedural rules to be applied are a matter for national law, they must not render the exercise of rights conferred by Community law—here, the right to reimbursement of charges levied contrary to Community law—in practice impossible or excessively difficult.

42. When considering whether that is so, it is necessary to examine each rule in its context its role in the national procedure viewed as a whole, having regard to all its features<sup>15</sup>.

43. The types of rule which the court has indicated as capable of making it in practice impossible or excessively difficult to recover charges levied contrary to Community law include in particular, in the context of unjust enrichment, certain presumptions or rules of evidence which place a burden of proof on the taxpayer<sup>16</sup> and certain procedural time limits, particularly where they are applied retroactively<sup>17</sup>. I shall deal with those aspects below.

44. First, however, it is necessary to consider the concept of unjust enrichment itself.

### *Unjust enrichment*

45. Although member states must in principle reimburse national charges levied in breach of Community law, they are not required to do so where that would entail the unjust enrichment of the recipient<sup>18</sup>. Legal systems in general do not recognise entitlement to any enrichment which would be unfair or unjustified, and no such entitlement is conferred by Community law.

46. In particular, in a case such as the present a member state need not reimburse a trader where it is established that the burden of the charge paid by him has been passed on in its entirety to some other person and that the trader would be unjustly enriched by reimbursement; if in the same circumstances the burden has been passed on in part, only the amount not passed on must be reimbursed<sup>19</sup>. A trader who has paid a tax but has in fact passed on the whole burden of it to his customers, without himself suffering any concomitant loss, will clearly be unjustly enriched if he then obtains reimbursement of that tax

14 See, for example, see the judgments in the *Peterbroeck* case (para 12 and the case law cited there), cited in footnote 12, above; more recently, *HJ Banks & Co Ltd v The Coal Authority* Case C-390/98 [2001] ECR I-6117 (para 121).

15 See footnote 12, above.

16 See, for example, the judgments in *Amministrazione delle Finanze dello Stato v SpA San Giorgio* Case 199/82 [1983] ECR 3595 (para 14), the *Dilexport* case (para 54), cited in footnote 10, above, and *Kapniki Mikhailidis AE v Idryma Kinonikon Asphalipseon (IKA)* Joined cases C-441 and C-442/98 [2000] ECR I-7145 (para 36 et seq).

17 See, for recent examples, the judgments in the *Marks & Spencer* case (para 35 et seq), cited in footnote 8, above, and the *Grundig Italiana* case (para 34 et seq), cited in footnote 9, above.

18 See, for example, the judgments in *Hans Just I/S v Danish Ministry for Fiscal Affairs* Case 68/79 [1980] ECR 501 (paras 26, 27) and more recently *Courage Ltd v Crehan* Case C-453/99 [2001] All ER (EC) 886, [2001] ECR I-6297 (para 30; together with the case law cited there).

19 See the judgments in the *Comateb* case (paras 27, 28), cited in footnote 5, above, and the *Kapniki Mikhailidis* case (para 33), cited in footnote 16, above.

a because it is found to have been unlawful<sup>20</sup>. A national rule precluding unjust enrichment in those circumstances is thus compatible with Community law.

47. However, even where the burden of the charge has been passed on in whole or in part, repayment to the trader of the relevant amount does not necessarily entail his unjust enrichment<sup>21</sup>.

b 48. For example, the trader may choose to curtail any increase in his retail prices and maintain his volume of sales by limiting his profit margin to absorb all or part of the tax. Or else, having decided not to take that course but to increase his prices by the exact amount of the tax, he may find that his profits drop because he is making fewer sales. And he may even choose to absorb part of the tax himself yet still find a drop in sales. In all such cases—which are plausible in a situation of keen competition between traders—he will have suffered an economic loss as a result of the imposition of an unlawful tax, so that it cannot be said either that he has passed on (all) the burden of that tax to third parties or that he would be unjustly enriched if (an appropriate proportion of) the tax were reimbursed to him<sup>22</sup>.

c 49. Community law thus does not allow a member state to resist claims for reimbursement simply where the burden of a tax has been passed on; it must also be established that unjust enrichment would ensue<sup>23</sup>.

d 50. It is therefore necessary to look at any disputed rule carefully in order to be sure that it is truly limited to preventing unjust enrichment and does not also make it in practice impossible or excessively difficult to obtain reimbursement in other circumstances in which a right to reimbursement is required under Community law.

e 51. The disputed amendment to the Vienna tax code precludes repayment 'where the economic burden of the duty has been borne by someone other than the taxable person'. The substance of that rule thus would not appear to affect any traders other than those who would indeed be unjustly enriched by reimbursement, provided that the concept of 'bearing the economic burden' of a tax includes all suffering of economic loss as a result of being liable to pay it, whether the amount of the tax itself is billed to a third party or not, and provided that the rule is interpreted so that any sharing of the economic burden is taken into account and pro rata reimbursement may be obtained where appropriate. Subject to those provisos, the substantive rule thus appears to respect the principle of effectiveness.

f 52. In that connection, the Commission drew attention at the hearing to an aspect which has not been debated in full detail before the court. If, as may have been the case, the amount of the beverage tax also had the effect of increasing the amount of VAT due on sales and thus the final retail price, traders sales and thus profits may have been further affected. That is one of the

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20 That would not be so if his customers were able to reclaim the tax from him in turn, or directly from the tax authorities, but such a procedure may not always be available. In the circumstances of the present case, the nature of retail sales of alcoholic beverages is likely to preclude any such possibility in practice. Cf the judgment in the *Comateb* case (para 24), cited in footnote 5, above.

i 21 See the *Comateb* case (para 29) and the *Kapniki Mikhailidis* case (para 34); see also, with regard to the present circumstances, para 68 of the opinion of Advocate General Saggio in the *EKW* case, cited in footnote 2, above.

22 Cf, inter alia, the judgments in the *Just* case (paras 26, 27), cited in footnote 18, above, the *Comateb* case (para 30), cited in footnote 5, above, and the *Kapniki Mikhailidis* case (para 35), cited in footnote 16, above.

23 Cf the judgments in the *Comateb* case (para 23) and the *Kapniki Mikhailidis* case (para 32).

factors which, if applicable, must be taken into account before it can be decided that unjust enrichment would ensue from reimbursement. a

### *Burden of proof*

53. More serious difficulty may arise with regard to requirements of proof, an aspect which is not governed by the disputed amendment itself. b

54. It is clear from the case law<sup>24</sup> that a rule requiring the claimant to prove that he has not passed on the tax to a third party, or a presumption that the tax has been passed on, does not comply with Community law. Any rule imposing special limitations on the form of evidence which may be adduced also fails to comply.

55. According to the order for reference, the relevant tax code does not contain any special rules on the burden of proof, the evidence admissible or the assessment of that evidence. The general procedural law applicable proceeds from the courts duty to ascertain the material circumstances *ex officio*. The taxable person must contribute to establishing the facts, but where proof cannot reasonably be expected the law is satisfied with establishment of probability, and admits as evidence anything which is capable of establishing the material facts and is appropriate in the circumstances of the case. The *Abgabenberufungskommission* and the Austrian government assert that the burden of proof is on the tax authorities. c  
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56. The claimant Karl Schlosser contends however that under Austrian law, since a claim for reimbursement involves a request for treatment benefiting the claimant and verification that the statutory conditions for according that beneficial treatment are met, the claimant is under a duty to assist in establishing the relevant facts. In particular he must provide documentation to support the calculations involved. In the present cases, the *Abgabenberufungskommission* reached its decision by concluding, from the uncontested fact that the price charged to customers for alcoholic beverages was inclusive of beverage tax, that the economic burden of the tax had been borne by consumers. That amounts to a presumption whereby reimbursement is rendered impossible or at least excessively difficult. e  
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57. It is not for this court to say which of those differing views of the implementation in practice of rules of national law is correct. However, in order for the national court to be certain that the disputed amendment complies with Community law as regards requirements of proof, it must satisfy itself that the rules governing the ascertainment of the relevant facts are not biased against the claimant. g

58. On the one hand there must be no obligation on the claimant to prove that he has not passed the burden of the tax on to a third party and no presumption that he has done so simply because his retail price was necessarily deemed to be inclusive of tax, regardless of any other circumstances. h

59. On the other hand it is clear that, where a self-assessed tax is concerned, the tax authorities cannot be expected to prove that the burden has been passed on without the taxable persons co-operation and access to such relevant records as he may have kept<sup>25</sup>.

60. In that context, it is in my view desirable to clarify the case law by pointing out that, whilst Community law precludes any presumption of unjust i

<sup>24</sup> For example, the judgments in the *San Giorgio* case (para 14), the *Dilexport* case (para 54) and the *Kapniki Mikhailidis* case (para 36 et seq), all cited in footnote 16, above.

<sup>25</sup> See para 71, below.



*a* enrichment to be refuted by the claimant, it does not preclude the possibility of drawing reasonable inferences from existing evidence. Without such a possibility, the balance might be tilted so far in favour of the claimant as to render the justified aim of preventing unjust enrichment in practice impossible to achieve. It must be possible for the deciding body to take all available relevant evidence into consideration and reach a fair decision taking full account of whatever likelihood there may be that the claimant bore any part of the burden of the tax or suffered any economic loss as a result of its imposition.

*b* 61. To conclude on this aspect, the national court must examine whether, in the context of the national procedural system viewed as a whole<sup>26</sup>, the disputed amendment has the effect in practice of establishing a presumption that the economic burden of the beverage tax was passed on to customers unless the trader can prove otherwise. Such a situation would be contrary to Community law, and could be cured only by disapplying the disputed rule or by interpreting it in such a way that it did not have that effect.

*d* *Retroactive effect*

62. With regard to Community measures, the court has repeatedly held that the principle of legal certainty precludes a measure from taking effect from a point in time before its publication, but that it may exceptionally be otherwise where the purpose to be achieved so demands and where the legitimate expectations of those concerned are duly respected<sup>27</sup>.

*e* 63. In the context of national rules concerning the recovery of charges unduly levied, the court has held that, where it has declared a charge to be contrary to Community law, the member state in question is not precluded from adopting new conditions applying to its reimbursement, such as a shorter time limit, provided that the principles of equivalence and effectiveness are observed<sup>28</sup>.

*f* 64. With regard to the latter principle, it must not adopt a procedural rule which specifically reduces the possibilities of bringing proceedings for recovery, in particular by retroactively reducing time limits for bringing proceedings without making appropriate transitional arrangements<sup>29</sup>.

*g* 65. The limitation of the temporal effect of the ruling in the *EKW* judgment does not mean that whenever a person had raised a claim before the date of the judgment that claim must be free from any other restriction laid down by national law but rather that, in relation to the period specified, no other claims may be allowed to proceed. Nor is there anything in the judgment which itself imposes or implies any general condition as to the date of enactment of any applicable national rules or which precludes any retroactive effect thereof.

*h* 66. A national rule which does no more than preclude unjust enrichment is compatible with Community law.

67. Where such a rule applies to claims in respect of situations which arose before its enactment, that effect does not seem to me incompatible with

*i* 26 See para 42, above.

27 See the judgments in *Firma A Racke v Hauptzollamt Mainz* Case 98/78 [1979] ECR 69 (para 20); more recently *Falck SpA v European Commission* Joined cases C-74/00 P and C-75/00 P [2002] ECR I-7869 (para 119).

28 See the judgment in the *Dilexport* case (para 43), cited in footnote 16, above, and para (2) of the operative part of the judgment.

29 See the *Deville* case, cited in footnote 10, above, and, more recently, the *Marks & Spencer* case (para 34 et seq), cited in footnote 8, above.

Community law. On the one hand, in so far as it seeks to preclude unjust enrichment, it in fact precludes only enrichment which would have occurred after its enactment, provided that there is no provision for recovery of any amount already reimbursed. On the other hand, there can in any event be no legitimate expectation of any such enrichment, since the very concept of legitimacy cannot embrace what is unjust. a

68. It is true that in other circumstances a retroactive effect may fall foul of the principle of effectiveness: in *Marks & Spencer* (para 35 et seq)<sup>30</sup> and *Grundig Italiana* (para 34 et seq)<sup>31</sup>, for example (to cite only the most recent cases), the court has indicated that a retroactive reduction of the period within which reimbursement may be claimed is incompatible with the principle of effectiveness if, in the absence of adequate transitional provisions, it deprives some individuals of their right to reimbursement or allows them too short a period in which to assert that right. b  
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69. Here, by contrast, since Community law does not require a right to reimbursement at all where unjust enrichment would ensue, the fact that, following a change to national law, a claim which might previously have succeeded can on that ground no longer succeed has no impact on the effectiveness of a right conferred by Community law. d

70. However, the question of retroactivity is relevant to the question of the burden of proof since, as Mr Schlosser points out, claimants who know that they will have to establish certain facts are more likely to ensure that they have specific evidence of those facts than are those who do not<sup>32</sup>.

71. To compile and retain such evidence may be a cumbersome task in situations such as the present, so that a trader might feel justified in not carrying it out if there were no current or foreseeable need to do so in order to be able to obtain reimbursement of a tax which he considered to be clearly incompatible with Community law and the imposition of which he knew caused him a loss. In particular, retail price calculations may not have taken the amount of tax specifically and separately into account if the trader did not expect to have to provide proof of his loss. e  
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72. A retroactive change in the rules would thus be incompatible with the principle of effectiveness if, by introducing an evidentiary requirement which was not anticipated at the time when the evidence could have been obtained, it made it in practice impossible or excessively difficult for such a trader to obtain reimbursement even when he had in fact borne (part of) the burden of the tax. g

## CONCLUSION

73. In view of all the above considerations, I am of the opinion that the Court of Justice should give the following answer to the Verwaltungsgerichtshof: h

A provision of national law which precludes any reimbursement of a tax found incompatible with Community law to a taxable person where the economic burden of the tax has been borne by a third party is not contrary to Community law, even if it applies to situations which arose before its i

<sup>30</sup> Cited in footnote 8, above.

<sup>31</sup> Cited in footnote 9, above.

<sup>32</sup> Cf the judgment in *Les Fils de Jules Bianco SA v Directeur Général des Douanes et Droits Indirects* Joined cases 331/85, 376/85 and 378/85 [1988] ECR 1099 (para 15).

a enactment and to parties whose right to rely on the incompatibility of the tax was not excluded by a temporal limitation of the effects of the judgment of the Court of Justice from which the incompatibility is deduced, provided that it complies with the principles of equivalence (it must not be less favourable than the rules governing reimbursement in comparable purely domestic situations) and effectiveness (it must not render in practice impossible or excessively difficult the exercise of rights conferred by Community law).

b In order to comply with the principle of effectiveness, the provision must not, in particular:

c —render reimbursement in practice impossible or excessively difficult in respect of any part of the economic burden which has been borne by the taxable person, either because he has not passed on the full amount of the tax or because he has otherwise suffered economic loss as a result of its imposition;

d —entail, in practice, any presumption to the effect that the economic burden has been borne by a third party or any requirement that the claimant establish the contrary;

—introduce any obligation to produce evidence which it is in practice impossible or excessively difficult to obtain at the time when the provision enters into force.

e 2 October 2003. **The COURT OF JUSTICE (Fifth Chamber)** delivered the following judgment.

f 1. By order of 23 March 2001, received at the Court of Justice of the European Communities on 2 April 2001, the Verwaltungsgerichtshof (Administrative Court) referred to the Court of Justice for a preliminary ruling under art 234 EC (formerly art 177 of the EC Treaty) a question on the interpretation of art 5 of the EC Treaty (now art 10 EC) and of para (3) of the operative part of the judgment of the court in *Evangelischer Krankenhausverein Wien v Abgabenberufungskommission Wien, Wein & Co Handelsges mbH v Oberösterreichische Landesregierung* Case C-437/97 [2001] All ER (EC) 735, [2000] ECR I-1157 (the *EKW* case).

g 2. That question has been raised in proceedings between Weber's Wine World Handels-GmbH, Ms Rathgeber, Mr Schlosser and Beta-Leasing GmbH (the claimants in the main proceedings) and the Abgabenberufungskommission Wien (Tax Appeals Commission for the City of Vienna (Austria)) (the tax authority) concerning the retroactive nature of art 185 of the Wiener Abgabenordnung (Vienna Tax Code; the WAO), which makes a claim for repayment of the duty on alcoholic beverages declared incompatible with h Community law in the *EKW* case subject to the condition that the duty has not been passed on to third parties.

#### LEGAL FRAMEWORK

##### i Community legislation

3. Article 5 of the Treaty provides:

'Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks.



They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty.' a

4. Paragraph (3) of the operative part of the *EKW* judgment is worded as follows:

'The provisions of art 3(2) of [Council] Directive 92/12 [on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products (OJ 1992 L76 p 1)] cannot be relied on in support of claims relating to a tax such as the duty on alcoholic beverages paid or chargeable prior to the date of the present judgment, except by claimants who have, before that date, initiated legal proceedings or raised an equivalent administrative claim.' b c

#### *National legislation*

5. Paragraph 162 of the WAO provides:

'(1) The taxable person's tax credits shall be applied in payment of the debts which are due. d

(2) In so far as the tax credits are not to be applied as provided for in subparagraph 1, they shall be repaid in accordance with the provisions of Paragraph 185.'

6. Under the provisions in force before 2 March 2000, a taxable person could, pursuant to para 185(1) of the WAO, claim repayment of tax credits not applied in payment of debts which were due. The repayment of such tax credits was not subject to any other precondition. e

7. Paragraph 1 of the Law published on 2 March 2000 (LGBI für Wien No 9/2000) (the amending act), amended the WAO by inserting, inter alia, sub-paras (3) and (4) into para 185 of that code. Furthermore, para 2 of the amending act provided that para 1 thereof was also applicable to tax liabilities which had arisen before promulgation of that act. f

8. A new amending act, dated 20 February 2001 (LGBI für Wien No 7/2001), also supplemented the first sub-subparagraph of para 185(3) of the WAO.

9. Paragraph 185 of the WAO, as amended by the two above-mentioned amending acts, provides: g

'(1) The taxable person may apply for the repayment of credits (Paragraph 162(2)). Repayment may also take place of the authority's own motion.

(2) Liabilities to duty whose amount has been determined, and which the taxable person will have to pay not later than three months from the making of the application for repayment, may be set off against the amount of repayment. h

(3) No entitlement to repayment exists where the economic burden of the duty was borne by someone other than the taxable person; nor does the reduction of the determination of duty by self-assessment or an assessment decision result in a credit in this respect. Where a duty which has thus been passed on has not yet been paid, the tax authority must prescribe this by a separate decision. i

(4) Paragraph 3 is not applicable to taxable persons who are able to rely on the "Anlaßfallwirkung" as regards the tax provisions held by the Verfassungsgerichtshof to be unlawful.'

- a* 10. In Austrian law, the 'Anlaßfallwirkung' is applicable, inter alia, following a judgment of the Verfassungsgerichtshof declaring a law unconstitutional. In such a situation, the law is not annulled with retroactive effect but, unless the Verfassungsgerichtshof decides otherwise, remains applicable to facts which arose before the declaration of unconstitutionality. However, in the case
- b* which gave rise to the examination of constitutionality and also in those pending before the Verfassungsgerichtshof at the time when it began to consider that case, the law in question must no longer be applied.

#### FACTUAL BACKGROUND

- c* *The circumstances prevailing at the time of the adoption of the amending act*
11. In 1997 the Verwaltungsgerichtshof, in a dispute between the tax authorities and taxable persons concerning the compatibility with Community law of the duty on beverages—and more particularly with the provisions on value added tax, excise duties and state aid—referred a number of questions to the Court of Justice for a preliminary ruling, which the court answered in the *EKW* judgment.
- d* 12. In his opinion of 1 July 1999 in the *EKW* case, Advocate General Saggio proposed that the court should rule that both Directive 92/12 and the Community rules on state aid precluded the maintenance of the duty on beverages.
- e* 13. Furthermore, in examining the Austrian government's request that the effects of the forthcoming judgment should be limited in time should the court decide that the duty on beverages was incompatible with Community law, the Advocate General submitted that that request should be refused, since he saw nothing to justify it.
- f* 14. That opinion gave rise to great anxiety among the Austrian local authorities, which feared that they would be compelled to repay very large sums.
15. According to the order for reference, all the Austrian Länder, following delivery of Advocate General Saggio's opinion, amended their tax legislation so that duties levied though not due would not be repaid or set off where they had been passed on to third parties. Those amendments were all introduced
- g* following delivery of the opinion, but, except in one case, before delivery of the *EKW* judgment, although at a time when the date of delivery had already been announced.
16. In the Land of Vienna, the amending law was enacted on 2 March 2000, one week before delivery of the *EKW* judgment.
- h* 17. At para (2) of the operative part of that judgment, the court ruled that art 3(3) of Directive 92/12 does not preclude the maintenance of a tax charged on non-alcoholic beverages and ice cream.
18. At the same paragraph of the operative part, however, the court ruled that art 3(2) of Directive 92/12 precludes the maintenance of that tax in so far as it concerns alcoholic beverages.
- i* 19. In answer to the Austrian Federal government, however, which had claimed that a judgment which required reimbursement of the duty on beverages would have serious financial consequences and that, in any event, the taxable persons had passed the duty on to consumers by incorporating the duty in the price of the beverages, the court, at para 59 of the *EKW* judgment, recognised the existence of—

'overriding grounds of legal certainty [which] preclude calling in question legal relations which have exhausted their effects in the past; [since] to do so would retroactively cast into confusion the system whereby Austrian municipalities are financed.'

20. Consequently, at para (3) of the operative part of the *EKW* judgment, the court limited the temporal effects of the judgment by precluding any possibility of repayment of the duties paid and not challenged before the date of the judgment.

### *The main proceedings*

21. Weber's Wine World Handels-GmbH is a wine dealer, whereas each of the other claimants in the main proceedings operates a restaurant.

22. In those capacities, they were subject, pursuant to the WAO, to the duty on beverages. As this is a 'self-assessed' duty, it is the taxable person who calculates and, not later than the 15th of each month, pays the duty payable for the previous month, without a prior tax notice from the tax authorities. Subsequently, each taxable person sends, not later than 15 February of each year, a tax return in respect of the tax debt for the previous year.

23. The claimants in the main proceedings calculated and paid the duty on alcoholic and non-alcoholic beverages. Subsequently, however, they withdrew their tax declarations, claiming that the duty was unlawful under Community law, and claimed repayment thereof.

24. In 1998, the claimants in the main proceedings applied to the Abgabenbehörde erster Instanz (the authority competent at first instance for collection of duties) for repayment of the duty on beverages in respect of certain periods between 1995 and 1998, on the ground that the duty was contrary to Directive 92/12 and that it had been wrongfully levied.

25. The Abgabenbehörde erster Instanz held that the claimants in the main proceedings were liable to pay the duty on both alcoholic and non-alcoholic beverages and dismissed the claims for repayment, since in its view the sums already paid by the taxable persons corresponded to the amount payable.

26. The claimants in the main proceedings appealed against those decisions to the tax authority, which, by decisions of 6 September 2000, amended the amount of the duty on beverages set at first instance, on the ground that only sales of non-alcoholic beverages should be taxed, in accordance with the *EKW* judgment.

27. However, the tax authority rejected the claims for repayment of the duties already paid, since it took the view that the inquiry had revealed that they had been definitively passed on by the taxable persons to the final consumer.

28. The claimants in the main proceedings appealed to the Verwaltungsgerichtshof against the decisions of 6 December 2000, in so far as they dismissed the claims for repayment of the duty on alcoholic beverages for the period 1995 to 1998.

29. All the claimants in the main proceedings maintain that their right to repayment of the duty on alcoholic beverages levied in breach of Community law has been infringed. In particular, they claim that the new amending act, adopted on 20 February 2001, or after delivery of the *EKW* judgment, infringes the duty of loyal co-operation laid down in art 5 of the Treaty and that the retroactive nature of para 185(3) of the WAO constitutes a breach of the



a principle of protection of legitimate expectations. They all further state that the duty was not passed on to consumers.

30. The tax authority has always taken the opposite point of view to that of the claimants in the main proceedings.

#### THE ORDER FOR REFERENCE AND THE QUESTION FOR THE COURT

b 31. The Verwaltungsgerichtshof considers that the *EKW* judgment places the Republic of Austria under an obligation, derived from the duty of loyal co-operation laid down in art 5 of the Treaty, to repay the unlawfully levied duty on alcoholic beverages to each taxable person who had initiated legal proceedings or raised an equivalent administrative claim before the date of delivery of that judgment.

c 32. It considers, however, that the fact that repayment of the duty is made subject to its not having been passed on to third parties is not contrary to Community law.

33. On the other hand, the national court is uncertain as to the compatibility with Community law of the retroactive nature conferred on para 185(3) of the

d WAO, since, according to para (3) of the operative part of the *EKW* judgment, any taxable person who before 9 March 2000 had lodged an administrative complaint in respect of the duty on alcoholic beverages should have his claim granted, whereas, under the amending act, the objection might be raised that the economic burden of the duty was borne by the third parties.

e 34. In those circumstances, the Verwaltungsgerichtshof decided to stay proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Do Article 10 EC (formerly Article 5 of the EC Treaty) and point 3 of the operative part of the [*EKW*] judgment, according to which Article 3(2) of Directive 92/12/EEC may not be relied on in support of claims relating to a tax such as the duty on alcoholic beverages paid or chargeable prior to the date of that judgment, except by claimants who before that date initiated legal proceedings or raised an equivalent administrative claim, preclude the application of the provision, created by the amendment to the Wiener Abgabenordnung (Vienna Tax Code, WAO) of 2 March 2000, LGBl. No 9/2000, and applicable also to tax liabilities which arose before promulgation of that amendment, in Article 185(3) of the WAO, under which there is no claim to repayment where the economic burden of the duty was borne by a person other than the taxable person?’

#### THE QUESTION REFERRED TO THE COURT

##### h *Observations submitted to the court*

35. The claimants in the main proceedings begin by referring to the court’s case law on the obligation placed on member states to repay taxes levied in breach of the provisions of Community law.

36. Thus, where the court declares that Community law precludes the maintenance of a national tax, it follows, according to a consistent line of decisions, that the member state concerned is under an obligation, under art 5 of the Treaty, to repay to the individual the tax which has been levied though not due.

i 37. However, in the absence of Community rules on recovery of national taxes which have been levied though not due, it is for the internal legal order of the member states to designate the competent courts and to lay down the

procedural rules of judicial proceedings designed to ensure the protection of the rights which individuals derive from Community law. a

38. For reasons of legal certainty, the member states are in principle permitted to limit, at national level, the repayment of taxes which have been levied though not due. Such restrictions should, however, satisfy the principle of equivalence, which requires that the national provisions apply in the same way to purely domestic cases and to those arising under Community law, and to the principle of effectiveness, which requires that the exercise of the rights conferred by the Community legal order is not rendered impossible in practice or excessively difficult. b

39. Furthermore, the claimants in the main proceedings recognise that a member state may refuse to repay taxes levied in breach of Community law in so far as they have been passed on to other persons by the taxable person and the latter would thereby be unjustly enriched, which it is for the national authority to establish. c

40. However, the claimants in the main proceedings claim that the court has held in a number of judgments that Community law precludes a national legislature, subsequent to a judgment of the court, from adopting procedural rules which specifically reduce the possibilities for the taxable person of bringing proceedings for recovery of taxes which were levied though not due. Such rules constitute a breach of the prohibition, deriving from art 5 of the Treaty, on frustrating Community law (see *Amministrazione delle Finanze dello Stato v SpA San Giorgio* Case 199/82 [1983] ECR 3595 (para 14), *Deville v Administration des Impôts* Case 240/87 [1988] ECR 3513 (para 13), *Aprile Srl (in liq) v Amministrazione delle Finanze dello Stato (No 2)* Case C-228/96 [2000] 1 WLR 126, [1998] ECR I-7141 (para 16) and *Dilexport Srl v Amministrazione delle Finanze dello Stato* Case C-343/96 [2000] All ER (EC) 600, [1999] ECR I-579 (para 39)). d e

41. According to the claimants in the main proceedings, para 185(3) of the WAO, read with para 2 of the amending act, does not fulfil the requirements laid down by the court in its decisions on the recovery of sums levied but not due. f

42. The condition that the tax has not been passed on laid down in art 185(3) of the WAO infringes both the principles of equivalence and effectiveness and the prohibition on frustrating Community law which derives from art 5 of the Treaty. g

43. First, it is contrary to the obligation of co-operation deriving from art 5 of the Treaty because, although it is formulated in general terms, in practice it is aimed at only a small number of indirect taxes which, on the basis of the internal division of powers, are levied by the Länder and the municipalities and, consequently, what is essentially concerned is the duty on alcoholic beverages held to be contrary to Community law. h

44. Next, the retroactive effect conferred on para 185(3) of the WAO by para 2 of the amending act, provided that the tax has not been passed on, is contrary to the principle of effectiveness because it is difficult to establish after the event that the duty on alcoholic beverages was not passed on to the final consumer. i

45. Last, as Beta-Leasing GmbH claimed at the hearing, Austrian law is also contrary to the principle of equivalence, since the WAO provides at para 185(4) that sub-para (3) of that paragraph is not to apply where it is possible to rely on the *Anlaßfallwirkung* and that a taxable person may obtain repayment of the amount paid by way of duty levied on the basis of tax provisions which have

a been declared unconstitutional by the Verfassungsgerichtshof. On the other hand, there is no equivalent provision for repayment of a duty levied on the basis of national provisions which have been held to be contrary to Community law by decision of the Court of Justice, since such repayment is conditional upon the economic burden of the duty not having been passed on to third parties, in application of para 185(3) of the WAO. Consequently, there  
b are two types of taxpayers in Austria: those entitled to repayment of a tax which has been levied though not due, provided that certain conditions are satisfied, including the condition that the tax has not been passed on to third parties, and those able to rely on a precedent in the form of a declaration by the Verfassungsgerichtshof that a tax provision is unconstitutional.

c 46. The claimants in the main proceedings further submit that, according to the court's case law, it is not permissible to place on the taxable person the burden of establishing that the tax was not passed on to the final consumer.

d 47. They maintain that the obligation for the competent authority to proceed of its own motion, which is provided for in Austrian law, does not release the claimant from the obligation to co-operate in establishing the facts (judgment of the Verwaltungsgerichtshof of 21 October 1987, 87/01/0137). Even though the Austrian administrative procedure does not expressly place taxable persons under a formal obligation to co-operate in the investigation, the fact remains that, within the framework of the unrestricted power to assess the evidence which is conferred on the tax authority, the latter is free—if the claimant does not co-operate, or does not sufficiently co-operate, in the investigation—to  
e draw inferences from such conduct, even though they may be unfavourable to the claimant.

f 48. The claimants in the main proceedings observe that in its decisions of 6 September 2000 the tax authority found it established that the duty on alcoholic beverages had been passed on to the final consumers, being of the view that according to the undisputed findings of fact made by the appellate body, the price of alcoholic beverages also includes the duty on beverages, so that the economic burden of the duty on beverages was borne by the final consumer.

g 49. The claimants in the main proceedings maintain that the mere fact that their prices included the duty on alcoholic beverages does not permit the conclusion that the duty was passed on to the final consumer. In reality, such a conclusion is a mere presumption, which in practice requires the taxable person himself to establish that the duty was not passed on.

h 50. As regards unjust enrichment, the claimants in the main proceedings observe that, according to the consistent case law of the court, the right to refuse to repay a duty levied in breach of Community law depends not only on proof that the entire burden of the duty was actually borne by a person other than the taxable person but also on the condition that repayment of the duty entails unjust enrichment of the taxable person.

51. In the present case, the claimants in the main proceedings contend that they themselves bore the duty on alcoholic beverages.

i 52. In that regard, although it is true in principle that the duty on alcoholic beverages must be borne by the final consumer because the law provides that it is to be passed on, in practice, however, for reasons relating to competition, it is only in rare cases that Austrian undertakings are able to pass the duty on to the consumer.



53. In most cases, the duty reduces the profit margin of the undertaking liable for the duty and is therefore de facto borne by that undertaking. Statistical studies show that in Europe the Republic of Austria is the state in which beverages bear the highest duty. a

54. The claimants in the main proceedings conclude that, in order to attain normal profitability on the market, the price of beverages in Austria should be increased at least by the amount corresponding to the proportion of the duty on alcoholic beverages. In fact, only undertakings with the greatest number of customers are able to charge such prices. On the other hand, the great majority of undertakings—including the claimants in the main proceedings—do not pass the duty on to the final customers. b

55. That fact is borne out by the annual studies commissioned by the Wirtschaftskammer Österreich (Economic Chamber of Austria), entitled Betriebskennzahlen des Österreichischen Gastgewerbes (data relating to the Austrian catering sector). In 1994, virtually all Austrian catering undertakings made a loss. Their situation has continued to deteriorate. Since then, those undertakings have been constantly overburdened with debt owing to competitive pressure and the need to respond to the demands of the market. c

56. The claimants in the main proceedings also state that in November 2000 the Österreichisches Institut für Wirtschaftsforschung (Austrian Institute for Economic Research), at the request of the Austrian Finance Ministry, carried out a macroeconomic study into the question of passing on the costs of the duty on beverages in the hotel, cafe and restaurant sector. That study did not make it possible to provide general answers to the question of the passing on of the duty on beverages to the final consumer in that sector. It contains no specific answer to the question of the passing on of that duty to the final consumer. The authors of the study observed, in particular, that the question whether, and to what extent, the duty was actually passed on depends on a whole series of factors, including elasticity between prices and assets and also the services concerned, changes in the level of prices and actual demand, market structure and the intensity of competition. d  
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57. Consequently, according to the claimants in the main proceedings, the question of unjust enrichment can only be answered on a case by case basis, following a specific investigation.

58. Beta-Leasing GmbH also emphasises that, in so far as the duty was actually passed on, it is the consumers that bore the burden of the duty on alcoholic beverages. However, neither the legal order of the *Land* of Vienna nor that of the Republic of Austria in general offers consumers the possibility of claiming, in the context of the taxation procedure, that a duty thus passed on is unlawful. g

59. Accordingly, if the taxable person were refused repayment of the duty on alcoholic beverages on the ground that he has passed it on to the final consumer, it would ultimately be the municipality concerned that would benefit from unjust enrichment. The municipalities' argument thus amounts to claiming unjust enrichment in favour of the creditors of the duty (the municipalities themselves), while maintaining that the person owing the duty must not benefit from such enrichment. Beta-Leasing GmbH asks what justification there is for the fact that unjust enrichment should be denied the person owing the duty, whereas it is acceptable in the case of the person to whom the duty is owed, a fortiori since it is the latter that adopted the unlawful provision. h  
i

a 60. The tax authority does not agree with that interpretation. It maintains that the condition placed by para 185(3) of the WAO on repayment of a tax levied though not due seeks to prevent persons entitled to claim repayment under domestic law from being enriched owing to particular circumstances related to the fiscal techniques associated with indirect taxation in the city of Vienna. The taxes at issue in the present case are duties in which the person  
b paying the tax and the taxable person are two separate persons. The taxable person is the trader who supplies taxable services, whereas the amount of such taxes is in general levied on the recipients of those services. The court approved that interpretation at paras 22 to 24 of its judgment in *Société Comateb v Directeur général des douanes et droits indirects* Joined cases C-192-218/95 [1997] STC 1006, [1997] ECR I-165.

c 61. It follows that repayment of the amount passed on is no longer required where the taxable person is not required to repay to the purchaser the sums corresponding to the amount of the tax which he has passed on to the latter.

d 62. On that point, the tax authority claims that under the Austrian legal order the purchaser cannot claim repayment of those sums directly from the national authorities. In the case of the duty on alcoholic beverages, repayment to consumers of the amounts they have paid is precluded in practice, owing to the time which has elapsed, the large number of transactions involved, evidential difficulties or other matters.

e 63. Consequently, the tax authority maintains that para 185(3) of the WAO is not inconsistent with para (3) of the operative part of the *EKW* judgment but, on the contrary, it is consistent with what was held by the court, since it provides that unjust enrichment of the trader in the form of repayment to him of the duty which he has paid is precluded when the legal relationship, which constitutes the taxable event, between the consumer who has borne the economic burden of the duty on beverages and the trader who has paid it has  
f already exhausted its effects and when the consumer can no longer take action against the trader with a view to obtaining repayment of the duty he has borne.

g 64. Nor, in the tax authority's submission, does a comparative examination of what may be the legally protected expectation of the taxable persons that the duty on alcoholic beverages would be repaid unconditionally and the legally protected expectation of the municipalities that the duty was compatible with Community law permit the conclusion that para 185(3) of the WAO infringes the obligation of loyal co-operation laid down in art 5 of the Treaty.

h 65. Last, the tax authority contends that neither Community law nor the principles of a state subject to the rule of law and the protection of legitimate expectations imply that a taxable person is to be enriched by repayment of a tax. Where the tax is passed on to third parties, reimbursement will necessarily  
i entail unjust enrichment of the trader.

66. The Austrian and Italian governments put forward an argument similar to the tax authority's and submit that para 185 of the WAO satisfied the conditions laid down by the court in respect of recovery of the sums levied but not due.

i 67. First, that provision is not concerned solely with rights to repayment based on Community law but governs both those rights and rights based on domestic law and thus has regard to the principle of equivalence.

68. The governments further claim that para 185(3) of the WAO does not make it impossible or excessively difficult in practice for the claimants to exercise the right to repayment based on Community law. Thus, para 185

of the WAO contains no specific provision relating to the burden of proof or to the permissible means of proof. The general rules of procedure are therefore applicable. They are based on the principle of investigation on the authority's own motion. a

69. The Austrian government maintains that, owing to that principle, the burden of proving that the duty has been passed on and that there has been unjust enrichment is borne by the competent fiscal services. The taxable persons are under a duty only to co-operate in establishing the facts. Thus, at the request of the fiscal services, they must provide clarification and additional information concerning their returns and prove that they are accurate, although the WAO is satisfied with the balance of probabilities when, in the light of the circumstances, such proof cannot reasonably be demanded. A reversal of the burden of proof to the detriment of the taxable person is therefore precluded. b  
c

70. Furthermore, the WAO authorises all modes of proof. The claimants may therefore in principle put forward all the arguments, of law and of fact, from which it might be concluded that the duty has not been passed on or that it is probable that it was not passed on. Nor, in that regard, has any reversal of the burden of proof or any general presumption been applied. d

71. The Austrian government further submits that para 185(4) of the WAO, which precludes the application of sub-para (3) of that paragraph to claims for repayment of duties which the Verfassungsgerichtshof has held to be unconstitutional, does not infringe the principle of equivalence. First, judgments of the court do not have the same effects as judgments of the Verfassungsgericht declaring a law unconstitutional, since the former have a general effect which also applies *ex tunc*, whereas the latter have only *ex nunc* effect. e

72. Last, the cases in which a claimant may invoke the benefit of the 'Anlaßfallwirkung', and therefore obtain repayment of an unconstitutional tax even where it has been passed on to third parties, are very rare and purely marginal. That situation is therefore in no way comparable with the consequences associated with a judgment of the court in which it is held that Community law precludes the maintenance of a national tax. f

73. The Commission of the European Communities submits that while it is true that repayment of a tax levied in breach of Community law can be effected only within the framework of the substantive and procedural conditions fixed by the various national laws on the matter, the fact remains that these conditions cannot be less favourable than those governing similar domestic claims and that they cannot be arranged in such a way as to render the exercise of the rights conferred by the Community legal order impossible or excessively difficult (see *BP Supergas Anonimos Etairia Geniki Emporiki-Viomichaniki kai Antiprossopeion v Greece* Case C-62/93 [1995] All ER (EC) 684, [1995] ECR I-1883, *Edilizia Industriale Siderurgica Srl (Edis) v Ministero delle Finanze* Case C-231/96 [1998] ECR I-4951 (paras 19, 34) and the *Dilexport* case (para 25)). g  
h

74. The Commission further submits that para 11 of the *Deville* case appears to tie the existence of a right to reimbursement of a tax which is inconsistent with Community law to the condition that the taxable person is unable to pass that tax on to others. i

75. Accordingly, in the Commission's submission, there is nothing in Community law to prevent the national courts from taking account, under their national law, of the fact that the charges levied though not due have been



- a incorporated in the prices of the undertaking responsible for paying the duty and passed on to the purchasers (see *Amministrazione delle Finanze dello Stato v Essevi SpA* Joined cases 142/80 and 143/80 [1981] ECR 1413 (para 35), *Les Fils de Jules Bianco SA v Directeur Général des Douanes et Droits Indirects* Joined cases 331/85, 376/85 and 378/85 [1988] ECR 1099, the *Dilexport* case (para 47) and *Roquette Frères SA v Direction des Services Fiscaux du Pas-de-Calais* Case C-88/99 [2000] ECR I-10465 (para 20)).

b 76. The Commission observes, however, that Community law precludes a member state from making repayment of customs duties and taxes contrary to Community law subject to a condition, such as the requirement that such duties or taxes have not been passed on to third parties, which the claimant must show he has satisfied (see the *Dilexport* case (para 54)).

- c 77. It points out, however, that the Verwaltungsgerichtshof does not expressly consider that point in the account of the substantive conditions of the reference, but merely states that, in view of the existing procedural guarantees, it cannot be said that para 185(3) of the WAO makes the exercise of the right to repayment a priori excessively difficult or even impossible. The Commission emphasises, however, that that national provision contains no special rule relating to the burden of proof and that the general rules of procedure applicable are based on the principle of investigation on the authority's own motion.

- d 78. In the absence of any express finding that national procedural law places the burden of proving that the tax has been passed on to the tax authority, the Commission concludes that there may be certain lacunae in that regard. Consequently, it proposes that the court should shed some light on the matter in its judgment, with reference to its relevant case law and, in particular, to para 54 of the *Dilexport* case.

- e 79. The Commission also shares the view of Advocate General Saggio in the *EKW* case that the tax authority may reject claims for repayment of taxes levied though not due only if it proves that the claimants have actually been enriched.

- f 80. It maintains that it is impossible to assert that the price of the product without the duty on alcoholic beverages would have been less than the price including the duty or, a fortiori, that the difference between the two prices would always correspond to the amount of the duty. Besides, the enrichment of the dealer might not always correspond precisely with the amount of the duty, since the increase in the price dictated by the need to offset the higher charge resulting from the duty may lead to a reduction in the volume of sales and of profits. Also, in some border areas, the price increased by the duty may lead to a reduction in the volume of sales of Austrian retailers capable of adversely affecting profits. In this case, it is impossible to assert that the enrichment resulting from repayment would correspond precisely to the amount of the duty paid. On the contrary, the assessment of any enrichment must take account of a reduction in profits attributable to the duty.

- g 81. In the Commission's view, these aspects should have been taken into account in the decisions of 6 September 2000 and an automatic rejection of the claims for reimbursement of all the duty paid cannot be accepted.
- h The Commission points out, however, that the order for reference makes no mention of the existence of that differentiated treatment of claims for reimbursement or of relevant rules in terms of procedure and method of calculation.

- i 82. At the hearing, the Commission argued that the WAO does not observe the principle of equivalence, since it deals differently with claims for repayment

based on Community law and those based on a judgment of the *Verfassungsgerichtshof* declaring a law unconstitutional, to the detriment of the former. a

83. Thus, taxable persons who are able to rely on the 'Anlaßfallwirkung' are not made subject, in order to obtain repayment of a duty levied in breach of the Austrian Constitution, to the condition that they themselves have borne the economic burden of the duty. Paragraph 185(4) of the WAO precludes the application of sub-para 4 of that paragraph in such a situation. b

84. On the other hand, no effect comparable to the 'Anlaßfallwirkung' is recognised in the case of judgments of the court holding that Community law precludes the maintenance of a national tax. This results in discriminatory treatment which is unfavourable for individuals where they exercise, under Community law, their right to repayment of a tax levied though not due. c

85. In that regard, the Commission rejects the Austrian government's argument that cases in which the 'Anlaßfallwirkung' is applicable are marginal. It contends, on the contrary, that the 'Anlaßfallwirkung' produces its effects in a great many practical cases and, moreover, that the limited number of cases of application of the 'Anlaßfallwirkung' cannot suffice to prevent a breach of the principle of equivalence. d

#### *Response of the court*

##### *Article 10 EC*

86. The court has already held that a national legislature may not, subsequent to a judgment of the court from which it follows that certain legislation is incompatible with the Treaty, adopt a procedural rule which specifically reduces the possibilities of bringing proceedings for recovery of taxes which were levied though not due under that legislation (see the *Déville* case (para 13), the *Dilexport* case (paras 38, 39) and *Marks & Spencer plc v Customs and Excise Comrs* Case C-62/00 [2002] STC 1036, [2002] ECR I-6325 (para 36)). e

87. It is clear from those judgments that a state may not adopt provisions making repayment of a tax held to be contrary to Community law by a judgment of the court or whose incompatibility is apparent from such a judgment, subject to conditions relating specifically to that tax which are less favourable than those which would otherwise be applied to repayment of the tax in question (see *Edis* case (para 24)). f

88. As regards the duty on alcoholic beverages, it should be borne in mind that the court held at para 50 of the *EKW* judgment that art 3(2) of Directive 92/12 precludes the maintenance of that duty. g

89. It should also be borne in mind that para 185 of the WAO, in the version prior to the amending act, did not make claims for repayment of duties levied though not due subject to any particular condition. It is also established that the introduction, in para 185 of the WAO, of a provision which became sub-para (3) of that paragraph, was preceded by much debate in the Parliament of the Land of Vienna, during which reference was made to the opinion of Advocate General Saggio in the *EKW* case and also to the disastrous consequences for the finances of the Austrian municipalities which would result from a judgment of the court declaring the duty on beverages incompatible with Community law. Furthermore, the WAO was amended one week before that judgment was delivered. h

90. It follows from all those circumstances that the purpose of inserting sub-para (3) into para 185 of the WAO was to preclude the effects of the *EKW* i

a judgment, should the duty on alcoholic beverages be deemed contrary to Community law and should that judgment not limit its temporal effects.

91. However, those circumstances do not in themselves suffice to establish whether para 185(3) of the WAO seeks specifically to reduce the possibilities of bringing proceedings for repayment of the duty on alcoholic drinks which has been levied though not due. The Verwaltungsgerichtshof emphasises in its order for reference that the WAO does not refer solely to repayment of duties which were levied in breach of Community law. Furthermore, the parties to the main proceedings, the Austrian and Italian governments and the Commission have submitted different arguments in that regard. However, it is not for the court to resolve a dispute relating exclusively to the interpretation of national law: that task is solely a matter for the national court.

c 92. It must be concluded on this point, therefore, that the adoption by a member state of rules which retroactively restrict the right to repayment of a sum levied but not due, in order to forestall the possible effects of a judgment of the court holding that Community law precludes the maintenance of a national duty, is contrary to Community law and, more particularly, to art 10 EC only in so far as it is aimed specifically at that duty, a point which falls to be determined by the national court. Accordingly, the fact that such a measure has retroactive effect does not in itself amount to an infringement of Community law, where the measure is not aimed specifically at the duty which formed the subject matter of a judgment of the court.

e *The relationship between the passing-on of the duty on alcoholic beverages and unjust enrichment*

f 93. The court has consistently held that individuals are entitled to obtain repayment of charges levied in a member state in breach of Community provisions. That right is the consequence and the complement of the rights conferred on individuals by Community provisions as interpreted by the court. The member state in question is therefore required, in principle, to repay charges levied in breach of Community law (see, in particular, the *Comateb* case (para 20), *Metallgesellschaft Ltd v IRC*, *Hoechst AG v IRC* Joined cases C-397/98 and C-410/98 [2001] All ER (EC) 496, [2001] ECR I-1727 (para 84) and the *Marks & Spencer* case (para 30)).

g 94. According to the case law, there is only one exception to that obligation to make repayment. A member state may resist repayment to the trader of a charge levied though not due only where it is established by the national authorities that the charge has been borne in its entirety by someone other than the taxable person and that reimbursement of the charge would constitute unjust enrichment of the latter. It follows that, if the burden of the charge has been passed on only in part, the national authorities are required to repay the amount not passed on (see to that effect, in particular, the *Comateb* case (paras 27, 28)).

i 95. As that exception is a restriction on a subjective right derived from the Community legal order, it must be interpreted restrictively, taking account in particular of the fact that passing on a charge to the consumer does not necessarily neutralise the economic effects of the tax on the taxable person.

96. Thus, at para 17 of the *Les Fils de Jules Bianco* case the court held, in particular, that even though indirect taxes are designed in national law to be passed on to the final consumer and in commerce are normally passed on in whole or in part, it cannot be generally assumed that the charge is actually



passed on in every case. The actual passing on of such taxes, either in whole or in part, depends on various factors in each commercial transaction which distinguish it from other transactions in other contexts. Consequently, the question whether an indirect tax has or has not been passed on in each case is a question of fact to be determined by the national court, which is free to assess the evidence adduced before it. a

97. The court stated at para 20 of the *Les Fils de Jules Bianco* case that it is quite probable, depending on the nature of the market, that the charge has been passed on. However, the numerous factors which determine commercial strategy vary from one case to another so that it is virtually impossible to determine how they each affect the passing on of the charge. b

98. The court has also held that, even where it is established that the burden of the charge levied though not due has been passed on in whole or in part to third parties, repayment to the trader of the amount thus passed on does not necessarily entail his unjust enrichment (see the *Comateb* case (para 29) and *Kapniki Mikhailidis AE v Idryma Kinonikon Asphaliseon (IKA)* Joined cases C-441 and C-442/98 [2000] ECR I-7145 (para 34)). c

99. Even where the charge is wholly incorporated in the price, the taxable person may suffer as a result of a fall in the volume of his sales (see the *Comateb* case (para 30) and the *Kapniki Mikhailidis* case (para 35)). d

100. Accordingly, the existence and the degree of unjust enrichment which repayment of a charge which was levied though not due from the aspect of Community law entails for a taxable person can be established only following an economic analysis in which all the relevant circumstances are taken into account. e

101. Consequently, Community law precludes a member state from refusing to repay to a trader a charge levied in breach of Community law on the sole ground that the charge was included in that trader's retail selling price and thus passed on to third parties, which necessarily means that repayment of the charge would entail unjust enrichment of the trader. f

102. It must therefore be concluded on this point that the rules of Community law on the recovery of sums levied but not due are to be interpreted as meaning that they preclude national rules which refuse—a point which falls to be determined by the national court—repayment of a charge incompatible with Community law on the sole ground that the charge was passed on to third parties, without requiring that the degree of unjust enrichment that repayment of the charge would entail for the trader be established. g

#### *The principles of equivalence and effectiveness* h

103. It has consistently been held that in the absence of Community rules on the recovery of national charges levied though not due, it is for the domestic legal system of each member state to lay down the detailed procedural rules governing such actions for repayment, provided, however, that they are not less favourable than those governing similar domestic actions (principle of equivalence) and that they do not render impossible in practice or excessively difficult the exercise of rights conferred by the Community legal order (principle of effectiveness) (see, in particular, the *Metallgesellschaft* case (para 85) and *Grundig Italiana SpA v Ministero delle Finanze* Case C-255/00 [2003] All ER (EC) 176, [2002] ECR I-8003 (para 33)). i

*a* —Principle of equivalence

104. First of all, the principle of equivalence prohibits a member state from laying down less favourable procedural rules for claims for repayment of a charge contrary to Community law which are based on Community law than those applicable to similar domestic proceedings.

*b* 105. With more particular regard to the WAO, it follows from the actual wording of para 185 that that paragraph provides for a derogation for certain claims for recovery of sums levied but not due based on national law.

*c* 106. Paragraph 185(4) of the WAO provides that sub-para (3) of that paragraph does not apply to persons who can rely on the effects of the 'Anlaßfallwirkung', although that provision fails to specify the rules or conditions applicable to actions for repayment of a charge levied though not due by claimants who can rely on the precedent of a judgment of the Verfassungsgerichtshof declaring that a national provision is contrary to the Constitution.

*d* 107. The principle of equivalence precludes the application of national provisions which allow taxable persons to obtain repayment of a charge levied though not due only where those provisions lay down more advantageous conditions where the claim for repayment is based on a declaration of unconstitutionality by a national court than those applicable to traders who, following a judgment of the court, seek repayment of a charge levied in breach of Community law.

*e* 108. In must therefore be concluded on this point that, in so far as the principle of equivalence precludes national rules which lay down less favourable procedural rules for claims for repayment of a charge which has been levied though not due from the aspect of Community law than those applicable to similar actions based on certain provisions of domestic law, it is for the national court to ascertain, on the basis of a comprehensive assessment of national law, whether it is actually the case that only claimants who bring proceedings based on domestic constitutional law may rely on the 'Anlaßfallwirkung' and that the rules governing repayment of charges held to be incompatible with domestic constitutional law are more favourable than those applicable to actions relating to taxes held to be contrary to Community law.

*g* —Principle of effectiveness

*h* 109. Second, as regards compliance with the principle of effectiveness, it must be borne in mind that, in principle, a trader who has paid a charge levied though not due is entitled to repayment of the amount paid (see, in particular, the *Comateb* case (para 20)) and that the tax authority may refuse to repay such a charge only if repayment entails unjust enrichment of the trader.

*i* 110. It is clear from the case law of the court (see, in particular, the *San Giorgio* case (para 14), the *Dilexport* case (paras 48, 52, 54) and the *Kapniki Mikhailidis* case (paras 36, 37)) that the authority cannot merely establish that the charge was passed on to third parties and presume from that fact alone, or from the fact that the national legislation requires that the charge be incorporated in the selling price to consumers, that the economic burden which the charge represented for the taxable person is neutralised and that, consequently, repayment would automatically entail unjust enrichment of the trader.

111. The court has also consistently held that national rules which place on the taxable person the burden of proving that the charge was not passed on to

third parties, which amounts to requiring negative proof, or which establish a presumption that the charge has been passed on to third parties, are not consistent with Community law (see, in particular, the *San Giorgio* case (para 14), the *Dilexport* case (para 54) and the *Kapniki Mikhailidis* case (paras 36–38)). a

112. In that regard, the national court states that the WAO contains no special provision governing the division of the burden of proving that the taxable person has passed the charge on to third parties and that repayment of the charge levied though not due would entail his unjust enrichment. b

113. Although the tax authority and the Austrian government contend that the burden of proof is wholly borne by the national authority, it is also apparent from the order for reference that the tax authority concluded that the economic burden of the duty on alcoholic beverages had not been borne by the claimants in the main proceedings simply because the price invoiced to consumers of those beverages included that duty. That approach might constitute a presumption that the duty has been passed on to third parties, and also of unjust enrichment of the taxable persons, of such a kind as to render repayment of the duty levied though not due impossible or at least excessively difficult, which is contrary to Community law. c  
d

114. It is for the national court to determine whether, in the absence of a statutory presumption, the tax authority's practice has the effect of establishing such a presumption of unjust enrichment.

115. It is true that in the case of a 'self-assessed' charge, proof that the charge has actually been passed on to third parties cannot be adduced without the co-operation of the taxable person concerned. In that regard, the tax authorities may demand access to the supporting documents which the taxable person was required to keep under the rules of national law. e

116. It is also for the national court to determine to what extent the co-operation required on the part of taxable persons in establishing that the economic burden of the duty on alcoholic beverages was not passed on amounts in practice to establishing a presumption that the duty was passed on, unless the taxable persons rebut such a presumption by adducing evidence to the contrary. f

117. It follows from the foregoing that the principle of effectiveness referred to at para 103 of this judgment precludes national legislation or a national administrative practice which makes the exercise of the rights conferred by the Community legal order impossible in practice or excessively difficult by establishing a presumption of unjust enrichment on the sole ground that the duty was passed on to third parties. g

118. The answer to the question referred by the national court must therefore be that: h

—the adoption by a member state of rules, such as the WAO, fixing more restrictive procedural rules for recovery of sums levied but not due, in order to forestall the possible effects of a judgment of the court holding that Community law precludes the maintenance of a national duty, is contrary to Community law and, more particularly, to art 5 of the Treaty only in so far as it is aimed specifically at that duty, a point which falls to be determined by the national court; i

—the rules of Community law on the recovery of sums levied but not due are to be interpreted as meaning that they preclude national rules which refuse—a point which falls to be determined by the national court—repayment of a charge incompatible with Community law on the sole ground that the



*a* charge was passed on to third parties, without requiring that the degree of unjust enrichment that repayment of the charge would entail for the taxable person be established;

—the principle of equivalence precludes national rules which lay down less favourable procedural rules for claims for repayment of a charge which has

*b* been levied though not due from the aspect of Community law than those applicable to similar actions based on certain provisions of domestic law. It is for the national court to ascertain, on the basis of a comprehensive assessment of national law, whether it is actually the case that only claimants who bring proceedings based on domestic constitutional law may rely on the 'Anlaßfallwirkung' and that the rules governing repayment of charges held to

*c* be incompatible with domestic constitutional law are more favourable than those applicable to actions relating to taxes held to be contrary to Community law;

—the principle of effectiveness precludes national legislation or a national administrative practice which makes the exercise of the rights conferred by the Community legal order impossible in practice or excessively difficult by

*d* establishing a presumption of unjust enrichment on the sole ground that the duty was passed on to third parties.

#### COSTS

*e* 119. The costs incurred by the Austrian and Italian governments and by the Commission, which have submitted observations to the court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

*f* On those grounds, the Court of Justice (Fifth Chamber), in answer to the question referred to it by the Verwaltungsgerichtshof by order of 23 March 2001, hereby rules:

*g* (1) The adoption by a member state of rules, such as the Wiener Abgabenordnung, fixing more restrictive procedural rules on recovery of sums levied but not due, in order to forestall the possible effects of a judgment of the court holding that Community law precludes the maintenance of a national duty, is contrary to Community law and, more particularly, to art 5 of the EC Treaty (now art 10 EC) only in so far as it is aimed specifically at that duty, a point which falls to be determined by the national court.

*h* (2) The rules of Community law on the recovery of sums levied but not due are to be interpreted as meaning that they preclude national rules which refuse—a point which falls to be determined by the national court—repayment of a charge incompatible with Community law on the sole ground that the charge was passed on to third parties, without requiring that the degree of unjust enrichment that repayment of the charge would entail for the taxable person be established.

*i* (3) The principle of equivalence precludes national rules which lay down less favourable procedural rules for claims for repayment of a charge which has been levied though not due from the aspect of Community law than those applicable to similar actions based on certain provisions of domestic law. It is for the national court to ascertain, on the basis of a comprehensive assessment of national law, whether it is actually the case that only claimants who bring proceedings based on domestic constitutional law may rely on the

'Anlaßfallwirkung' and that the rules governing repayment of charges held to be incompatible with domestic constitutional law are more favourable than those applicable to actions relating to taxes held to be contrary to Community law. a

(4) The principle of effectiveness precludes national legislation or a national administrative practice which makes the exercise of the rights conferred by the Community legal order impossible in practice or excessively difficult by establishing a presumption of unjust enrichment on the sole ground that the duty was passed on to third parties. b

***a* Criminal proceedings against Kapper**  
(Case C-476/01)

COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES (FIFTH CHAMBER)

***b*** JUDGES TIMMERMANS (ACTING FOR THE PRESIDENT OF THE FIFTH CHAMBER),  
ROSAS (RAPPORTEUR) AND VON BAHR  
ADVOCATE GENERAL LÉGER

8 MAY, 16 OCTOBER 2003, 29 APRIL 2004

***c*** *Road traffic – Driving licence – Community driving licence – Mutual recognition of driving licences issued by member states – Member state cancelling driver's right to drive – Driver obtaining new licence in another member state after expiry of cancellation period – Whether member state permitted to refuse to recognise driving licence issued by another member state where licence holder failing to meet requirement as to residence in issuing member state at date of issue – Whether member state*  
***d*** *permitted to reserve to itself right to issue new driving licence to person in respect of whom member state had cancelled right to drive – Council Directive (EEC) 91/439, arts 1(2), 7(1)(b), 8(4), 9.*

In Germany, the national authorities were not to recognise the validity of a driving licence that had been issued by another member state where, when the  
***e*** licence had been issued, the licence holder had been resident in Germany, or where a court in Germany had previously ordered that the driving licence be withdrawn. A person in that latter situation might obtain a valid driving licence in Germany only if he or she submitted a new request for a licence to the national authorities and satisfied the appropriate requirements and tests. The  
***f*** main proceedings concerned an application by the defendant to set aside a fine imposed on him for having driven a motor vehicle in Germany when not the holder of a valid driving licence. His German driving licence had been withdrawn by a criminal order coupled with an instruction that the administrative authorities were not to issue a new driving licence before the expiry of a period of nine months. However, after that period had expired, a  
***g*** driving licence was issued to the defendant by the Netherlands authorities. The national court considered that the application of the national rules implied a review in Germany of the sovereign act of the member state that had issued the driving licence and thus amounted to a restriction on the principle of the mutual recognition of driving licences issued by member states established by art 1(2)<sup>a</sup> of Council Directive (EEC) 91/439 (on driving licences).  
***h*** Article 7(1)(b)<sup>b</sup> of Directive 91/439 provided that driving licences were to be issued only to those applicants who had their normal residence (as was defined by art 9<sup>c</sup> of the directive) in the territory of the member state issuing the licence. Article 8(4) of the directive applied by way of derogation to art 1(2) and provided that a member state might refuse to recognise a driving licence issued by another member state where the person was, in the territory of the  
***i*** former member state, subject to a measure restricting, suspending, withdrawing or cancelling the right to drive. The national court further

***a*** Article 1(2), so far as material, is set out at judgment para 3, below

***b*** Article 7(1)(b), so far as material, is set out at judgment para 4, below

***c*** Article 9, so far as material, is set out at judgment para 7, below



considered that art 8(1) to (4)<sup>d</sup> of the directive applied only to the exchange of a valid driving licence, but did not authorise a member state to regard a sovereign act of another state as void. In those circumstances, the national court decided to stay the proceedings and refer for preliminary ruling pursuant to art 234 EC (formerly art 177 of the EC Treaty) a question concerning the compatibility of the national provisions with the directive.

**Held** – (1) Articles 1(2), 7(1)(b) and 9 of the directive precluded a host member state from refusing to recognise a driving licence issued by another member state on the ground that the holder of the licence had taken up normal residence in the host member state on the date that that licence had been issued. The directive had conferred on a member state that issued a driving licence exclusive competence to ensure compliance with the residence requirement set out in arts 7(1)(b) and 9 of the directive. It was for that member state alone to take appropriate measures where the person to whom the licence had been issued was shown subsequently to have failed to satisfy that requirement. Where a host member had doubts as to the validity of such a licence, it was to inform the issuing member state of those doubts under the directive's provisions relating to mutual assistance and the exchange of information, and, where an issuing member state had failed to take appropriate measures in that regard, a host member state might bring proceedings under art 227 EC (formerly art 170 of the EC Treaty) for a declaration by the Court of Justice that the issuing member state failed to comply with the obligations arising under the directive (see judgment paras 48, 49, below).

(2) Articles 1(2) and 8(4) of the directive precluded a member state from refusing to recognise the validity of a driving licence issued by another member state on the ground that its holder had, in the host member state, been subject to a measure withdrawing or cancelling the driving licence issued by that member state, where a temporary ban on obtaining a new licence, with which that measure was coupled, had expired before the date of issue of the licence issued by the other member state. Contrary to the view expressed by the national court, art 8(4) of the directive did not apply only where the holder of a driving licence issued by another member state had applied to the authorities of a host member state to exchange his or her driving licence. Although art 8 contained various other provisions specifically regulating the substantive and formal conditions applicable to the exchange or replacement of a driving licence where the holder had submitted a request to that effect to the competent authorities, arts 8(2) and (4) served a different aim, namely that of permitting member states, within their territory, to apply their national provisions concerning the withdrawal, suspension, and cancellation of driving licences. Therefore, the exercise of those rights was not dependent on any voluntary act of the licence holder. However, art 8(4), as a derogation from the general principle of mutual recognition of driving licences in art 1(2), which aimed to facilitate the exercise of fundamental freedoms guaranteed by the Treaty, was to be interpreted strictly and was not to be used by a host member state as a means by which to refuse to recognise indefinitely the validity of a driving licence issued by another member state to a person who had previously been the object in the host member state's territory of a measure withdrawing or cancelling a previous licence issued by that member state (see judgment paras 72, 73, 76, 78, below).

<sup>d</sup> Article 8, so far as material, is set out at judgment para 6, below

**a Notes**

For the grant of driving licences, see 40(1) *Halsbury's Laws* (4th edn reissue) para 247.

**Cases cited**

- b** *Adolf Truley GmbH v Bestattung Wien GmbH* Case C-373/00 [2003] ECR I-1931, ECJ.
- Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* Case C-67/96 [2001] ICR 774, [1999] ECR I-5751, ECJ.
- Ambulanter Pflegedienst Kügler GmbH v Finanzamt für Körperschaften I in Berlin* Case C-141/00 [2002] ECR I-6833, ECJ.
- c** *Arduino (Criminal proceedings against)* Case C-35/99 [2002] ECR I-1529, ECJ.
- Arkkitehtuuritoimisto Riitta Korhonen Oy v Varkauden Taitotalo Oy* Case C-18/01 [2003] ECR I-5321, ECJ.
- Awoyemi (Criminal proceedings against)* Case C-230/97 [1998] ECR I-6781, ECJ.
- Bacardi Martini SAS v Newcastle United Football Co Ltd* Case C-318/00 [2003] ECR I-905, ECJ.
- d** *Beuttenmüller v Land Baden-Württemberg* Case C-102/02 (2003) Transcript (opinion), 16 September, (2004) Transcript (judgment), 29 April, ECJ.
- Canal Satélite Digital SL v Administración General del Estado* Case C-390/99 [2002] ECR I-607, ECJ.
- Centros Ltd v Erhvervs-og Selskabsstyrelsen* Case C-212/97 [2000] All ER (EC) 481, [2000] Ch 446, [2000] 2 WLR 1048, [1999] ECR I-1459, ECJ.
- e** *Choquet (Criminal proceedings against)* Case 16/78 [1978] ECR 2293, ECJ.
- Da Silva Carvalho* Case C-408/02 (2003) Transcript (order) 11 December, ECJ.
- Der Weduwe (Criminal proceedings against)* Case C-153/00 [2002] ECR I-11319, ECJ.
- European Commission v Netherlands* Case C-246/00 [2003] ECR I-7485, ECJ.
- f** *Evangelischer Krankenhausverein Wien v Abgabenberufungskommission Wien, Wein & Co Handelsges mbH v Oberösterreichische Landesregierung* Case C-437/97 [2001] All ER (EC) 735, [2000] ECR I-1157, ECJ.
- Foglia v Novello* Case 244/80 [1981] ECR 3045, ECJ.
- Idéal Tourisme SA v Belgian State* Case C-36/99 [2001] STC 1386, [2000] ECR I-6049, ECJ.
- g** *Kolpinghuis Nijmegen BV (Criminal proceedings against)* Case 80/86 [1987] ECR 3969, ECJ.
- Krüger (SA) v Directie van de rechtspersoonlijkheid bezittende Dienst Wegverkeer* Case C-253/01 (2004) Transcript (order), 29 January, ECJ.
- La Pyramide SARL* Case C-378/93 [1994] ECR I-3999, ECJ.
- h** *Pretore di Genova v Banchemo* Case C-157/92 [1993] ECR I-1085, ECJ.
- PreussenElektra AG v Schleswig AG (Windpark Reußenköge III GmbH, intervening)* Case C-379/98 [2001] All ER (EC) 330, [2001] ECR I-2099, ECJ.
- Schwarze v Einfuhr-und Vorratsstelle für Getreide und Futtermittel* Case 16/65 [1965] ECR 877, ECJ.
- Skanavi (Criminal proceedings against)* Case C-193/94 [1996] All ER (EC) 435, [1996] ECR I-929, ECJ.
- i** *Telemarsicabruzzo SpA v Circostel* Joined cases C-320–322/90 [1993] ECR I-393, ECJ.
- Union Royale Belge des Sociétés de Football Association ASBL v Bosman, Royal Club Liégeois SA v Bosman, Union des Associations Européennes de Football v Bosman* Case C-415/93 [1996] All ER (EC) 97, [1995] ECR I-4921, ECJ.

*Van de Bijl v Staatssecretaris van Economische Zaken* Case 130/88 [1989] ECR 3039, *a*  
ECJ.

## Reference

By decision of 11 October 2001, corrected by letter of 19 December 2001, the *b*  
Amtsgericht Frankenthal (Frankenthal Local Court), Germany, referred to the  
Court of Justice of the European Communities for a preliminary ruling under  
art 234 EC (formerly art 177 of the EC Treaty) a question (set out at judgment  
para 22, below) on the interpretation of art 1(2) of Council Directive (EEC)  
91/439 (on driving licences), as amended by Council Directive (EC) 97/26  
(Directive 91/439). That question was raised in criminal proceedings brought  
against Felix Kapper, who was sentenced to a fine for having driven a motor *c*  
vehicle on 20 November and 11 December 1999 without being in possession of  
a valid driving licence, although he held a driving licence issued by the  
Netherlands authorities on 11 August 1999. Written observations were  
submitted on behalf of: Mr Kapper, by W Säftel, Rechtsanwalt; the  
German government, by W-D Plessing and M Lumma, acting as agents; the  
Netherlands government, by HG Sevenster, acting as agent; the Commission of *d*  
the European Communities, by M Wolcarius, G Braun and HMH Speyart,  
acting as agents. Oral observations were made on behalf of: Mr Kapper,  
represented by W Säftel; the Italian Republic, represented by A Cingolo,  
Avvocato dello Stato; and the Commission, represented by G Braun. The  
language of the case was German. The facts are set out in the opinion of the  
Advocate General. *e*

16 October 2003. **The Advocate General (P Léger)** delivered the following  
opinion<sup>1</sup>.

1. Is a member state entitled to refuse to recognise a driving licence issued by  
another member state? If so, on what grounds? Those are, in essence, the  
questions asked by the Amtsgericht Frankenthal (Frankenthal Local Court), *f*  
Pfalz, Germany, in criminal proceedings brought against an individual. They  
closely affect a number of important aspects of the daily life of the European  
citizen.

## I—LEGAL BACKGROUND

### A—Community legislation

2. The issue and use of driving licences were first harmonised by the  
adoption of the First Council Directive (EEC) 80/1263<sup>2</sup>. Its purpose was to  
contribute to improving road traffic safety and to assist the movement of  
persons settling in a member state other than that in which they had passed a  
driving test, or moving within the European Economic Community. *g*

3. To that end, Directive 80/1263 harmonised certain national rules,  
particularly those relating to the issue of driving licences and the conditions for  
the validity of such licences. It established a Community model licence,  
introduced a principle of mutual recognition of such licences and provided for  
the exchange of licences by holders transferring their place of residence or  
place of employment from one member state to another. *h*

4. Directive 80/1263 was repealed by Council Directive (EEC) 91/439<sup>3</sup>. The  
latter marks a further stage in the harmonisation of national provisions, in *i*

<sup>1</sup> Original language: French.

<sup>2</sup> On the introduction of a Community driving licence (OJ 1980 L375 p 1).

<sup>3</sup> On driving licences (OJ 1991 L237 p 1) (hereinafter the directive).



a particular as regards the conditions governing the issue of licences and the scope of the principle of mutual recognition relating to them.

5. The issue of driving licences is subject to minimum age conditions<sup>4</sup>, and to requirements to have passed certain tests<sup>5</sup>, to meet certain medical standards<sup>6</sup> and to have normal residence in the territory of the member state issuing the licence, or to produce evidence that the applicant has been studying there for at least six months<sup>7</sup>. Article 7(5) of the directive states that no person may hold a driving licence from more than one member state. Thus, where a person is the holder of a (valid) driving licence issued by a member state, and which the other member states have undertaken to recognise, he is precluded from obtaining another licence from the same or another member state.

c 6. The principle of the mutual recognition of licences is laid down by art 1(2) of the directive in general terms as follows: 'Driving licences issued by Member States shall be mutually recognized.'

7. However, where the holder of a valid licence issued by a member state has taken up normal residence in another member state, art 8(2) of the directive provides that—

d 'Subject to observance of the principle of territoriality of criminal and police laws, the Member States of normal residence may apply its national provisions on the restriction, suspension, withdrawal or cancellation of the right to drive to the holder ... [in question] and, if necessary, exchange the licence for that purpose.'

e 8. Furthermore, under art 8(4) of the directive—

'A Member State may refuse to recognize the validity of any driving licence issued by another Member State to a person who is, in the former State's territory, the subject of one of the measures referred to in paragraph 2.'

f The implementation of this provision by member states by way of adjustments to their national legislation is subject to the agreement of the Commission of the European Communities<sup>8</sup>.

### B—National legislation

g 9. Since 1 January 1999, the driving of motor vehicles in Germany by the holders of licences issued by another member state and who have taken up residence in Germany has been governed by the Verordnung über die

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h 4 Article 6 of the directive.

5 Article 7(1)(a) of the directive.

6 As above.

7 Article 7(1)(b) of the directive. 'Normal residence' is defined in art 9 of the directive as the place where a person usually lives, that is, for at least 185 days in each calendar year, because of personal and occupational ties, or, in the case of a person with no occupational ties, because of personal ties which show close links between that person and the place where he is living. The article states that the normal residence of a person whose occupational ties are in a different place from his personal ties and who consequently lives in turn in different places situated in two or more member states is to be regarded as being the place of his personal ties, provided that such person returns there regularly (this last condition need not be met however where the person is living in a member state in order to carry out a task of a definite duration).

i 8 See the second paragraph of art 10 of the directive.

Zulassung von Personen zu den Straßenverkehr of 18 August 1998, also called the Fahrerlaubnisverordnung<sup>9</sup> (Regulation on Access to Road Traffic; hereinafter the FeV).

10. Under para 28(1) and (4) of the FeV, the holder of a driving licence issued by a member state of the European Union or the European Economic Area (hereinafter the EEA) is not permitted to drive in Germany when at the time the licence was issued he had already taken up normal residence in Germany (unless he obtained his driving licence while he was attending a school or university in the member state in which it was issued)<sup>10</sup>.

11. The same applies when a licence issued by a member state of the European Union or the EEA is withdrawn (whether on a temporary or permanent basis) by the courts in Germany or is subject to an equivalent (immediately enforceable or final) administrative measure, when there has been a refusal to issue such a licence, when there has been an abandonment of its use<sup>11</sup>, or when the holder of the licence has been banned from driving in Germany or has had his driving licence confiscated or seized or been required to surrender it<sup>12</sup>.

12. It follows from these provisions that the holder of a German licence is no longer permitted to drive in Germany if the licence has been withdrawn<sup>13</sup> or if he has been banned from driving by the German authorities, even if he has subsequently obtained a licence from another member state<sup>14</sup>.

13. Moreover, according to the interpretation which has been given to those provisions by case law<sup>15</sup>, the loss of the right to drive in Germany is not limited in time to the period of the driving ban or of the blocked period which is coupled with a withdrawal of the licence. Unlike the position which applied

9 Bundesgesetzblatt 1999 I, p 2214. The relevant provisions of this regulation have, as regards the main proceedings, been very slightly amended by a regulation of 7 August 2002, which came into force on 1 September 2002.

10 Paragraph 28(4)(2) of the FeV. Similar provisions were in place under the first paragraph of art 1(4) of the Verordnung zur Umsetzung der Richtlinie 91/439/EEC des Rates vom 29 Juli 1991 über den Führerschein und zur Änderung straßenverkehrsrechtlicher Vorschriften (Bundesgesetzblatt 1991 I, p. 885, hereinafter the regulation implementing the directive). This regulation was adopted on 19 June 1996 and was in force from 1 July 1996 until 31 December 1998 (when the FeV, which replaced it, came into force).

11 Paragraph 28(4)(3) of the FeV.

12 Paragraph 28(4)(4) of the FeV.

13 In German law, the withdrawal of a licence (Entziehung) automatically entails the loss or cancellation of the right to drive and not simply its suspension. Such a measure requires to be coupled with a prohibition on taking out a new licence for a period fixed by the court (a blocked period). At the end of the blocked period, the person concerned is only permitted to resume driving once he has been authorised to do so by the competent authorities, having passed a number of aptitude tests.

14 For an illustration, see in particular the order of the Bundesgerichtshof of 20 June 2002 (4StR 371/01, NJW 2002, p 2330).

15 See, *inter alia*, the order of the Bundesgerichtshof cited above (III, para 2).

- a before the regulation implementing the directive<sup>16</sup>, such a loss of the right to drive in Germany is capable of lasting indefinitely, even after the expiry of the periods concerned<sup>17</sup>.

## II—FACTS AND PROCEDURE IN THE MAIN PROCEEDINGS

- b 14. On 26 February 1998, the Amtsgericht Frankenthal, Pfalz, ordered the withdrawal (equivalent to cancellation) of the driving licence belonging to Mr Felix Kapper, a German national and the holder of a German licence, and instructed the relevant national authorities not to issue a new licence to him before the expiry of a period of nine months, that is to say not before 25 November 1998.

- c 15. Since then, no new licence has been issued to him in Germany. However, he obtained a Netherlands driving licence on 11 August 1999.

- d 16. On 17 March 2000, the same court sentenced Mr Kapper to a fine for driving a motor vehicle in Germany, on 20 November and 11 December 1999, without a valid licence, or, more precisely, while possessing a Netherlands licence whose validity was not recognised by the German authorities.
- d Mr Kapper appealed against that decision, to the same court, on the basis that he held a Netherlands licence.

## III—THE QUESTION REFERRED FOR A PRELIMINARY RULING

- e 17. In light of the parties' arguments, the Amtsgericht Frankenthal, Pfalz, decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

- 'Does Article 1(2) of Council Directive 91/439/EEC of 29 July 1991 on driving licences preclude a Member State from refusing to recognise a driving licence where, according to its investigations, another Member State issued that licence although the holder of the licence did not have his normal residence there, and in appropriate cases is actual effect to be given to that provision in that regard?'

## IV—ANALYSIS

### A—*The admissibility of the question referred for a preliminary ruling*

- g 18. The Netherlands government is uncertain whether the question referred for a preliminary ruling is admissible, in the absence, in its opinion, of sufficient information in the order for reference relating to the facts, to the relevant provisions of national law and to the importance of the question for the resolution of the main proceedings, particularly on the assumption that the person concerned was still banned from driving in Germany.

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16 It followed from the first paragraph of art 1(4) of the regulation implementing the directive that the holder of a licence issued by another member state who had previously had his German licence provisionally withdrawn or who could not obtain such a licence by reason of a final judicial decision was not entitled to drive a vehicle in Germany for so long as this provision applied to him. At the expiry of the period in question, the person concerned could automatically rely in Germany on his licence issued by another member state.

i

17 However, the regulation of 7 August 2002, which came into force on 1 September 2002, made it possible to put an end to the situation where the right to drive was lost. Under para 28(5) of the FeV, as amended, permission to drive in Germany under a licence issued by another member state may be granted by the German authorities when the person concerned so requests, provided that the circumstances which led to the withdrawal of the licence no longer exist. These provisions concern specifically the situation where the holder of a German licence has had his licence withdrawn by the German authorities and has subsequently obtained a new licence from another member state.



19. It should be borne in mind in that regard that the court has consistently held that the procedure under art 234 EC (formerly art 177 of the EC Treaty) is an instrument which assists co-operation between the Court of Justice and the national courts<sup>18</sup>. In the context of that co-operation, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine both the need for a preliminary ruling and the relevance of the questions which it puts to the court. Consequently, where the questions submitted by the national court concern the interpretation of Community law, the Court of Justice is, in principle, bound to give a ruling<sup>19</sup>.

20. However, it has stated that it is for the court to examine the circumstances in which the case was referred to it by the national court in order to assess whether the court has jurisdiction<sup>20</sup>.

21. It is in the light of this role that the court has held that it has no jurisdiction to give a preliminary ruling where it is quite obvious that the interpretation or the assessment of the validity of a Community rule sought by that court bears no relation to the facts or purpose of the main proceedings, or where the problem is hypothetical, or where the court does not have before it the factual or legal information necessary to give a useful answer to the questions submitted to it<sup>21</sup>.

22. As regards the last-mentioned case, I would point out that the requirement adequately to describe the legal and factual context of the dispute principally pursues two objectives.

23. First, the information provided in the decision referring the matter for a preliminary ruling must enable the court to provide an interpretation of Community law which will be of assistance to the national court<sup>22</sup>.

24. It is true that in the present case the order for reference contains little information on the factual and legal background to the main proceedings. A reading of it does not make it clear whether when Mr Kapper was charged with driving without a valid licence his right to drive in Germany was, or was not, still cancelled or restricted following the withdrawal of his German licence.

25. Nevertheless, the information provided in the order for reference has been supplemented, both by the reply from the national court to the request for clarification sent to it by the court, and by the replies from Mr Kapper and

<sup>18</sup> This point was stated for the first time in *Schwarze v Einfuhr-und Vorratsstelle fur Getreide und Futtermittel* Case 16/65 [1965] ECR 877 at 886.

<sup>19</sup> See inter alia *Union Royale Belge des Sociétés de Football Association ASBL v Bosman*, *Royal Club Liégeois SA v Bosman*, *Union des Associations Européennes de Football v Bosman* Case C-415/93 [1996] All ER (EC) 97, [1995] ECR I-4921 (para 59), *PreussenElektra AG v Schleswig AG (Windpark Reußenköge III GmbH, intervening)* Case C-379/98 [2001] All ER (EC) 330, [2001] ECR I-2099 (para 38), *Criminal proceedings against Der Weduwe* Case C-153/00 [2002] ECR I-11319 (para 31) and *Bacardi Martini SAS v Newcastle United Football Co Ltd* Case C-318/00 [2003] ECR I-905 (para 41).

<sup>20</sup> See inter alia *Foglia v Novello* Case 244/80 [1981] ECR 3045 (para 21), the *PreussenElektra* case (para 39), *Der Weduwe's case* (para 39) and the *Bacardi-Martini* case (para 42).

<sup>21</sup> See inter alia *Bosman's case* (para 61), cited in footnote 19, above, *Evangelischer Krankenhausverein Wien v Abgabenberufungskommission Wien*, *Wein & Co Handelsges mbH v Oberösterreichische Landesregierung* Case C-437/97 [2001] All ER (EC) 735, [2000] ECR I-1157 (para 52), *Idéal Tourisme SA v Belgian State* Case C-36/99 [2001] STC 1386, [2000] ECR I-6049 (para 20) and *Canal Satellite Digital SL v Administración General del Estado* Case C-390/99 [2002] ECR I-607 (para 19).

<sup>22</sup> See *Telemarsicabruzzo SpA v Circostel* joined cases C-320–322/90 [1993] ECR I-393 (para 6) and, in particular, the opinion of Advocate General Gulmann in that case (paras 5–21). See also *Pretore di Genova v Banchemo* Case C-157/92 [1993] ECR I-1085 (para 6) and *La Pyramide SARL* Case C-378/93 [1994] ECR I-3999 (para 14).

a the German government to the questions put to them in this regard. These make it clear that at the time he was charged in relation to the matters in question he was no longer prohibited from obtaining a new licence (which had been withdrawn for a period of nine months), but apparently continued to be deprived of the right to drive in Germany by reason of para 28(4)(4) of the FeV<sup>23</sup>. I am therefore of the view that notwithstanding the lacunae in the order  
b for reference, the court is in a position to provide a useful answer to the question put by the Amtsgericht Frankenthal, Pfalz.

26. Secondly, the information provided by an order for reference must give the governments of the member states and interested parties the opportunity to submit observations pursuant to art 20 of the Statute of the Court of Justice<sup>24</sup>.

c 27. In this case, it is clear from the observations submitted by the governments of the member states and by the Commission that the information provided in the order for reference has enabled them to comment effectively on the question referred for a preliminary ruling. Moreover, as mentioned above, that information has been supplemented by the reply from  
d the national court to the request for clarification sent to it by the court. This additional information was referred to in the report for the hearing and made known to the governments of the member states and other interested parties, either for the purpose of a written answer to certain questions or for the purpose of the hearing. The latter have thus had the opportunity to add to their observations where necessary.

e 28. I am therefore of the opinion that the question referred for a preliminary ruling by the Amtsgericht Frankenthal, Pfalz, is admissible.

29. However, as Mr Kapper, the German and Italian governments and the Commission have proposed, the scope of the question referred for a preliminary ruling should be extended to include the interpretation of art 8(2)  
f and (4) of the directive in order to provide a useful and complete answer to the national court.

30. I am accordingly of the view that the question referred for a preliminary ruling should be treated as asking whether art 1(2), in conjunction with art 7(1)(b), art 8(2) and (4) and art 9 of the directive, should be interpreted as meaning that a member state is entitled to refuse to recognise a driving licence  
g issued by another member state on the grounds (a) that according to its investigations, the holder of the licence in question had not taken up normal residence in the member state in which the licence was issued prior to its being issued, and/or (b) that the holder of the licence is still banned from driving in the first-mentioned member state following the withdrawal or cancellation of a previous licence, issued in that member state, coupled with a provisional  
h prohibition on obtaining a new licence there, when both those measures are fully executed and their effects have therefore been exhausted.

i 23 It is not for the court to take a view on the application of national law *ratione tempore*. Nevertheless, a reading of the order of the Bundesgerichtshof of 20 June 2002 referred to above suggests that the FeV is applicable to Mr Kapper's situation, to the exclusion of the regulation implementing the directive.

24 See *inter alia* *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* Case C-67/96 [2001] ICR 774, [1999] ECR I-5751 (para 40) and *Criminal proceedings against Arduino* Case C-35/99 [2002] ECR I-1529 (paras 28, 29) and my opinion in that case (para 30).

*B—Substance*

31. It should be noted at the outset that art 1(2) of the directive lays down the principle that 'driving licences issued by Member States shall be mutually recognized'.

32. As I recently pointed out, these provisions adopt a general approach to the mutual recognition of licences, and do not require that any particular conditions or formalities are met<sup>25</sup>.

33. The court so held in *Criminal proceedings against Skanavi*<sup>26</sup> in the context of requirements relating to the exchange of licences. The court restated the point in *Awoyemi's* case, adding that the obligation to recognise driving licences is clear and unconditional and that the member states have no discretion as to the measures to be adopted in order to comply with those requirements. It follows that the provisions referred to above have direct effect<sup>27</sup>.

34. The point was again made by the court very recently in *Commission v Netherlands* in the context of a requirement relating to the registration of licences<sup>28</sup>.

35. It is in the light of this principle of mutual recognition of licences, founded on mutual confidence between member states, that it should be considered whether a member state is entitled to refuse to recognise a licence issued by another member state for reasons relating to the residence of the holder of the licence in question or the fact that the latter has had his licence withdrawn or cancelled.

*1—The condition relating to the residence of the holder of the licence at the time of issue of the licence*

36. Under art 7(1)(b) of the directive, a driving licence may only be issued to an applicant who has his normal residence in the territory of the member state issuing the licence.

37. I agree with Mr Kapper and the Netherlands and Italian governments that it is the task solely of the member state issuing the licence to verify that this condition precedent is complied with, in accordance with the criteria set out in art 9 of the directive. It follows that where a licence has been issued by a member state, the other member states cannot refuse to recognise it on the grounds that in their view this condition has not been met.

38. To accept the contrary, as the German government proposes, would strike at the heart of the system established by the directive as well as the principle of mutual recognition, which is its linchpin.

39. As I have already observed in relation to the registration procedure in the Netherlands, the very philosophy of the system established by the directive consists in laying down common rules for the issue of driving licences and in conferring on the member state of issue the exclusive power of ensuring that the rules have been met<sup>29</sup>. It is on the basis of this system that the principle of mutual recognition of licences is founded which, it should be borne in mind, is intended to operate automatically, that is to say without any special conditions, formalities or investigative measures, and therefore requires mutual confidence on the part of the member states.

25 See my opinion in *European Commission v Netherlands* Case C-246/00 [2003] ECR I-7485 (para 38).

26 Case C-193/94 [1996] All ER (EC) 435, [1996] ECR I-929 (para 26).

27 *Criminal proceedings against Awoyemi* Case C-230/97 [1998] ECR I-6781 (para 41).

28 See paras 60, 61, cited in footnote 25, above.

29 See my opinion in *Commission v Netherlands* (para 42), cited in footnote 25, above.



a 40. Accordingly, to accept that a member state is entitled to check that the holder of a licence issued by another member state has fulfilled the condition as to residence of the holder and that, should the first-mentioned member state take the view that there has been a failure to comply with that condition, it may refuse to recognise the licence in question, would amount to stripping the principle of mutual recognition of licences of its substance and destroying  
b the mutual confidence which must guide member states in the matter.

41. Similar considerations led the court to hold that—

‘if a person holds a driving licence issued by a Member State, that should be deemed to be proof that the licence holder has fulfilled the conditions for the issue of a licence provided for in Directive 91/439; the host Member  
c State cannot then require the holder to prove again that he or she actually satisfied the conditions laid down in Articles 7(1)(b) and 9 of Directive 91/439, without violating the principle of mutual recognition of driving licences.’<sup>30</sup>

42. The court’s analysis is based on the fact that—

d ‘this requirement [of proof] negates the very recognition of driving licences issued by other Member States, because it amounts to rechecking whether the licence holder has fulfilled the conditions for obtaining a licence provided for in Articles 7(1)(b) and 9 of Directive 91/439.’<sup>31</sup>

e 43. The court was careful to emphasise in that regard that this requirement meant that the holder of the licence to be registered had to prove something the evidence for which could be extremely difficult to provide owing to the time which might elapse between when the licence is obtained and when the person took up residence in the Netherlands and the distance there might be between the place where the licence holder resided (when the driving licence was obtained) and the municipality in which the licence holder decided  
f to take up residence (in the member state in question)<sup>32</sup>.

44. In my opinion, that which applies to a requirement that the holder of the licence himself must prove as a matter of course that he has met the residence condition referred to above, in the context of a registration procedure with a member state which did not issue the licence, applies also to the checks or investigations which that member state would undertake in that regard in  
g order to decide whether to grant or refuse recognition of the licence.

45. Such a process would amount to rechecking whether the holder of a licence issued by another member state had fulfilled the residence condition laid down by the directive for obtaining the licence. As the court has held, the holding of such a licence should be deemed to be proof that the holder of  
h the licence in question has fulfilled that condition. The fact that such proof exists thus necessarily precludes a member state from disregarding the

30 See *Commission v Netherlands* (para 75), cited in footnote 25, above. The complaint against the Kingdom of the Netherlands in that case was that it had instituted a system of compulsory registration of driving licences issued by other member states, a year after the holder of such a licence had taken up residence in the Netherlands, and had imposed a registration system so cumbersome that it could barely be distinguished from a procedure for exchanging licences. It was cumbersome in particular owing to the fact that the holder of the licence to be registered was required to prove to the Netherlands authorities that during the year in which the licence was obtained he had resided for at least 185 days in the member state in which the licence was issued or had been enrolled for at least six months at a school or university in that state.

31 Paragraph 74.

32 As above.

obligation to recognise a licence issued by another member state solely on the ground that in its opinion there was evidence which suggested that the condition had not been fulfilled and thus calling into question the reliability of that proof. That is all the more the case as, if such evidence were taken into account by that member state as grounds for refusing to recognise the licence in question, its holder would ultimately be required to provide evidence once again that he had fulfilled that condition, which, as the court has held, would also be contrary to the principle of the mutual recognition of licences.

46. I am therefore of the opinion that a member state is not entitled either to check that the holder of a licence issued by another member state has properly fulfilled the residence condition laid down by the directive, or to refuse to recognise the licence in question on the ground that it has taken the view that the holder has not fulfilled that condition.

47. Contrary to what the Commission suggests, I believe that this conclusion also applies where, as is the case in Germany, such checks are not carried out as a matter of course, but are limited to those cases where the member state concerned had significant doubts as to compliance with the residence condition.

48. Where a member state has such doubts, it may so inform the member state which issued the licence by way of an exchange of information under art 12(3) of the directive<sup>33</sup>. It should nevertheless be made clear that if the result of such an exchange is that the member state which issued the licence confirms that the residence condition in question was properly fulfilled, the member state concerned continues to be required to recognise the disputed licence, even if it is not convinced by the reply it has received. It is thus not entitled to rely on its own checks or investigations into the matter, even if confined to the specific case, to refuse to recognise the licence.

49. That being so, were the host member state to take the view that the member state which had issued the licence had carried out inadequate checks into the residence condition in question, it would always be open to the former to bring infringement proceedings under art 227 EC (formerly art 170 of the EC Treaty).

50. In that regard, I am aware that it is possible (although very unlikely) that as a result of an exchange of information the member state which issued the licence realised that, contrary to what it had believed when the licence was issued, the residence condition laid down by the directive had not been properly fulfilled. Nevertheless, even in such a case, I believe that a refusal to recognise the licence would still not be permissible<sup>34</sup>.

<sup>33</sup> See in that regard the Commission interpretative communication on Community driver licensing (OJ 2002 C77 p 5, Pt II, para C.2).

<sup>34</sup> It is very likely that this situation does not apply in the main proceedings. Nothing in the documents before the court suggests that the German authorities have exchanged information with the Netherlands authorities as regards the licence issued by the latter to Mr Kapper. Moreover, if, at the hearing, he claimed to have spent eight months in the Netherlands when the licence was issued, and to have subsequently returned to Germany, where he now resides, that information could neither be affirmed nor denied by the Netherlands government, which was not present at the hearing (nor indeed by the German government, which was also not present). It is therefore not known whether in fact Mr Kapper did not fulfil the residence condition in question. That being the case, the possibility falls to be considered for the sake of completeness.

a 51. Unlike the Commission, I find it difficult to place the failure of the holder of a licence to fulfil the residence condition in the member state in which it was issued on the same footing as the situation before the court in *Van de Bijl v Staatssecretaris van Economische Zaken*<sup>35</sup>.

b 52. In that case, the court considered the position of a Netherlands national who wished to exercise the trade of a self-employed painter, but was unable to establish that he had the qualifications required to exercise it in that member state, and who relied in his dealings with the Netherlands authorities on a certificate issued by the United Kingdom authorities which stated that he had carried on that activity in the United Kingdom for a specified period, with a view to being granted permission to carry on the activity concerned in the Netherlands under Council Directive (EEC) 64/427<sup>36</sup>. That directive provided c that where, in a member state, the taking up or pursuit of certain activities was dependent on the possession of certain knowledge and ability, that member state should accept as sufficient evidence of such knowledge and activity the fact that the activity in question had been pursued in another member state for a specified period, relying for that purpose on a certificate issued by the d authorities of the latter member state.

53. That condition precedent as to the carrying on of an activity arose in the context of a temporary system of authorisation for carrying on those activities, pending the co-ordination of national rules relating to the taking up and pursuit of those activities, and the mutual recognition of qualifications<sup>37</sup>. The condition reflected the legitimate concern of the host member state that it e should be satisfied that the person concerned possessed certain general knowledge and ability sufficient to pursue the intended activity, in order to protect the interests of the recipients of that activity.

54. That context explains why the court held that—

f 'the competent authority in the host Member State, when it is presented with an application for a licence to take up an activity on the basis of a certificate drawn up by the competent authority of the Member State from which the beneficiary comes pursuant to ... the directive, is not bound to grant the application automatically if the certificate produced contains a manifest inaccuracy inasmuch as it states that the person covered ... has completed a period of professional activity in the Member State from g which he comes, when it is clear that during that same period the person in question has pursued his activities in the territory of the host Member State.'<sup>38</sup>

55. In my opinion, that case law cannot be applied to the situation in the main proceedings.

h 56. It should be pointed out first of all that the residence condition under the directive is part of a system of recognition of driving licences, and not of authorisation, which will as a rule exclude all discretion on the part of other member states than the state of issue as to fulfilment of the conditions for obtaining those licences.

i

<sup>35</sup> Case 130/88 [1989] ECR 3039.

<sup>36</sup> Laying down detailed provisions concerning transitional measures in respect of activities of self-employed persons in manufacturing and processing industries falling within ISIC Major Groups 23 to 40 (Industry and small craft industries) (OJ English Sp Edn 1963–1964 p 148).

<sup>37</sup> See *Van de Bijl's* case (para 14), cited in footnote 35, above.

<sup>38</sup> See footnote above (para 27).



57. Moreover, that residence condition does not reflect needs which are comparable to those applying to the possession of general knowledge and ability, which are intended to protect the interests of recipients of an activity carried on by a self-employed person. However important it may be in the structure of the system established by the directive, the condition cannot be treated in the same way as an essential condition, such as the passing of certain tests of skills and behaviour and theoretical tests, all of which are prompted by overriding reasons relating to the public interest, as art 7(1)(a) of the directive requires<sup>39</sup>.

58. It follows from this reasoning that the parallel suggested by the Commission between the failure to fulfil the residence condition under the directive which has been found and the situation considered by the court in *Van de Bijl's* judgment is not relevant in my opinion. That judgment does not therefore call into question my analysis.

59. In my opinion, such a failure does not of itself justify a refusal to recognise the driving licence in question, nor indeed does it justify the withdrawal or cancellation of the licence by a member state which did not issue the licence (with effects on its own territory)<sup>40</sup>. That being the case, if a member state which issues licences were consistently to fail to meet its obligation to confirm that the residence condition has been fulfilled, the host member state and the Commission could bring infringement proceedings against the member state in question under art 226 EC (formerly art 169 of the EC Treaty) and art 227 EC.

60. It is moreover not inconceivable that the member state which issued the licence might decide that by reason of the irregularity which has been found it should withdraw or cancel the licence, operating a mirror procedure, with the result that the other member states would plainly not be required to recognise it.

61. I am accordingly of the opinion that the combined provisions of arts 1(2), 7(1)(b) and 9 of the directive should be interpreted as meaning that a member state is not entitled to refuse to recognise a licence issued by another member state on the ground that in its opinion the holder of the licence in question had not taken up normal residence in the latter member state at the time when the licence was issued.

*2—The effects of a withdrawal or cancellation of a licence issued by a member state as regards a licence issued subsequently by another member state*

62. The question here is whether a member state is entitled to refuse to recognise a licence issued by another member state on grounds other than that considered above, on the basis of measures taken against the holder of the licence in question to withdraw or cancel a licence previously issued by the first member state.

<sup>39</sup> It would appear that that is not the view of the Commission as expressed in its interpretative communication, cited in footnote 33, above. The consequences of a breach of art 7(1)(b) of the directive are the same as those relating to a breach of art 7(1)(a).

<sup>40</sup> Contrary to what the Commission suggests in its interpretative note, cited in footnote 33, above (Pt II, para C.2.3), it is my view that even if it were agreed that the residence condition laid down by the directive had not been fulfilled, a member state is not entitled to cancel, with effects in its territory, a licence issued by another member state (short of subsequently returning it to the member state which issued it, so that the latter may proceed to cancel it itself, with consequent effects in all member states). The effects of cancelling a licence in this way would be largely similar to those resulting from a decision to refuse to recognise a licence.

- a 63. According to Mr Kapper, it is possible that, on the basis of art 8(4) of the directive, the German authorities might refuse to recognise the validity in their territory of a licence issued by another member state so long as a national measure such as a suspension or cancellation of the right to drive for a specified period was in place. However, it is certainly not open to them to do so after that time.
- b 64. Similarly, the Italian government submits that these provisions are solely intended to secure the application of a criminal penalty, such as the suspension or withdrawal of a licence, so that its holder cannot avoid these by improperly relying on a licence obtained in another member state. Once the criminal penalty has been executed, the member state in which it was imposed is no longer entitled to refuse to recognise the licence.
- c 65. According to the Commission, the directive does not prevent a member state from refusing to recognise a licence issued by another member state when its holder has had his national licence withdrawn and the first-mentioned member state has not reinstated it. It added at the hearing that such a refusal of recognition, based on art 8(4) of the directive, could not apply indefinitely,
- d particularly where, at a given time, the person concerned could once more obtain a licence in his home country.
66. Having considered the observations of the parties, I am of the opinion that in circumstances such as those arising in the main proceedings such a refusal to recognise a licence cannot be justified on the basis of either art 8(2) of the directive or art 8(4).
- e 67. As far as art 8(2) of the directive is concerned, I note that it provides that where the holder of a valid national driving licence issued by a member state has taken up normal residence in another member state, the host member state may, subject to the observance of the principle of territoriality of criminal and police laws, apply its national provisions on the restriction, suspension, withdrawal or cancellation of the right to drive to the holder of the licence
- f and, if necessary, exchange the licence for that purpose.
68. In my opinion, these provisions of the directive, which do not apply only to exchanges of licences<sup>41</sup>, cover the situation where the holder of a licence is accused of committing a road traffic offence in the host member state and where the relevant authorities in that member state intend to impose on him a penalty by way of restriction, suspension, withdrawal or cancellation of the right to drive, whose effects would be limited to the member state concerned<sup>42</sup>.
- g 69. This is not the situation in which Mr Kapper finds himself in the main proceedings.
70. When the order was made in Germany for the withdrawal (equivalent to cancellation) of his licence, that punishment applied only to the German
- h licence which he had previously held, before obtaining the Netherlands licence in issue. The question does not arise in the main proceedings whether, under art 8(4) of the directive, the German authorities are entitled to order the withdrawal or cancellation of Mr Kapper's licence once again, this time in relation to his Netherlands licence. The only point at issue is whether the German authorities are entitled to refuse to recognise the validity of the
- i Netherlands licence. As with the residence condition, this question must be answered in the negative. It follows that Mr Kapper's Netherlands licence must

41 Contrary to what the order for reference assumes.

42 See, to that effect, the Commission's interpretative communication, cited in footnote 33, above, Pt II, para C.2.1.

be treated as valid, so that the offence with which he is charged (that of driving without a valid licence) cannot be sustained. As such an offence has not been committed, art 8(2) of the directive will not apply to the person concerned. a

71. In my opinion, contrary to what the German government contends, art 8(2) of the directive cannot be interpreted as meaning that a host member state is entitled to refuse to recognise a licence issued by another member state where, under the national rules (of the host member state in question) relating to the restriction, suspension, withdrawal or cancellation of the right to drive, the right to drive in that member state has been removed from the holder of the licence by reason of his previously having been banned from driving (by the authorities of that member state), even where that penalty has been fully executed and thus ceased to have effect. As will be seen, a broad interpretation of these provisions of the directive would make art 8(4) of the directive redundant. b  
c

72. As regards the last-mentioned provisions of the directive, I am of the view that these should be narrowly interpreted, to mean that a member state is entitled to refuse to recognise a licence issued by another member state when the authorities of the first member state have imposed on the holder of the licence in question a measure which restricts, suspends, withdraws or cancels the right to drive only where such a measure has not been fully executed and its effects have not therefore been exhausted. There are several factors which support such an interpretation. d

73. First of all, as the Italian government observed, it follows from the wording of these provisions<sup>43</sup> that the option open to member states (to refuse to recognise the validity of a licence issued by another member state) applies only to the case of a person 'who is' in its territory the subject of one of the measures referred to above, which falls to be distinguished from a person 'who was' the subject of such measures. The use of the present, and not the past, tense clearly reflects the will of the Community legislature to limit the use of that option to measures removing or restricting the right to drive which are current, that is to say which remain enforceable. e  
f

74. It should moreover be noted that the option given to member states under art 8(4) of the directive constitutes an exception to the principle of recognition of licences laid down in art 1(2). It follows under settled case law that art 8(4) of the directive should be interpreted narrowly. g

75. Lastly, it should be pointed out that the purpose of the directive is to establish a Community model licence and to introduce a system of mutual recognition of those licences without any requirement for exchange, in order inter alia to facilitate the movement of persons settling in a member state other than that in which they have passed a driving test<sup>44</sup>. The principle of mutual recognition of licences laid down in art 1(2) of the directive therefore constitutes the linchpin of the system established by the directive. For a member state to be entitled to rely on its national rules to refuse indefinitely or permanently to recognise a licence issued by another member state would run entirely contrary to this principle<sup>45</sup>. h

<sup>43</sup> At least in the Italian and French versions. i

<sup>44</sup> See the first recital in the preamble to the directive. The importance of the recognition of driving licences has been emphasised by the court as regards the freedom of movement of workers as well as the freedom of establishment and the freedom to provide services. See *Skanavi's case* (para 23), cited in footnote 26, above.

<sup>45</sup> I note that that appears to be the effect of the German legislation (the FeV), as currently applied under national case law. See in that regard paras 12 and 13 of this opinion.



a 76. I would also note that it is clear from the second paragraph of art 10 of the directive that where a member state wishes to adopt provisions under its national legislation intended to implement art 8(4) of the directive, it must obtain the prior agreement of the Commission. This requirement exists in order to ensure that the proposed national legislation complies with the terms of art 8(4) of the directive. For that reason, it is important that such an agreement is expressed in legally binding form, and is not limited to an implicit or informal understanding, as was the case with the German rules at issue in the main proceedings<sup>46</sup>.

b 77. I am accordingly of the opinion that art 1(2) and art 8(4) of the directive should be interpreted as meaning that a member state is entitled to refuse to recognise a driving licence issued by another member state where the authorities of the first member state have imposed on the holder of the licence in question a measure which restricts, suspends, withdraws or cancels the right to drive only where such a measure has not been fully executed and its effects have therefore not been exhausted.

c  
d V—CONCLUSION

78. In light of the foregoing considerations, I propose that the Court of Justice should answer as follows the questions referred for a preliminary ruling by the Amtsgericht Frankenthal, Pfalz:

e (1) The combined provisions of art 1(2), art 7(1)(b), art 8 and art 9 of Council Directive (EEC) 91/439 (on driving licences) are to be interpreted as meaning that a member state is not entitled to refuse to recognise a licence issued by another member state on the ground that in its opinion the holder of the licence in question had not taken up normal residence in the latter member state at the time when the licence was issued.

f (2) However, a member state is entitled under art 8(4) of the directive to refuse to recognise such a licence where the authorities of that member state have imposed on the holder of the licence in question a measure which restricts, suspends, withdraws or cancels the right to drive only where such a measure has not been fully executed and its effects have therefore not been exhausted.

g 29 April 2004. **THE COURT OF JUSTICE (Fifth Chamber)** delivered the following judgment.

h 1. By decision of 11 October 2001, corrected by letter of 19 December 2001, received at the Court of Justice of the European Communities on 7 and 24 December 2001 respectively, the Amtsgericht Frankenthal (Frankenthal Local Court), Germany, referred to the Court of Justice for a preliminary ruling under art 234 EC (formerly art 177 of the EC Treaty) a question on the interpretation of art 1(2) of Council Directive (EEC) 91/439 (on driving licences) (OJ 1991 L237 p 1), as amended by Council Directive (EC) 97/26 (OJ 1997 L150 p 41) (hereinafter Directive 91/439 or the directive).

i 2. That question was raised in criminal proceedings brought against Mr Kapper, who was sentenced to a fine for having driven a motor vehicle on

<sup>46</sup> Moreover, in accordance with the first paragraph of art 10 of the directive, the Commission has already formalised its agreement in the form of a decision (Commission Decision (EC) 2000/275 (on equivalences between certain categories of driving licences) (OJ 2000 L91 p 1)). It will probably do the same with the agreement provided for under the second paragraph of art 10 of the directive.

20 November and 11 December 1999 without being in possession of a valid driving licence, although he held a driving licence issued by the Netherlands authorities on 11 August 1999. a

## LEGAL BACKGROUND

### *Community legislation* b

3. Article 1 of Directive 91/439 states:

‘1. Member States shall introduce a national driving licence based on the Community model described in Annex I or Ia, in accordance with the provisions of this Directive.

2. Driving licences issued by Member States shall be mutually recognized. c

3. Where the holder of a valid national driving licence takes up normal residence in a Member State other than that which issued the licence, the host Member State may apply to the holder of the licence its national rules on the period of validity of the licence, medical checks and tax arrangements and may enter on the licence any information indispensable for administration.’ d

4. Under art 7(1)(b) of that directive, driving licences are to be issued only to those applicants ‘who have their normal residence in the territory of the Member State issuing the licence, or can produce evidence that they have been studying there for at least six months’. e

5. Article 7(5) of that directive states that ‘No person may hold a driving licence from more than one Member State’.

6. Article 8(1) to (4) of the directive provides:

‘1. Where the holder of a valid national driving licence issued by a Member State has taken up normal residence in another Member State, he may request that his driving licence be exchanged for an equivalent licence; it shall be for the Member State effecting the exchange to check, if necessary, whether the licence submitted is in fact still valid. f

2. Subject to observance of the principle of territoriality of criminal and police laws, the Member States of normal residence may apply its national provisions on the restriction, suspension, withdrawal or cancellation of the right to drive to the holder of a driving licence issued by another Member State and, if necessary, exchange the licence for that purpose. g

3. The Member State effecting the exchange shall return the old licence to the authorities of the Member State which issued it and give the reasons for so doing.

4. A Member State may refuse to recognize the validity of any driving licence issued by another Member State to a person who is, in the former State’s territory, the subject of one of the measures referred to in paragraph 2. h

A Member State may likewise refuse to issue a driving licence to an applicant who is the subject of such a measure in another Member State.’ i

7. Article 9 of Directive 91/439 is worded as follows:

‘For the purpose of this Directive, “normal” residence means the place where a person usually lives, that is for at least 185 days in each calendar year, because of personal and occupational ties, or, in the case of a person

a with no occupational ties, because of personal ties which show close links between that person and the place where he is living.

However, the normal residence of a person whose occupational ties are in a different place from his personal ties and who consequently lives in turn in different places situated in two or more Member States shall be regarded as being the place of his personal ties, provided that such person returns there regularly. This last condition need not be met where the person is living in a Member State in order to carry out a task of a definite duration. Attendance at a university or school shall not imply transfer of normal residence.'

b 8. The second paragraph of art 10 of the directive states:

c 'With the agreement of the Commission, Member States may make to their national legislation such adjustments as are necessary for the purpose of implementing the provisions of Article 8(4), (5) and (6).'

d 9. Article 12(1) of Directive 91/439 states that, after consulting the Commission of the European Communities, member states are, before 1 July 1994, to adopt the laws, regulations or administrative provisions necessary to comply with that directive as of 1 July 1996.

10. Article 12(3) of Directive 91/439 provides that the member states are to assist one another in the implementation of the directive and must, if need be, exchange information on the licences they have registered.

e *National legislation*

11. In the Federal Republic of Germany, the mutual recognition of driving licences which Directive 91/439 provides for was governed from 1 July 1996 to 31 December 1998 by the Verordnung zur Umsetzung der Richtlinie 91/439/EWG des Rates vom 29 Juli 1991 über den Führerschein und zur Änderung straßenverkehrsrechtlicher Vorschriften (Regulation on the transposition of Directive 91/439) of 19 June 1996 (BGB1 I, p 877) (hereinafter 'the EU-Führerschein-VO 1996').

f 12. Under the first subparagraph of art 1(4) of the EU-Führerschein-VO 1996, the right to drive a motor vehicle in Germany was not available to:

'... holders of a foreign driving licence:

g if when the licence was issued they had their permanent residence in the territory to which this regulation applies, unless they have been staying abroad for a minimum of six months for the sole purpose of attending a university or school,

h for so long as their driving licence has been provisionally withdrawn in the territory to which this regulation applies or for so long as they are unable to obtain a driving licence by reason of a decision of a court which is final, or

i if in Germany an administrative authority has adopted an immediately enforceable or definitive decision withdrawing the driving licence or if the issue of a licence to such a holder has been definitively refused; the same shall apply if there was no withdrawal solely because the licence was surrendered in the meantime.'

13. The law which has applied since 1 January 1999 is the Verordnung über die Zulassung von Personen zum Straßenverkehr (Regulation on access to road traffic) of 18 August 1998, also called the Fahrerlaubnisverordnung (Regulation on the right to drive) (BGB1 I, p 2214) (hereinafter the FeV1999).



14. Paragraph 7 of the FeV 1999, which sets out the requirements as to normal residence for the grant of a driving licence, contains the national provisions which transpose arts 7(1)(b) and 9 of Directive 91/439. a

15. Paragraph 28 of the FeV 1999 provides:

'(1) The holders of a valid EU or EEA driving licence having their normal residence within the meaning of Paragraph 7(1) or (2) in the Federal Republic of Germany are authorised, subject to the restriction set out in subparagraphs (2) to (4), to drive motor vehicles in Germany to the extent to which they are qualified to do so. The conditions subject to which foreign driving licences are issued shall also have effect in Germany. The provisions of this regulation shall apply to those driving licences, save where the contrary is provided ... b

(4) The authorisation which is referred to in subparagraph (1) does not apply to the holders of an EU or EEA driving licence c

1. where the licence is provisional only, whether this is because they are learning to drive or for some other reason,

2. who, when the licence was issued, had their normal residence in Germany, unless they had obtained the licence as students or pupils within the meaning of Paragraph 7(2), during a minimum stay of six months, d

3. whose driving licence has, in Germany, been provisionally or finally withdrawn by a court, or has been withdrawn by an immediately enforceable or definitive decision of an administrative authority, who has been definitively refused a driving licence, or whose driving licence has not been withdrawn solely because the licence was surrendered in the meantime, or e

4. who are banned from driving, or whose driving licence has been confiscated, seized or impounded under Paragraph 94 of the Criminal Procedure Code, in Germany, in the State in which the licence was issued or in the State in which they have their normal residence.' f

#### THE PROCEDURE IN THE MAIN PROCEEDINGS AND THE QUESTION REFERRED

16. Mr Kapper challenged a criminal order of the Amtsgericht of 17 March 2000. That court had sentenced him to a fine for having driven a motor vehicle in Germany on 20 November and 11 December 1999 without being the holder of a valid driving licence. At the time of the offence charged, Mr Kapper was the holder of a driving licence which had been issued to him by the Netherlands authorities on 11 August 1999. g

17. By a criminal order of 26 February 1998, the same court had withdrawn the German driving licence held by Mr Kapper and had instructed the administrative authorities not to issue him with a new licence before the expiry of a period of nine months, that is to say before 25 November 1998. h

18. According to the order for reference, no new driving licence has been issued to Mr Kapper in Germany since 25 November 1998. There is nothing in the documents before the court to indicate whether or not he has applied for such a licence to the German authorities since that date.

19. In the proceedings brought by Mr Kapper to have the order set aside, the Amtsgericht questions whether the German rules are compatible with Directive 91/439, while observing that if the court is not competent to determine that point, it is competent to decide whether Community law precludes the application of criminal provisions which penalise a breach of those rules. According to the national court, the national provisions must be i

a interpreted as meaning that the driving licence issued in the Netherlands has no validity in Germany. It refers in that regard to the first indent of art 1(4) of the EU-Führerschein-VO 1996, which is in terms similar to para (4) of the FeV 1999, in force since 1 January 1999.

b 20. The national court also states that the application of the national rules implies verification of the residence of the holder of a licence at the time when it was issued by another member state. That means that the sovereign act of that state is submitted to review in Germany, and thus amounts to a restriction on the principle of the mutual recognition of driving licences issued by member states established by art 1(2) of Directive 91/439.

c 21. The Amtsgericht considers that art 8(1) to (4) of the directive does not provide an answer to the question raised in the main proceedings. According to the national court, that provision, which expressly authorises a member state to check the validity of a licence issued by another member state, applies only to the exchange of a valid licence, but does not authorise a member state to regard a sovereign act of another state as void.

d 22. In those circumstances, the Amtsgericht Frankenthal decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

e 'Does Article 1(2) of [Directive 91/439] preclude a Member State from refusing to recognise a driving licence where, according to its investigations, another Member State issued that licence although the holder of the licence did not have his normal residence there, and in appropriate cases is direct effect to be given to that provision in that regard?'

#### THE ADMISSIBILITY OF THE QUESTION REFERRED

f 23. The Netherlands government has expressed doubts as to the admissibility of the question referred. It submits that the order for reference does not provide sufficient information in relation to the facts of the case, to the relevant provisions of national law, or to the reason why an answer to the question is germane to the main proceedings. It is likely that at the time of the facts charged Mr Kapper's right to drive was still withdrawn. If so, it is of no relevance to know whether he did, or did not, possess a driving licence. It is thus also not relevant whether the German authorities were entitled to refuse to recognise the Netherlands driving licence which had been issued to g Mr Kapper or whether that licence had been issued unlawfully because he did not have his normal residence in the Netherlands at that time.

h 24. It should be observed in that regard that according to settled case law it is solely for the national courts before which actions are brought, and which must bear the responsibility for the subsequent judicial decision, to determine in the light of the special features of each case both the need for a preliminary ruling in order to enable them to deliver judgment and the relevance of the questions which they submit to the court. Consequently, where the questions referred involve the interpretation of Community law, the court is, in principle, obliged to give a ruling (see, inter alia, *PreussenElektra AG v Schleswag AG (Windpark Reußenköge III GmbH, intervening)* Case C-379/98 [2001] All ER (EC) 330, [2001] ECR I-2099 (para 38), *Canal Satélite Digital SL v Administración General del Estado* Case C-390/99 [2002] ECR I-607 (para 18), *Adolf Truley GmbH v Bestattung Wien GmbH* Case C-373/00 [2003] ECR I-1931 (para 21) and *Arkkitehtuutoimisto Riitta Korhonen Oy v Varkauden Taitotalo Oy* Case C-18/01 [2003] ECR I-5321 (para 19)).

25. Moreover, it follows from that case law that the court may decline to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of Community law that is sought bears no relation to the facts of the main action or its purpose, where the problem is hypothetical, or where the court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see the *PreussenElektra* case (para 39), the *Canal Satellite* case (para 19), the *Adolf Truley* case (para 22) and the *Arkkitehtuuritoimisto Riitta Korhonen* case (para 20)).

26. That does not apply in the present case. It is true that the order for reference is expressed in very succinct terms, which do not make it clear, in particular, whether when Mr Kapper was charged by the police on 20 November and 11 December 1999 his right to drive in Germany was still withdrawn or restricted. Nevertheless, in response to the request for clarification addressed to it by the court under art 104(5) of the Rules of Procedure, the national court has stated that the ban on obtaining a new driving licence, with which the measure of 26 February 1998 withdrawing Mr Kapper's licence was coupled, expired on 25 November 1998. The national court has added that after that date Mr Kapper could have submitted a new request to the German authorities for the issue of a driving licence.

27. Moreover, it is clear from the written response of the German government to the questions put to it by the court that where there is a measure withdrawing (*Entziehung*) a driving licence which applies to a Community national having his normal residence in Germany, the national provisions relating to the consequences of that withdrawal apply in the same manner whether that person is the holder of or subsequently obtains a licence issued by the authorities of another member state. It follows that a foreign licence of that kind is not recognised by the German authorities.

28. Having regard to the additional information referred to above, the court has sufficient particulars on matters of fact and law available to it to answer the question referred to it in a useful manner.

29. It should also be noted that the succinct nature of the order for reference has not prevented the governments of the member states which have submitted observations to the court, or the Commission, from stating their views on the question referred.

30. The question referred by the *Amtsgericht* must therefore be declared to be admissible.

#### THE QUESTION REFERRED

31. Having regard to the facts of the main proceedings and what is stated in the observations submitted to the court, consideration of the question referred should not be limited to the matters expressly raised by the national court, but should also take into account several other provisions of Directive 91/439 which may be relevant to the answer to that question, in particular art 8(4) of the directive. In order to provide an answer to the question referred which is both useful and as complete as possible, the scope of the question should therefore be expanded.

32. The question should accordingly be restated and divided into two parts, which will be considered separately. The national court essentially asks, first, whether arts 1(2), 7(1)(b) and 9 of Directive 91/439, taken together, must be interpreted as meaning that they preclude a member state from refusing to recognise a driving licence issued by another member state on the ground that,



- a according to the information available to the first member state, the holder of the licence had, on the date on which it was issued, taken up normal residence in that member state and not in the member state in which the licence was issued. The national court asks, secondly, whether arts 1(2) and 8(4) of Directive 91/439, taken together, must be interpreted as meaning that they preclude a member state from refusing to recognise the validity of a driving
- b licence issued by another member state on the ground that its holder has, in the first member state, been subject to a measure cancelling or withdrawing the driving licence issued by that member state, where a temporary ban on obtaining a new licence with which that measure is coupled has expired before the date of issue of the licence issued by the other member state.

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*The first part of the question referred*

*Observations submitted to the court*

33. According to the German government, Directive 91/439, having regard in particular to art 7(1)(b) thereof, must be interpreted as meaning that the
- d member state in which the holder resides may refuse to recognise a licence issued by another member state where the holder did not have his normal residence in the member state which issued the licence. The German government notes that the order for reference does not provide sufficient information to determine whether Mr Kapper did in fact have his normal residence in the Netherlands within the meaning of art 9 of the directive. In
- e any event, it argues that if that condition was not satisfied, the disputed Netherlands licence was void ab initio, or at least unlawful. In those circumstances, the Netherlands authorities ought not to have issued a driving licence, which, because of that mistake, would also not qualify for recognition. The German government notes that art 7(1)(b) of the directive expressly makes
- f the issue of a driving licence conditional on the holder having had his normal residence in the territory of the member state issuing that licence for a period of at least six months.

34. The Netherlands government submits, on the other hand, that it follows from the principle of mutual recognition laid down in art 1(2) of Directive 91/439 that a member state must recognise a valid driving licence issued by
- g another member state and that it is not entitled to check the circumstances in which it was issued. It observes that, in the case at issue in the main proceedings, the Netherlands authorities had determined that Mr Kapper had his normal residence in the Netherlands, and issued the licence to him. The German authorities are not entitled to review the legality of that decision and must therefore simply recognise the licence issued.

- h 35. In so far as the German rules impose conditions on the recognition of a valid licence issued by another member state, it is appropriate to consider whether art 1(2) of Directive 91/439 has direct effect. In that regard the Netherlands government points out that wherever the provisions of a directive appear, as far as their subject matter is concerned, to be unconditional and sufficiently precise, those provisions may be relied upon by an individual
- i against the state where the latter fails to implement the directive in national law by the end of the period prescribed or where it fails to transpose the directive correctly (see *Criminal proceedings against Kolpinghuis Nijmegen BV* Case 80/86 [1987] ECR 3969 (para 7)).

36. It submits that art 1(2) of the directive imposes a clear and precise obligation on member states to give mutual recognition to European model

driving licences and not to require the holder of a licence issued by another member state to exchange it, whatever his nationality might be. That provision provides for mutual recognition, without any formality, of driving licences issued by member states (see *Criminal proceedings against Skanavi* Case C-193/94 [1996] All ER (EC) 435, [1996] ECR I-929 (para 26)). The directive does not give the member states to which it is addressed any freedom of action in relation to the measures requiring to be adopted in order to comply with those obligations. According to the Netherlands government, art 1(2) of the directive thus has direct effect (see *Criminal proceedings against Awoyemi* Case C-230/97 [1998] ECR I-6781 (para 43)).

37. Like the Netherlands government, the Commission notes that under art 1(2) of Directive 91/439 the mutual recognition of driving licences issued by the member states is not, in principle, linked to other conditions and should occur 'without any formality' (see *Skanavi's* case (para 26)). It is based on mutual trust in compliance with provisions that are already largely harmonised, given that the directive not only requires the mutual recognition of driving licences but also compliance with a number of minimum conditions and standards when those licences are issued.

38. While Directive 91/439 contains provisions allowing in exceptional cases refusal to recognise the validity of a driving licence, the host member state cannot automatically infer from the fact that it considers that a licence has been issued in another member state in breach of some of the conditions laid down in the directive that it is entitled to refuse to recognise the licence. That applies particularly where the authorities of a member state have established that a driving licence has been issued in breach of art 7(1)(b) of the directive to a person who did not, at the time of issue, satisfy the condition requiring a minimum period of residence of six months in the member state which issued that licence.

39. According to the Commission, in cases involving clear irregularities the authorities of the host member state may, in accordance with art 12(3) of the directive, seek clarification from the member state which issued the licence. If a state finds evidence of clear and systematic irregularities in the issuing of licences by the authorities of another member state, it may bring an action against that state under art 227 EC (formerly art 170 of the EC Treaty).

40. As regards the direct effect of art 1(2) of the directive, the Commission notes at the outset that the court has already confirmed, in para 43 of its judgment in *Awoyemi's* case that that provision is unconditional and sufficiently precise.

41. The Commission notes that, in so far as art 28 of the FeV 1999 applies to persons who have obtained a driving licence in a member state of the European Union or the European Economic Area other than Germany but who were resident in that country, that provision is incompatible with the principle of mutual recognition. However, it does not follow from that provision that the German authorities carry out systematic checks relating to possible breaches by other member states of the rules governing the issue of driving licences. According to the Commission, it is only when the German authorities become aware, on the basis of the information available to them, that the holder of a foreign licence did not satisfy the residence requirement under the directive because he was resident in Germany that those authorities refuse to recognise the licence in question.

42. The residence requirement serves in particular to prevent 'driving licence tourism'. It plays an important role in the current system since,

- a notwithstanding the progress made in the harmonisation of the national rules relating to driving licences, there are many areas (for example, period of validity and regular medical checks) where the rules vary from one member state to another. The residence requirement is a consequence of the fact that harmonisation is incomplete and will tend to become less important as the latter progresses, thereby permitting full implementation of the principle of mutual recognition.

43. According to the Commission, as long as the residence requirement remains in force, all member states must comply with it. It none the less remains the duty of a member state which issues or renews a licence to check that the requirement has been satisfied, and the other member states must respect the principle of mutual recognition.

- c 44. The Commission takes the view that the German legislation complies with both these requirements, although the point is a fine one. The restriction on the principle of mutual recognition which those rules impose appears justified. Moreover, the host member state cannot be obliged to overlook matters which have occurred within its own territory and which relate directly to the question where the person concerned resided at the time when he obtained his driving licence. The Commission refers in that regard to *Van de Bijl v Staatssecretaris van Economische Zaken* Case 130/88 [1989] ECR 3039 (paras 24–26).

#### *Findings of the court*

- e 45. The court has consistently held that art 1(2) of Directive 91/439 provides for mutual recognition, without any formality, of driving licences issued by member states (see *Skanavi's case* (para 26) and *Awoyemi's case* (para 41)). That provision imposes on member states a clear and precise obligation, which leaves no room for discretion as to the measures to be adopted in order to comply with it (see *Awoyemi's case* (para 42) and *European Commission v Netherlands* Case C-246/00 [2003] ECR I-7485 (para 61)).

- f 46. In its judgment in *Commission v Netherlands*, the court has thus already expressly dismissed the possibility of a host member state introducing systematic checks to verify that the requirement as to residence in the member state which issued the licence, laid down in arts 7(1)(b) and 9 of Directive 91/439, was properly complied with by the holders of driving licences issued by other member states. At para 75 of that judgment, it held, first, that it is for the authorities which issue driving licences to ensure that applicants have their normal residence in the state issuing the licence, and, secondly, that if a person holds a driving licence issued by a member state, that should be deemed to be proof that the licence holder has satisfied the conditions for the issue of a licence provided for in Directive 91/439. Accordingly, the host member state cannot then require the holder to prove again that he or she actually satisfied the conditions laid down in arts 7(1)(b) and 9 of Directive 91/439, without violating the principle of the mutual recognition of driving licences.

- h 47. It follows that the principle of mutual recognition of driving licences also means that when a host member state is carrying out a traffic check within its territory, it is precluded from refusing to recognise a driving licence issued by another member state to the driver of a vehicle on the ground that, according to the information available to the first member state, the holder of the licence in question had, at the date of its issue, established his normal residence in that member state and not in the issuing member state (see order in *Da Silva Carvalho* Case C-408/02 (2003) Transcript (order) 11 December (para 22)). As

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Advocate General Léger has noted at para 44 of his opinion, the considerations set out in para 75 of the judgment in *Commission v Netherlands*, relating to a requirement that the holder of the driving licence must prove as a matter of course that he has satisfied the residence requirement in the context of a registration procedure relating to the licence in a member state which did not issue that licence, also apply to verification procedures or ad hoc investigations by that member state for the purpose of deciding whether to grant or to refuse recognition to that licence. a

48. Given that Directive 91/439 confers exclusive competence on the member state which issues a licence to ensure that driving licences are issued in compliance with the residence requirement set out in arts 7(1)(b) and 9 of that directive, it is for that member state alone to take appropriate measures in relation to driving licences held by persons who are subsequently shown to have failed to satisfy that requirement. Where a host member state has good reason to doubt the validity of one or more licences issued by another member state, it must so inform the latter under the rules relating to mutual assistance and the exchange of information contained in art 12(3) of that directive. Should the member state which issued the licence fail to take the appropriate measures, the host member state may bring proceedings against the first state under art 227 EC for a declaration by the court that there has been a failure to comply with the obligations arising under Directive 91/439. b

49. In the light of the above, the answer to the first part of the question referred must be that the provisions of arts 1(2), 7(1)(b) and 9 of Directive 91/439, taken together, must be interpreted as meaning that they preclude a member state from refusing to recognise a driving licence issued by another member state on the ground that, according to the information available to the first member state, the holder of the licence had, on the date on which it was issued, taken up normal residence in that member state and not in the member state in which the licence was issued. c

#### *The second part of the question referred*

##### *Observations submitted to the court*

50. Mr Kapper submits that the German provisions set out in para 28 of the FeV 1999 are incompatible with Directive 91/439. In adopting those provisions, the German legislature intended that, in certain circumstances, driving licences validly obtained in another member state should be deemed to be void and of no effect in Germany. Those provisions are contrary to the essence of the mutual recognition of measures adopted by the administrative authorities of the different member states. They even represent a retrograde step in relation to the law as it was in force prior to Directive 91/439, under which licences issued by other member states remained valid for at least 12 months where there was a change of residence. d

51. Mr Kapper accepts that Directive 91/439 lays down certain exceptions to the principle of mutual recognition enshrined in art 1(2). He refers in that regard to art 1(3), which provides that where there is a change of residence the host member state may apply its national rules in order to enter on the licence any information indispensable for administration. However, that provision does not entitle a member state simply to refuse to recognise a licence issued by another member state. As they involve exceptions to the principle of mutual recognition, those exceptions require in principle to be strictly interpreted. e

52. Nor does art 8 of the directive permit the German legislature to adopt the contested provisions. f

a 53. It relates exclusively to certain questions which arise when a licence is exchanged. In support of that interpretation, Mr Kapper notes that the wording of art 8(1), (2), (3) and (6) of Directive 91/439 expressly refers to various procedures which apply when a licence is exchanged. It would be illogical to treat the two remaining paragraphs of that article, paras (4) and (5), as containing rules of entirely general application which do not address issues arising in cases of exchange.

b 54. Mr Kapper accepts that the German authorities may refuse to recognise the validity of a foreign licence in Germany for so long as a measure such as a suspension or cancellation of the right to drive for a specified period is in force there. However, they certainly cannot do this once that period has expired.

c 55. Mr Kapper states that the absence of any limit on the duration of the effects of a provisional or final suspension or cancellation of a driving licence leads to unacceptable results. A German national whose German licence was withdrawn in that country and who had moved to another member state would not be entitled to use a driving licence issued by that member state when he returned to his country of origin, even if the new licence had been obtained several years after the withdrawal of the German licence. He would also not be permitted to obtain a German licence by reason of art 7(5) of the directive, quite apart from the fact that that state would have no power to issue him with one.

d 56. In addition, Mr Kapper argues that it is necessary to consider whether the Federal Republic of Germany has obtained the agreement of the Commission to the provisions in question, as art 10 of the directive requires.

e 57. The German government submits that Directive 91/439, in particular art 8(2) and (4) thereof, should be interpreted as meaning that the member state of residence is entitled to refuse to recognise a licence issued by another member state when the licence issued by the first state has been withdrawn.

f 58. The legislative context of Directive 91/439 means that the very general provisions set out in art 1(2) are insufficient in themselves to afford automatic and unconditional validity to foreign licences outside the member states which issued them. On the contrary, recognition is subject to the various conditions laid down in the detail of the directive, in particular arts 2 to 12 thereof.

g 59. The German government points out that art 8(2) of the directive expressly provides that the member state of normal residence may apply its national provisions on the withdrawal of the right to drive to the holder of a licence issued by another member state. Community nationals who have their normal residence in Germany are thus always subject to the German rules relating to the withdrawal of the right to drive, not only as regards licences issued by the German authorities, but also as regards those issued by the authorities of another member state.

h 60. Indeed, art 8(4) provides expressly that a member state may refuse to recognise the validity of any driving licence issued by another member state to a person whose licence has been withdrawn in the first state.

i 61. The German government does not agree with the strict interpretation of the national court, which takes the view that the provisions of art 8(2) and (4) apply only where a valid licence is exchanged. According to that government, it is clear on the contrary from the wording of art 8(2) that that provision applies where a licence is exchanged, but does not apply only in those circumstances.

62. As regards any direct effect that the directive may have, this could only arise if the provisions in question were sufficiently specific and had not been

properly transposed into German law. It has been shown that para 28(4)(3) of the FeV 1999 transposes Community law in a manner which is precise and complete. a

63. In its written response to the questions put by the court, the German government has added that the *Verordnung zur Änderung der Fahrerlaubnisverordnung und Straßenverkehrsrechtlicher Vorschriften* (Regulation amending the Regulation on driving licences and other provisions relating to the right to drive) of 7 August 2002 (BGBl I, p 3267) (hereinafter the FeV 2002), which came into force on 1 September 2002, amended, inter alia, para 28 of the FeV 1999, by adding a new sub-para (5). The latter expressly permits the competent authorities to grant, on request, the right to use a driving licence in Germany which has been issued by another member state, where the reasons which justified its holder being subject to one of the measures referred to in sub-paras (3) and (4) of the same paragraph no longer exist. b  
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64. The Italian government, which intervened at the oral stage of the procedure, submits that art 8(4) of Directive 91/439 establishes the principle that national rules of criminal law which restrict the right to drive take precedence over the automatic recognition of driving licences issued by another member state. The provision seeks to avoid criminal sanctions involving the withdrawal of a driving licence being disregarded in the member state which imposed the sanctions by the use of another driving licence subsequently obtained in another member state, irrespective of whether that licence was validly issued. None the less, the wording of art 8(4) of the directive refers by implication to the current nature of the sanction in question. Having regard to the fact that the fundamental principle of the directive is the reciprocal and mutual recognition of driving licences, and that art 8(4) constitutes an exception to that principle, that provision must be strictly construed so as to mean that a member state cannot use it as a basis for refusing to recognise a licence issued by another member state where the measure restricting the right to drive is no longer in force. d  
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65. In its written observations, the Commission argues that it would be legitimate to base the refusal to recognise the Netherlands licence issued to Mr Kapper on the measure withdrawing the licence in Germany, as that is a measure listed in art 8(2) of Directive 91/439. The refusal would be compatible with art 8(4) of the directive, which was transposed into German law by para 28(4)(3) of the FeV 1999. g

66. According to the Commission, the provision does not apply only where a valid driving licence is exchanged. It naturally applies where the holder requests an exchange of his foreign licence. However, it does not apply only in such a case. That approach, which is contrary to the one adopted by the national court, is confirmed by the wording of art 8(2) and (4) of the directive. h

67. Moreover, a refusal to recognise a foreign licence in such narrow circumstances does not contradict the principle of mutual recognition laid down in art 1(2) of the directive, given that all member states have an interest in the national measures referred to in art 8(2) of the directive being respected. The final recital in the preamble to the directive should be interpreted in that way. The Commission also refers in that regard to the court's case law which provides that member states are entitled to take measures designed to prevent any of their nationals from attempting, under cover of the rights created by the EC Treaty, improperly to circumvent their national legislation or to prevent individuals from improperly or fraudulently taking advantage of provisions of i



- a Community law (see *Centros Ltd v Erhvervs-og Selskabsstyrelsen* Case C-212/97 [2000] All ER (EC) 481, [1999] ECR I-1459 (para 24)).

68. At the hearing, the Commission nevertheless took the view that the facts of the main proceedings, as they had become apparent from the clarifications supplied by the national court in response to the court's request, required it to supplement its observations on that point. Account should be taken of the fact that, according to those clarifications, the measure imposed in Germany which restricted the right to drive was limited to nine months and that, on the date on which the Netherlands licence was issued, Mr Kapper could, in theory, have requested that a new licence be issued to him in his country of origin. In light of those points, the Commission submits that art 8(4) of the directive should not be interpreted as meaning that it entitles a member state to continue to refuse to recognise any licence issued by another member state for an indefinite period extending beyond the time when the person concerned could have obtained a new licence in the first member state.

69. At the hearing, the Commission also supplemented the written answer it had provided to a question put by the court as to whether the Federal Republic of Germany had obtained the agreement referred to in the second paragraph of art 10 of Directive 91/439. The Commission gave its tacit consent to the provisions contained in para 28 of the FeV 1999, inasmuch as those provisions were notified to it and did not give rise to any objection on its part, unlike other provisions of the FeV 1999, which are the subject of infringement proceedings. The second paragraph of art 10 of the directive does not require the Commission to adopt formal decisions recording its express agreement to national provisions which are notified to it by member states.

#### *Findings of the court*

70. Inasmuch as the first paragraph of art 8(4) of Directive 91/439 permits a member state to refuse to recognise the validity of any driving licence issued by another member state if the holder is, in the first member state's territory, subject to a measure which restricts, suspends, withdraws or cancels the right to drive, it constitutes an exception to the general principle of the mutual recognition of driving licences issued by the member states laid down in art 1(2) of the directive.

71. As the first recital in the preamble to the directive makes clear, that principle was established in order to facilitate the movement of persons settling in a member state other than that in which they have passed a driving test. In that regard, the court has held that rules relating to the issue and mutual recognition of driving licences by the member states exert an influence, both direct and indirect, on the exercise of the rights guaranteed by the provisions of the Treaty relating to freedom of movement for workers, to freedom of establishment and to the freedom to provide services. In view of the importance of individual means of transport, possession of a driving licence duly recognised by the host state may affect the actual pursuit by persons subject to Community law of a large number of occupations for employed or self-employed persons and, more generally, freedom of movement (see *Criminal proceedings against Choquet* Case 16/78 [1978] ECR 2293 (para 4) and *Skanavi's case* (para 23)).

72. According to settled case law, the provisions of a directive which derogate from a general principle established by that directive must be strictly interpreted (see, as regards exceptions to the general principle that value added tax is to be levied on all services supplied for consideration by a taxable person,

*Ambulanter Pflegedienst Kügler GmbH v Finanzamt für Körperschaften I in Berlin* Case C-141/00 [2002] ECR I-6833 (para 28) and, as regards exceptions to the general principle of recognition of professional qualifications giving the right to take up a regulated profession, *Beuttenmüller v Land Baden-Württemberg* Case C-102/02 (2003) Transcript (opinion), 16 September, (2004) Transcript (judgment), 29 April (para 64)). The same must apply a fortiori where that general principle aims to facilitate the exercise of fundamental freedoms guaranteed by the Treaty, such as those referred to in para 71 of this judgment. a

73. It should none the less be made clear that, contrary to the opinion expressed by the national court, art 8(4) of the directive does not apply only where an application is made to the authorities of a member state by the holder of a driving licence issued by another member state for the exchange of that licence. Although art 8 of the directive contains various provisions specifically regulating the substantive and formal conditions applicable to the exchange or replacement of a licence where the holder has submitted a request to that effect to the competent authorities, art 8(2) and (4) serves a different aim, namely that of permitting member states, within their territory, to apply their national provisions concerning the withdrawal, suspension and cancellation of driving licences. The exercise by the member states of the rights given to them by art 8(2) and (4) of the directive is thus not dependent on a voluntary act of the holder of a licence issued by another member state, such as an application for the exchange of that licence. It should be noted that, according to the court's case law, Directive 91/439 is expressly intended to abolish systems for exchanging driving licences and precludes a member state from requiring that driving licences that were not issued by its own authorities be registered or exchanged where the holders of those licences move to the territory of that state (see *Commission v Netherlands* (para 72) and order in *Krüger (SA) v Directie van de rechtspersoonlijkheid bezittende Dienst Wegverkeer* Case C-253/01 (2004) Transcript (order), 29 January (paras 30–32)). c d e

74. In the present matter, it is clear from the documents in the case and the observations submitted to the court that the national court must have regard in the main proceedings, inter alia, to the provisions of para 28(4)(3) and (4) of the FeV 1999. Those provisions, which apply where the holder of a licence has his normal residence outside the Federal Republic of Germany, preclude the German authorities from recognising the validity of a licence issued by another member state, where, in particular, a court in Germany has ordered that the licence be withdrawn. It appears that under the national rules a person in that situation may obtain a valid driving licence in Germany only if he submits a new request for a licence and satisfies the appropriate requirements and tests. However, since 1 September 2002, para 28(5) of the FeV 2002 expressly provides that the German authorities may permit the person concerned to use a licence issued by another member state where there no longer remain any grounds justifying the withdrawal of the licence or the temporary ban on obtaining a new licence. f g h

75. It is also clear from the papers in the case that the measure withdrawing or cancelling the licence imposed on Mr Kapper by the criminal order of 26 February 1998 was coupled with a temporary ban on obtaining a new licence, which expired on 25 November 1998. After that date, Mr Kapper was entitled, according to the national court, to request the German authorities to issue him with a new licence. In those circumstances, it must be held that when a new licence was issued to Mr Kapper by the Netherlands authorities on i

- a 11 August 1999 he was no longer subject, in Germany, to a temporary ban on applying to the competent authorities in the Federal Republic of Germany for the issue of a new licence.

b 76. According to art 8(4) of Directive 91/439, a member state may refuse to recognise the validity of any driving licence issued by another member state to a person who is the subject in that member state of one of the measures referred to in para (2) of that article. Given that that provision must be strictly interpreted, it may not be used by a member state as a basis for refusing indefinitely to recognise, in relation to a person who has been the object in its territory of a measure withdrawing or cancelling a previous licence issued by that state, the validity of any licence that may subsequently be issued to him by another member state. Where a temporary ban on obtaining a new licence with which the measure in question was coupled has already expired in a member state, the provisions of arts 1(2) and 8(4) of Directive 91/439, taken together, preclude that member state from continuing to refuse to recognise the validity of any driving licence subsequently issued to the person concerned by another member state.

c 77. That conclusion is not affected by the fact that the applicable national provisions, in particular those set out in para 28 of the FeV 1999, have as their specific aim the indefinite extension of the temporal effects of a measure withdrawing or cancelling a previous licence and the reservation to the German authorities of the right to issue a new licence. As Advocate General Léger noted at para 75 of his opinion, to allow a member state to rely on its national provisions in order to refuse indefinitely to recognise a licence issued by another member state would be fundamentally incompatible with the principle of the mutual recognition of driving licences which is the linchpin of the system established by Directive 91/439.

e 78. In light of all the foregoing considerations, the answer to the second part of the question referred must be that the provisions of arts 1(2) and 8(4) of Directive 91/439, taken together, must be interpreted as meaning that they preclude a member state from refusing to recognise the validity of a driving licence issued by another member state on the ground that its holder has, in the first member state, been subject to a measure withdrawing or cancelling the driving licence issued by that member state, where a temporary ban on obtaining a new licence, with which that measure is coupled, has expired before the date of issue of the licence issued by the other member state.

#### COSTS

h 79. The costs incurred by the German, Italian and Netherlands governments and by the Commission, which have submitted observations to the court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

i On those grounds, the Court of Justice (Fifth Chamber), in answer to the question referred to it by the Amtsgericht Frankenthal by order of 11 October 2001, corrected by letter of 19 December 2001, hereby rules:

(1) The provisions of arts 1(2), 7(1)(b) and 9 of Council Directive (EEC) 91/439 (on driving licences), as amended by Council Directive (EC) 97/26, taken together, must be interpreted as meaning that they preclude a member state from refusing to recognise a driving licence issued by another member state on the ground that, according to the information available to the



first member state, the holder of the licence had, on the date on which it was issued, taken up normal residence in that member state and not in the member state in which the licence was issued. a

(2) The provisions of arts 1(2) and 8(4) of Directive 91/439, taken together, must be interpreted as meaning that they preclude a member state from refusing to recognise the validity of a driving licence issued by another member state on the ground that its holder has, in the first member state, been subject to a measure withdrawing or cancelling the driving licence issued by that member state, where a temporary ban on obtaining a new licence, with which that measure is coupled, has expired before the date of issue of the licence issued by the other member state. b

*a*

# Allonby v Accrington and Rossendale College and others

(Case C-256/01)

*b*

COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

JUDGES SKOURIS (PRESIDENT), JANN, TIMMERMANS, GULMANN AND CUNHA RODRIGUES (PRESIDENTS OF CHAMBERS), LA PERGOLA, PUISOCHET, SCHINTGEN, MACKEN, COLNERIC (RAPPORTEUR) AND VON BAHR

*c*

ADVOCATE GENERAL GEELHOED

28 JANUARY, 2 APRIL 2003, 13 JANUARY 2004

*d*

*European Community – Equality of treatment of men and women – Equal pay for equal work – Pension – Occupational pension scheme – Teachers’ Superannuation Scheme – Membership of pension scheme restricted to teachers with contract of employment – Female claimant self-employed lecturer – Whether claimant entitled to claim access to pension scheme – Article 141(1) EC (formerly EC Treaty, art 119).*

The claimant had been originally employed by the college as a part-time lecturer under a succession of one year contracts. She was paid an hourly rate.

*e*

As the college’s financial obligations had become increasingly onerous, the college decided that it would either terminate, or would not renew, contracts and would retain the services of its part-time lecturers as sub-contractors. The claimant was offered re-engagement through ELS, an agency. She thereby became self-employed and her pay was determined as a proportion of the fee agreed between ELS and the college. Her income fell and she lost a number of

*f*

employment-linked benefits. The Secretary of State for Education and Employment administered an occupational pension scheme for teachers. The terms of the relevant national legislation restricted membership of the scheme to, inter alia, teachers with a contract of employment. The claimant brought proceedings against the college seeking, inter alia, a redundancy payment and redress for indirect sex discrimination by reason of the dismissal. She brought a

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further set of proceedings alleging, inter alia, that the Secretary of State was acting unlawfully in denying her access to the scheme. The redundancy claim was settled. Subsequently, the employment tribunal decided that, inter alia, her claim against the Secretary of State failed. The Employment Appeal Tribunal upheld that decision but granted the claimant permission to appeal on all issues. The Court of Appeal stayed the proceedings and referred two questions

*h*

to the Court of Justice for a preliminary ruling: (i) whether art 141(1)<sup>a</sup> EC had direct effect so as to enable a woman to claim equal pay with a man in the circumstances of the instant case; and (ii) whether art 141 had direct effect so as to entitle the claimant to claim access to the scheme either: (a) by comparing herself with a named male comparator, (b) by showing statistically that a considerably smaller proportion of female than of male teachers who were otherwise eligible to join the scheme could comply with the requirement of being employed under a contract of employment, and by establishing that the requirement was not objectively justified.

*i*

<sup>a</sup> Article 141, so far as material, is set out at judgment paras 4, 5, below

**Held** — (1) In circumstances such as those in the main proceedings, art 141(1) had to be interpreted as meaning that a woman whose contract of employment with an undertaking had not been renewed and who was immediately made available to her previous employer through another undertaking to provide the same services was not entitled to rely, vis-à-vis the intermediary undertaking, on the principle of equal pay, using as a basis for comparison the remuneration received for equal work or work of the same value by a man employed by the woman's previous employer. Where the differences identified in the pay conditions of workers performing equal work or work of equal value could not be attributed to a single source, there was no body which was responsible for the inequality and which could restore equal treatment. Such a situation did not come within the scope of art 141(1). In the instant case, the fact that the level of pay received by the claimant was influenced by the amount which the college paid the ELS was not a sufficient basis for concluding that the college and ELS constituted a single source to which could be attributed the differences identified between the claimant's conditions of pay and those of a male worker paid by the college (see judgment paras 46, 48, 50, below).

(2) Article 141(1) had to be interpreted as meaning that a woman in circumstances such as those in the main proceedings was not entitled to rely on the principle of equal pay in order to secure entitlement to membership of an occupational pension scheme for teachers set up by state legislation of which only teachers with a contract of employment could become members, using as a basis for comparison the remuneration, including such a right of membership, received for equal work or work of the same value by a man employed by the woman's previous employer (see judgment para 57, below).

(3) In the absence of any objective justification, the requirement, imposed by state legislation, of being employed under a contract of employment as a precondition for membership of a pension scheme for teachers was not applicable where it was shown that, among the teachers who were workers within the meaning of art 141(1) and fulfilled all the other conditions for membership, a much lower percentage of women than of men was able to fulfil that condition. The formal classification of a self-employed person under national law did not change the fact that a person had to be classified as a worker within the meaning of that article if his independence was merely notional. In the case of teachers who were, vis-à-vis an intermediary undertaking, under an obligation to take an assignment at a college, it was necessary in particular to consider the extent of any limitation on their freedom to choose their timetable, and the place and content of their work. The fact that no obligation was imposed on them to accept an assignment was of no consequence in that context. In order to show that the precondition of membership constituted a breach of the principle of equal pay in the form of indirect discrimination, a female worker could rely on statistics showing that, among the teachers who were workers within the meaning of art 141(1) and fulfilled all the conditions for membership of the scheme except that of being employed under a contract of employment as defined by national law, there was a much higher percentage of women than of men. If that was the case, the difference of treatment concerning membership of the scheme at issue had to be objectively justified (see judgment paras 66, 71, 72, 75, 76, below).

(4) Article 141(1) had to be interpreted as meaning that where state legislation was at issue, the applicability of that provision vis-à-vis an undertaking was not subject to the condition that the worker concerned could



- a be compared with a worker of the other sex who was or had been employed by the same employer and who had received higher pay for equal work or work of equal value. A woman could rely on statistics to show that a clause in state legislation was contrary to art 141(1) because it discriminated against female workers. Where that provision was not applicable, the consequences were binding not only on the public authorities or social agencies but also on the employer concerned (see judgment paras 81, 84, below).
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### Notes

For equal pay and pensions, see 13 *Halsbury's Laws* (4th edn reissue) para 381.

For the EC Treaty, art 141 EC (formerly art 119), see 50 *Halsbury's Statutes* (4th edn) Current Statutes Service (issue 88) 405.

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### Cases cited

*Amministrazione delle Finanze dello Stato v Simmenthal SpA* Case 106/77 [1978] ECR 629, ECJ.

*Barber v Guardian Royal Exchange Assurance Group* Case C-262/88 [1990] 2 All ER 660, [1991] 1 QB 344, [1991] 2 WLR 72, [1990] ECR I-1889, ECJ.

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*Bestuur van het Algemeen Burgerlijk Pensioenfonds v Beune* Case C-7/93 [1995] All ER (EC) 97, [1994] ECR I-4471, ECJ.

*Bettray v Staatssecretaris van Justitie* Case 344/87 [1989] ECR 1621, ECJ.

*Bilka-Kaufhaus GmbH v Weber von Hartz* Case 170/84 [1986] IRLR 317, [1986] ECR 1607, ECJ.

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*Birds Eye Walls Ltd v Roberts* Case C-132/92 [1994] IRLR 29, [1994] ICR 338, [1993] ECR I-5579, ECJ.

*Coloroll Pension Trustees Ltd v Russell* Case C-200/91 [1995] All ER (EC) 23, [1995] ICR 179, [1994] ECR I-4389, ECJ.

*Defrenne v SA Belge de Navigation Aérienne (SABENA)* Case 149/77 [1978] ECR 1365, ECJ.

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*Defrenne v Sabena* Case 43/75 [1981] 1 All ER 122, [1976] ICR 547, [1976] ECR 455, ECJ.

*Deutsche Post AG v Sievers* Joined cases C-270/97 and C-271/97 [2000] ECR I-929, ECJ.

*Deutsche Telekom AG v Vick* Joined cases C-234/96 and C-235/96 [2000] ECR I-799, ECJ.

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*Fisscher v Voorhuis Hengelo BV* Case C-128/93 [1995] All ER (EC) 193, [1995] ICR 635, [1994] ECR I-4541 (opinion), [1994] ECR I-4583, ECJ.

*Lawrence v Regent Office Care Ltd* Case C-320/00 [2002] IRLR 822, [2003] ICR 1092, [2002] ECR I-7325, ECJ.

*Lawrie-Blum v Land Baden-Württemberg* Case 66/85 [1986] ECR 2121, ECJ.

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*Liefting v Amsterdam University Hospital* Case 23/83 [1984] ECR 3225, ECJ.

*Macarthy v Smith* Case 129/79 [1980] ECR 1275, ECJ.

*Martinez Sala v Freistaat Bayern* Case C-85/96 [1998] ECR I-2691, ECJ.

*Meeusen v Hoofddirectie van de Informatie Beheer Groep* Case C-337/97 [1999] ECR I-3289, ECJ.

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*R v Secretary of State for Employment, ex p Seymour-Smith* Case C-167/97 [1999] All ER (EC) 97, [1999] 2 AC 554, [1999] 3 WLR 460, [1999] ECR I-623, ECJ.

*Raulin v Minister van Onderwijs en Wetenschappen* Case C-357/89 [1992] ECR I-1027, ECJ.

*Rinner-Kühn v FWW Spezial-Gebäudereinigung GmbH & Co KG* Case 171/88 [1989] IRLR 493, [1989] ECR 2743, ECJ.

## Reference

By order of 22 June 2001, the Court of Appeal (Civil Division) (England and Wales) referred to the Court of Justice of the European Communities for a preliminary ruling under art 234 EC (formerly art 177 of the EC Treaty) two questions (set out in judgment para 39, below) on the interpretation of art 141 EC (formerly art 119 of the EC Treaty). Those questions were raised in proceedings brought by Debra Allonby, who worked as a lecturer, against Accrington and Rossendale College (the College), Education Lecturing Services, trading as Protocol Professional (formerly Education Lecturing Service) and the Secretary of State for Education and Employment concerning equal pay for men and women. Written observations were submitted on behalf of: Ms Allonby by T Gill, Barrister, instructed by Michael Scott & Co, Solicitors; Education Lecturing Services, by D Pannick QC and P Nicholls, Barrister, instructed by K Legal, Solicitors; the United Kingdom government by G Amodeo, acting as agent, assisted by N Paines QC and M Hall, Barrister; the German government by W-D Plessing and R Stüwe, acting as agents; the Commission of the European Communities by J Sack and N Yerrel, acting as agents. Oral observations were made on behalf of: Ms Allonby, represented by T Gill and R Moretto, Barrister; Education Lecturing Services, represented by Lord Lester of Herne Hill QC; the United Kingdom government, represented by P Ormond, acting as agent, assisted by N Paines; and of the Commission, represented by N Yerrel. The language of the case was English. The facts are set out in the opinion of the Advocate General.

2 April 2003. **The Advocate General (LA Geelhoed)** delivered the following opinion<sup>1</sup>.

## I—INTRODUCTION

1. A college of further education terminates the employment of its part-time, mostly female lecturers. It subsequently buys in their services again through the intermediary of an agency with which those lecturers are registered as self-employed persons. Through these arrangements the college seeks to achieve savings in operating costs. For the lecturers concerned the arrangements entail a diminution in emoluments in relation to those which they received under the original employment relationship with the college. In that context the following questions have arisen:

—whether the female lecturers concerned may compare themselves, in regard to their remuneration, including the conditions governing access to a pension scheme, with a male lecturer remaining in the service of the college, and

—whether the lecturers concerned may demand admission to the pension scheme where the condition restricting access to that scheme to lecturers who are employees of the college results in an objectively unjustified difference in treatment?

## II—LEGAL FRAMEWORK

### A—Community law

2. According to art 2 EC, the Community has the task of promoting, inter alia, equality between men and women.

<sup>1</sup> Original language: Dutch.

a 3. The principle of equal pay for male and female workers for equal work or work of equal value is enshrined in art 141(1) EC (formerly art 119 of the EC Treaty). The first subparagraph of art 141(2) EC provides:

‘For the purpose of this article, “pay” means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer.’

b 4. Under the first paragraph of art 1 of Council Directive (EEC) 75/117 (on the approximation of the laws of the member states relating to the application of the principle of equal pay for men and women)<sup>2</sup>:

c ‘The principle of equal pay for men and women outlined in Article 119<sup>3</sup> of the Treaty, hereinafter called “principle of equal pay”, means, for the same work or for work to which equal value is attributed, the elimination of all discrimination on grounds of sex with regard to all aspects and conditions of remuneration.’

d B—National law

5. In the United Kingdom, the principle of equal pay for men and women is laid down in the Equal Pay Act 1970, s 1 of which provides:

*Requirement of equal treatment for men and women in same employment.*—(1) If the terms of a contract under which a woman is employed at an establishment in Great Britain do not include (directly or by reference to a collective agreement or otherwise) an equality clause they shall be deemed to include one.

(2) An equality clause is a provision which relates to terms (whether concerned with pay or not) of a contract under which a woman is employed (the “woman’s contract”), and has the effect that ... (c) where a woman is employed on work which, not being work in relation to which paragraph (a) or (b) above applies, is, in terms of the demands made on her (for instance under such headings as effort, skill and decision), of equal value to that of a man in the same employment—(i) if (apart from the equality clause) any term of the woman’s contract is or becomes less favourable to the woman than a term of a similar kind in the contract under which that man is employed, that term of the woman’s contract shall be treated as so modified as not to be less favourable, and (ii) if (apart from the equality clause) at any time the woman’s contract does not include a term corresponding to a term benefiting that man included in the contract under which he is employed, the woman’s contract shall be treated as including such a term ...

(6) Subject to the following subsections, for purposes of this section—(a) “employed” means employed under a contract of service or of apprenticeship or a contract personally to execute any work or labour, and related expressions shall be construed accordingly ... (c) two employers are to be treated as associated if one is a company of which the other (directly or indirectly) has control or if both are companies of which a third person (directly or indirectly) has control, and men shall be treated as in the same employment with a woman if they are men employed by her employer or

2 OJ 1975 L45 p 19.

3 Now, after amendment, art 141 EC.



any associated employer at the same establishment or at establishments in Great Britain which include that one and at which common terms and conditions of employment are observed either generally or for employees of the relevant classes.’ a

6. The Pensions Act 1995 contains new provisions which the United Kingdom adopted as a result of the Court of Justice of the European Communities’ decision in *Barber v Guardian Royal Exchange Assurance Group*<sup>4</sup> and of a number of decisions which followed. Section 62 of that Act, which s 63(4) requires to be construed as one with s 1 of the 1970 Act, provides in its first four subsections: b

‘62. *The equal treatment rule.*—(1) An occupational pension scheme which does not contain an equal treatment rule shall be treated as including one. c

(2) An equal treatment rule is a rule which relates to the terms on which—(a) persons become members of the scheme, and (b) members of the scheme are treated. c

(3) Subject to subsection (6), an equal treatment rule has the effect that where—(a) a woman is employed on like work with a man in the same employment, (b) a woman is employed on work rated as equivalent with that of a man in the same employment, or (c) a woman is employed on work which, not being work in relation to which paragraph (a) or (b) applies, is, in terms of the demands made on her (for instance under such headings as effort, skill and decision) of equal value to that of a man in the same employment, but (apart from the rule) any of the terms referred to in subsection (2) is or becomes less favourable to the woman than it is to the man, the term shall be treated as so modified as not to be less favourable. d

(4) An equal treatment rule does not operate in relation to any difference as between a woman and a man in the operation of any of the terms referred to in subsection (2) if the trustees or managers of the scheme prove that the difference is genuinely due to a material factor which—(a) is not the difference of sex, but (b) is a material difference between the woman’s case and the man’s case.’ e

7. The occupational pension scheme for teachers is contained in the Teachers’ Superannuation Scheme 1988 (TSS) and is governed by the Teachers’ Superannuation (Consolidation) Regulations 1988, SI 1988/1652, and the Teachers’ Superannuation (Amendment) Regulations 1993, SI 1993/114 (TSS regulations). The TSS is administered by the Secretary of State for Education and Employment. Under the rules governing the TSS teachers employed under a contract of employment, whether full-time or part-time, are eligible to join this pension scheme. f

### III—FACTS OF THE MAIN PROCEEDINGS AND COURSE OF THE PROCEDURE g

8. This reference is made in proceedings between Ms Allonby, on the one hand, and Accrington and Rossendale College (the College), Education Lecturing Services Ltd (ELS) and the Secretary of State for Education and Employment (the Secretary of State), on the other. The proceedings arise out of the dismissal, by non-renewal of their contracts of employment, of a number of hourly-paid lecturers employed by the College, including Ms Allonby, and the College’s decision thenceforth to engage hourly-paid h

a lecturers only through ELS, which offered lecturers the possibility of being registered as self-employed persons for teaching assignments at institutes of further education.

b 9. Ms Allonby was originally employed by the College as a part-time lecturer in office technology. She was employed from 1990 to 1996 on a succession of one-year contracts under which she was paid by the hour at a rate determined by the level at which she was teaching. It is not disputed that for present purposes these were continuous contracts of service, carrying with them an employer's statutory obligations.

c 10. By 1996, those obligations had become financially more onerous for the employer because of legislative changes which required part-time lecturers to be accorded equal or equivalent benefits to full-time lecturers. The College employed 341 part-time lecturers. In order to reduce its overheads it decided not to renew their contracts of employment and instead to retain their services as sub-contractors. Ms Allonby's employment was terminated with effect from 29 August 1996. She was informed that she could continue to offer lecturing services at the College as a sub-contractor. To that end she was required to d register with ELS. ELS is a company limited by guarantee which operates as an agency, on a commission basis, and holds a database of available lecturers on whom colleges can call, by name if they wish, for lecturing services. Ms Allonby, and others like her who had to register with ELS in order to continue to work as part-time lecturers, thereby became self-employed. Their pay was a proportion of the fee agreed between ELS and the College. e Their income fell and they lost a series of benefits attached to their earlier employment. The College, which like most further education colleges was in financial straits, estimated that it would thereby save £13,000 a year.

f 11. Of the 341 hourly-paid part-time lecturers who were made redundant by the College and were offered the opportunity of again working through the intermediary of ELS in 1996, 110 were men and 231 were women. Also in 1996 the College had 105 full-time salaried lecturers, of whom 55 were men and 50 women and 23 part-time salaried lecturers of whom 12 were men and 11 women.

g 12. The relationship between men and women on hourly-paid part-time contracts with the College in 1996 reflected the national picture in the United Kingdom, where part-time work is overwhelmingly done by women. On the other hand, ELS' database contained almost as many men as women: 18,050 to 19,909 on the most recent count available to the tribunal of first instance in this case, a difference of less than 5%.

h 13. In August 1996 Ms Allonby, supported by her union, brought proceedings against the College. She sought a redundancy payment and claimed that her dismissal was unfair on the basis of unlawful discrimination on the ground of sex. In December 1996 she brought three further sets of proceedings against:

—the College on the ground that it was discriminating against her as a contract worker contrary to the Sex Discrimination Act 1975;

—ELS on the ground that it was obliged by law to pay her equally—that is, pro rata—with a male full-time lecturer at the College; and

i —the state, represented by the Department for Education and Employment, on the ground that it was acting unlawfully in denying her access, as a self-employed worker, to the TSS.

It appears from the case file in the main proceedings that both groups of proceedings are in the nature of a test case for others similarly affected.

14. The redundancy claim was settled. In a decision of 20 August 1997, the employment tribunal decided, as a preliminary issue, that Ms Allonby was not entitled to use as a comparator for equal pay purposes a male lecturer employed full-time by the College. In a series of decisions of 8 July 1998 that tribunal decided that Ms Allonby's dismissal by the College was unfair but attracted no redress, and that it constituted indirect sex discrimination but was justifiable. It also dismissed the claim against the Department for Education and Employment concerning access to the TSS, as well as the claim under s 9 of the 1975 Act on the basis that all the service providers made available by ELS to the College, whether women or men, were treated alike. All those decisions were upheld in March 2000 in a group of interlocking judgments by the Employment Appeal Tribunal (United Kingdom) which, however, granted Ms Allonby leave to appeal on all issues.

15. Before the Court of Appeal it was contended on behalf of Ms Allonby that: (a) her dismissal by the College constituted unlawful indirect sex discrimination: this issue was remitted to the employment tribunal for reconsideration; (b) the College, by thereafter denying her benefits available to salaried lecturers, was discriminating against her as a contract worker on the ground of her sex, this issue was also remitted for reconsideration by the employment tribunal; (c) ELS was required to pay her equally with a male lecturer employed at the College: this question forms part of the subject matter of the present reference; and (d) her exclusion from the TSS constitutes unlawful sex discrimination: this question is also referred for a preliminary ruling (see [2001] EWCA Civ 529, [2001] IRLR 364, [2001] ICR 1189).

16. As for claims (c) and (d), the referring court makes the following observations (paras 17–20).

17. Against ELS Ms Allonby claims that art 141 EC entitles her, when she works at the College, to a rate of remuneration equal to that of a male lecturer employed by the College on work which is to be taken to be of equal value. Ms Allonby seeks against ELS a rate of pay equal to that of employed lecturers at the College by means of a comparison with a named teacher, Mr Ross Johnson.

18. The circumstances material to that equal pay claim are that: (a) Ms Allonby and Mr Johnson undertake lecturing work of presumptively equal value at the College although not always on the same site; (b) Mr Johnson is employed by the College as a lecturer and is paid by the College at a rate set by the College; (c) Ms Allonby is engaged by ELS on a self-employed basis, she works on specific assignments agreed by her with ELS, at the College or elsewhere; (d) the College agrees with ELS the fee which it will pay for each lecturer. ELS agrees with Ms Allonby the fee which she is to receive for each assignment and sets the conditions under which its lecturers are to work, the College has no direct control over ELS in those or other matters; and (e) the College and ELS employ both male and female staff.

19. Against ELS, the College and the Secretary of State Ms Allonby claims access to the TSS either (i) by comparison with a male lecturer employed by the College or (ii) since the TSS was set up pursuant to statute, without such comparison if she can show statistically that a considerably smaller proportion of female than of male teachers who are otherwise eligible to join the TSS can comply with the requirement of being employed under a contract of employment. Neither the existence of such proof nor the question of objective justification has yet been determined by the courts in the present case. However, the Court of Appeal considers that the least inconvenient course



a from a procedural point of view is to refer the question to the Court of Justice and then, if the answer makes it appropriate, to order the material facts to be found.

20. The circumstances material to Ms Allonby's pension claims are that: (a) the TSS was set up by the Secretary of State under powers conferred by primary legislation; (b) it is a condition of membership of the TSS that the member be an employee and be engaged as a teacher in a specified category of educational institution, the College is in one of these categories; (c) no self-employed person is eligible to be a member of the TSS; (d) the TSS provides old age pensions and other benefits calculated principally by reference to the duration of the member's employment and to a reference salary earned in employment to which the TSS relates, which need not have been the same employment throughout but must have been at eligible establishments; (e) the rates of pay which determine the level of benefits under the TSS may differ between employers; (f) the benefits payable under the TSS are funded by contributions from the members of the TSS and their employers; and (g) no lecturer engaged by ELS is engaged as an employee. In consequence none is eligible for membership of the TSS.

#### *The questions submitted for a preliminary ruling*

21. By order of 23 March 2001, which was received at the court on 3 July 2001, the Court of Appeal referred the following questions to the Court of Justice for a preliminary ruling:

e '(1) Does Article 141 EC have direct effect so as to enable a woman to claim equal pay with a man in the circumstances of this case?

(2) Does Article 141 EC have direct effect so as to entitle Ms Allonby to claim access to the pension scheme either (i) by comparing herself with Mr Johnson or (ii) by showing statistically that a considerably smaller proportion of female than of male teachers who are otherwise eligible to join the TSS can comply with the requirement of being employed under a contract of employment, and by establishing that the requirement is not objectively justified?' f

#### *Procedure before the court*

g 22. In the procedure before the court written observations were submitted by Ms Allonby, ELS, the United Kingdom government, the German government and the Commission of the European Communities. Ms Allonby, ELS, the United Kingdom government and the Commission provided further clarification of their views at the hearing on 28 January 2003.

#### h IV—ASSESSMENT

##### *The first question submitted for a preliminary ruling*

i 23. Ms Allonby argues that the facts at issue in the present case are representative of a development in employment relationships of major importance to the effectiveness of the principle enshrined in art 141 EC of equal treatment of men and women in the employment market. It has become increasingly common for employers to contract out some of their work to sub-contractors or recruitment agencies. The workers engaged in connection with contracted-out work customarily work in the same undertaking, establishment or department as workers who have continued to be employed by that undertaking and are frequently engaged on work comparable to that

done by such employees. However, remuneration which they receive in that connection may be considerably lower, whilst their status may also differ in the sense that in the performance of individual services they carry on their activities as self-employed persons instead of as employees. Unfavourable consequences may be attached to that difference in status for persons performing contracted-out activities as self-employed persons. a

24. If employers adopt the practice of contracting out activities which are performed predominantly by women with the attendant unfavourable consequences on remuneration, the effect is that the protection afforded by art 141 EC is lost if that provision cannot—any longer—be relied on in such a situation. That is all the more so if employers specifically resort to such arrangements in order to evade the consequences of the principle of equal pay laid down in art 141 EC. Therefore it is essential for Ms Allonby that art 141 EC be so construed as to retain its effectiveness also in situations in which establishments, departments or undertakings contract out their activities wholly or in part. b  
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25. Ms Allonby stresses that in the present case the College terminated the employment of part-time staff in order subsequently to re-engage them indirectly, via ELS. In that way the College saves costs attendant on applying legislation concerning the equal treatment of part-time employees. She points out that she continues to perform the same work at the College but under substantially less favourable terms than the comparator selected by her. She further considers that under those circumstances she must be able to compare her work and pay with that comparator. d  
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26. She adds that the fact that the direct employer, ELS, and the indirect employer, the College, are according to national law two separate legal entities does not of itself preclude the application of art 141 EC. Unlike under s 1(6)(c) of the 1970 Act where the comparator must be employed by the same employer or an associated employer in the same undertaking or group of undertakings, that requirement is not to be found in the court's case law. She considers that in order to give full effect to the principle of equal pay for men and women for equal work she must be able to plead the work performed and the pay received by men and women in the same establishment or service, irrespective of who the employer is and with there being no requirement that it must be the same employer. For under the judgment in *Defrenne II*<sup>5</sup> it is sufficient that a woman and a male comparator are 'in the same establishment or service'. In the present case both she and Mr Johnson work in the same establishment. f  
g

27. At the hearing it was stated on behalf of Ms Allonby that it is to be inferred from the recent judgment in *Lawrence v Regent Office Care Ltd*<sup>6</sup> that in order for reliance to be placed on art 141 EC the difference in treatment must be attributable to a single source. The court did not state that the operation of art 141 EC is confined to men and women who work for the same employer. In *Lawrence's* case the difference was not attributable to a single source. Ms Allonby asserts that in the present case it is so attributable. For the source of the discrimination is the College when it took its decision to use ELS as an intermediary. She was thereby required, if she wished to continue to lecture at the College, to register with ELS as a self-employed person. Subsequently, the College was able to avail itself via ELS more cheaply of her services. However, h  
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<sup>5</sup> *Defrenne v Sabena* Case 43/75 [1981] 1 All ER 122, [1976] ECR 455.

<sup>6</sup> Case C-320/00 [2002] IRLR 822, [2002] ECR I-7325.

a she still actually works for the College and subject to the direction and instructions of that establishment. In Ms Allonby's view, the fact that ELS is not in itself the source of the discrimination does not preclude the applicability of art 141 EC. For that provision is also applicable where the source of the discrimination is the management of a group of undertakings, a collective labour agreement or a legislative provision. In all those cases the source of the discrimination is outside the purview of the individual employer yet he must in the final analysis pay more to his female employees if discrimination is found.

b 28. Another feature, according to Ms Allonby, which distinguishes the present case from *Lawrence's* case is that that case concerned the transfer of an undertaking. Nor in that case was it established that the transfer of employees was such as to enable the council to prevent the unequal treatment. Nor after the transfer could the council any longer determine the individual wages of the transferred employees. However, the present case does not concern the transfer of an undertaking. Moreover, by virtue of its agreement with ELS the College indeed is able to influence the level of the fee paid by ELS to Ms Allonby. For within the scale applied by ELS for various categories the College and ELS agree an hourly rate for lecturers working at the College. Thus under the agreement with ELS the College has a powerful influence on a lecturer's pay. In its contractual relationship with ELS the College is said to be obliged to apply the principle of equal pay for equal work to men and women working for it and at its schools, regardless of whether they are directly employed or indirectly work for it under the agreement with ELS.

c 29. According to ELS, the United Kingdom government, the German government and the Commission art 141 EC does not have direct effect in the present case.

d 30. ELS points out that discrimination in the matter of pay can exist only if it is possible to identify a discriminator, that is to say, a source which can be held responsible for the difference in pay as between men and women. That source may be an individual legal person or even a number of legal persons provided they are subject to common control. However, if the latter requirement is not satisfied and the separate entities pay different rates to their respective employees, there is no basis for a claim to equal pay under art 141 EC. Only where the different rates of pay are from a single source can the court identify whether the reason for that difference is the sex of the complainant, and only where there is a common employer can the complainant's employer explain why there is a difference in pay.

e 31. ELS points out that it offers services to educational establishments in the whole of the United Kingdom. The lecturers who register with it may state their preference for a specific College and may indicate the periods when they are available. One of the conditions applied by ELS is that the lecturers registered with it work on assignments as self-employed persons. A lecturer is under no obligation to accept a specific assignment. ELS and the lecturer agree a fee for each assignment accepted by the lecturer. A lecturer may accept assignments with several educational establishments. ELS agrees annually with each educational establishment a fee for the services to be provided. The amount thereof is determined on a commercial basis. Finally, ELS points out that the College has no influence on the fee paid by ELS to Ms Allonby and also that ELS has no influence on the remuneration paid by the College to Mr Johnson.

f 32. ELS explains that, although all the lecturers registered in its database carry out their assignments as self-employed persons, ELS is regarded as the



employer in connection with claims under the 1970 Act. That is owing to the definition of 'employed' in s 1(6)(a) of that law. That definition also encompasses agreements personally to execute any work or labour. That is why Ms Allonby also brought a claim against ELS although ELS has no charge of discrimination to answer.

33. ELS further points out that the aim of art 141 EC, namely equal pay, requires an analysis of the pay provided by an employer to its male and female workforce<sup>7</sup>. Nor may the concept of pay be interpreted so as to refer to the salaries paid by different employers. In that connection ELS points out that a central element of the concept of pay under the court's case law is that a benefit arose from an employment relationship<sup>8</sup>.

34. ELS points out that Ms Allonby is holding ELS and not her ex-employer responsible for the difference in pay between her and the male comparator employed by the College. If Ms Allonby's claim is conceded the practical consequences go much further than the facts of the present case. That means, inter alia, that she must be allowed to compare herself with a male comparator when working in another educational establishment. The consequences for management consultants offices and other intermediaries providing services cannot be overlooked.

35. The United Kingdom government also points to such consequences which were not intended by art 141 EC. A pay rise agreed by an employer with his staff could automatically trigger a claim on the basis of unequal pay in the case of another employer, unless that employer also raises the salaries of its staff. Moreover, one employer may not be aware of such pay rises, irrespective of the desirability of such disclosure, particularly in the private sector. For agencies providing staff that would mean that they would be required to pay their staff the same salary as that paid by the client to its staff. Thus an agency could not supply staff until it had ascertained levels of salary and other conditions of employment—including health insurance or sickness benefits often paid by a third party—provided by that client. The agency would then have to ensure the same level of salary for all its staff, irrespective of the client. Conversely, an employee of the client could claim the same salary as that paid to agency staff.

36. The German government points out that if art 141 EC were also to have direct effect in regard to pay differences as between different employers the consequence of that would be that the freedom of collective wage bargaining between workers and employers' organisations would be significantly reduced.

37. In its written observations the Commission put forward two alternatives. The first consists in deeming the College still to be the employer rather than ELS. The arrangement conceived of by the College must be disregarded. This merely serves in order to avoid a direct contractual relationship with Ms Allonby in order thus to circumvent the relevant employment legislation. However, at the hearing the Commission announced that it was abandoning this line of argument. None the less, the Commission considers it unsatisfactory that an employer can significantly reduce rights conferred on employees under art 141 EC (or other employment legislation) but at the same

<sup>7</sup> In that connection ELS refers to the following case law: the *Defrenne II* case (cited at footnote 5, above), *Macarthy v Smith* Case 129/79 [1980] ECR 1275, *Birds Eye Walls Ltd v Roberts* Case C-132/92 [1994] IRLR 29, [1993] ECR I-5579 and *Coloroll Pension Trustees Ltd v Russell* Case C-200/91 [1995] All ER (EC) 23, [1994] ECR I-4389.

<sup>8</sup> Judgment in *Barber's* case (cited in footnote 4, above).

a time is of the view that the solution to that problem is not to be found in an artificial extension of art 141 EC such as the deeming of a notional employer with all the problems which that entails.

b 38. The second alternative finally opted for by the Commission entails that, irrespective of whether ELS is not the employer within the meaning of art 141 EC, a comparison between 'employees' and 'self-employed persons' is not possible under art 141 EC. For the latter category does not come within the scope of that article. The right to equal pay can extend only to workers whose situation is governed by the same entity as that of the comparator, since it is only in that case that there is a common source of pay discrepancy. It is inherent in the notion of discrimination that there is ultimately a single source which causes or is responsible for the difference in treatment.

#### Assessment

d 39. In my assessment I am proceeding from the starting-point that Ms Allonby continues to work at the same College, albeit as a self-employed person via ELS and performs the same work there as before. Is she entitled as a self-employed person to compare herself with an employee of that College whom I am assuming performs equivalent lecturing duties? Ms Allonby takes the view that the reply must be affirmative. The fact that from a formal point of view the employers are different is in her view not relevant. Moreover, she is demanding that equal pay from ELS. I will deal with these matters separately.

e 40. In the recent *Lawrence*<sup>9</sup> judgment the court noted that there is nothing in the wording of art 141(1) EC to suggest that the applicability of that provision is limited to situations in which men and women work for the same employer. To that extent a comparison between her and a comparator at the College would thus be possible.

f 41. However, the court also held in that judgment, as I also stated in my opinion in that case, that where the differences identified in the pay conditions of workers performing equal work or work of equal value cannot be attributed to a single source, there is no body 'which is responsible for the inequality and which could restore equal treatment'<sup>10</sup>. Such a situation does not come within the scope of art 141(1) EC.

g 42. If that judgment is applied to the present case the following picture emerges. It is apparent from the order for reference and the case file that Ms Allonby carries out assignments in the context of her agreement with ELS for the provision of services. Indeed she carries out those assignments at the College where her comparator is employed but there is no longer any employment relationship between her and the College. As established by the referring court, that was brought to an end by termination of her employment.

h Furthermore, the College and ELS apply different working conditions which are determined independently of each other. In that connection ELS determines the remuneration payable to Ms Allonby and the College determines Mr Johnson's remuneration. Although Ms Allonby and Mr Johnson give lectures at the same College the difference in pay between them is not attributable to a single source. On the basis of the case law mentioned above i art 141 EC is not applicable to that situation with the result that Ms Allonby cannot base a claim against ELS or, possibly, the College on a comparison with Mr Johnson.

<sup>9</sup> Cited in footnote 6, above.

<sup>10</sup> My emphasis.

43. I could confine myself to this finding which is undeniably supported by the court's case law in *Lawrence's* case. However, the question is whether the courts must turn a blind eye to the fact that in the circumstances of the main proceedings a legal device has been used precisely, it should be noted, in order to evade the consequences of the principle of equal treatment laid down in art 141 EC. A change in the legal form of the relationship between Ms Allonby and her original employer, the College, thus results in the loss of the protection conferred by art 141 EC on Ms Allonby as a female employee. a

44. We are here confronted with an illustration of a broader evolution which is emerging in employment relations in the European Community, albeit in a more pronounced fashion in some member states than in others. On the one hand, it entails that employers are increasingly contracting out to specialised contractors or undertakings more and more activities which they do not regard as central to their undertaking. As the expression of a progressive specialisation in the economy this development should not per se be regarded as undesirable from a social or societal point of view. On the other hand, the phenomenon is emerging whereby in certain occupations the classic employer-employee relationship under an employment contract is being supplanted by contractual arrangements for the provision of services under which the providers of the services operate as self-employed persons. In this connection also the advantages of technical and functional specialisation and diversification mean that this is in principle not an undesirable development from a social or societal point of view. b

45. None the less, the legal arrangements instituted as a result of these developments may also be used to evade the consequences of employment-protection legislation or, as in the case of art 141 EC, legislation which seeks to give effect to fundamental legal principles in regard to the employment market. The facts underlying the present case, as they incontestably appear in the case file of the main proceedings, strongly point in that direction. Ms Allonby's work as a lecturer and the environment in which since August 1996 she has continued to exercise her professional activities are substantively little changed: she operates under the direction and responsibility of the College which moreover continues to be entrusted with the organisation of her activities. The College remains liable to its students for the quality of the teaching given by her. In brief in all her activities she is de facto bound by the instructions of the management of the College as principal. There is however one significant difference. Her remuneration for her work as a sub-contractor is received from ELS which is contractually bound to deliver the educational services required by the College. c

46. Incidentally I would observe that both ELS and the United Kingdom government concede by implication that the changes which have occurred since August 1996 in Ms Allonby's legal position have had very little effect on her functions as a lecturer at the College. d

47. The Commission has identified the dilemma arising in this case, namely whether the alteration which has occurred in Ms Allonby's legal position furnishes a ground for widening the court's case law concerning the attributability of indirect discrimination to a single source, or whether the legislature should take action against legal devices whose effect is that the protection afforded to persons by art 141 EC may be undermined. e

48. In its written observations the Commission expressed an initial preference for a judicial solution. It initially asserted that the College, although no longer formally the employer, could still be regarded as such for the purposes of f



a art 141 EC. The idea behind this was to counter what it regards as a misuse of law where employers who dismiss their part-time staff subsequently make use of their services again via an agency, thus seeking to evade the relevant employment-protection legislation, such as equal pay for equal or equivalent work and other social rights conferred on part-time employees. Such 'misuse' could undermine the operation of the principle of equality laid down in art 141 EC. Accordingly, in cases such as this the decisive factor should not be the legal relations between the original employer and his part-time employees, but the factual relations which none the less remain unaltered.

b 49. At the hearing the Commission expressly distanced itself from this idea based on a legal fiction. First, there is no common source, within the meaning of *Lawrence's* judgment, which could be held responsible for the difference in treatment and could correct that difference. For the termination of employment is a fact; there is therefore no longer any link from the point of view of employment law between the College and Ms Allonby which could serve as the basis for restoring equality in terms of pay conditions. The question then arises as to how long the legal fiction could be used in order to hold the original employer responsible for differences in pay. For by the simple effluxion of time variations in conditions of pay may increase further. Initially the Commission sought to attribute liability to the body which in its view could be held responsible from the outset for the difference occurring, namely the College when it decided to restructure its organisation. The problem in that connection is that the College cannot be held entirely responsible for the difference occurring between Ms Allonby and her comparator. For the fee which Ms Allonby receives for the services provided by her is agreed between her and ELS. The College cannot be held liable for that even if it endeavours in its relations with ELS to ensure that equivalence is maintained as between the remuneration paid to its employees and the sub-contractors engaged by ELS. Moreover, it goes without saying that over time maintenance of parity in pay conditions becomes more difficult. This may be accounted for again by the lack of a single source which could be held liable for preserving and restoring parity.

c 50. I would further point out that in the main proceedings Ms Allonby addressed her claim to ELS. I cannot share the view put forward on Ms Allonby's behalf at the hearing that there is a single source to which the difference in pay may be attributed (the College) and that she must therefore be able to compare herself with Mr Johnson in order to be able to succeed in her claim for equal pay against ELS. The cause of the difference in the pay received by Ms Allonby when she was employed by the College and the pay which she now receives for her assignments from ELS may perhaps be attributable to the College but certainly not to ELS. In the words of the court ELS is therefore not the 'body which is responsible for the inequality and which could restore equal treatment'<sup>11</sup>. On any other view the result would be that one employer (ELS) would have to bear the consequences attributable to another employer (the College) without there being any connection between the body responsible for the inequality and the body required to restore equal treatment.

d 51. In my view the Commission was correct to point out that in the present case it was the termination of employment itself which was open to challenge on the ground that the projected restructuring of legal relations with the part-time staff produced unequal effects for women. Indeed it was challenged in the present case and Ms Allonby obtained certain satisfaction.

11 My emphasis.

52. Finally, the Commission pointed out that the nub of the problem lies in the fact that working relations are becoming more flexible. Legislative action is required in order to counter the effects of that development which are undesirable from the point of view of social protection. In that connection it has announced a directive which seeks to afford to workers engaged by employment agencies greater protection by analogy with staff in stable employment. a

53. I share the view taken by the Commission in this connection, though it is not easy to accept. The unmistakeable phenomenon within the Community of a shift away from traditional employment relationships to more flexible arrangements, such as forms of self-employment, raises the more general question as to the consequences to be drawn from that phenomenon by the Community legislature concerning the specific protection conferred by Community law on workers whether employed or self-employed. The principle of equal treatment, laid down as a fundamental legal principle in art 13 EC (formerly art 6a of the EC Treaty) and art 141 EC and arts 21(1) and 23 of the Charter of Fundamental Rights of the European Union (OJ 2000 C364 p 1), is an essential feature of that protection. That justifies specific action by the Community legislature under art 141(3) EC. In my view such action may precede other measures to ensure the protection of workers for which under art 137(2)(b) [sic] unanimity in the Council is required. b

54. I therefore conclude that, as Community law currently stands, in the circumstances of the main proceedings no reliance can be placed on art 141 EC in order for women to claim equal pay with men. c

*The second question referred for a preliminary ruling*

55. In its second question the referring court seeks to ascertain whether art 141 EC has direct effect with the result that Ms Allonby can claim access to the TSS, whether on the basis of a comparison of herself with Mr Johnson or on the basis of statistical evidence. d

56. As is apparent from the foregoing the status of part-time lecturers who were initially employed at the College and are now engaged through the intermediary of ELS has changed. At the College they worked on the basis of a contract of service; with ELS they work as self-employed persons on the basis of a contract for services. e

57. Access to the TSS may be obtained only if work is performed which confers entitlement to access to the pension scheme (pensionable employment). Under the TSS regulations a person is in pensionable employment where that person is employed under a contract of employment but not where the person is contractually bound under a contract to provide services. f

58. The second question also arises in connection with the fact that Ms Allonby cannot point to a comparator which is a requirement under national pension legislation. Ms Allonby states that such a requirement impedes her claim for access to the pension scheme. She takes the view that, in support of her claim to access to the pension scheme, she may refer to Mr Johnson or, if the reply to the first question and thus also to the first part of the second question is negative, she may show on the basis of statistical evidence that the exclusion from participation in the pension scheme in respect of self-employed workers affects considerably more women than men. This disadvantage is accounted for by the definition in the pension scheme under which persons engaged under a contract to provide services are excluded from g

a the scheme. If she is successful in that claim and there is no objective justificatory ground for such exclusion, the Secretary of State in his capacity as legislator and administrator of the pension scheme will have to change those conditions with the result ultimately that lecturers engaged as self-employed persons under contracts to provide services will be able to join the scheme and their employer ELS will be obliged to contribute to it.

b 59. Ms Allonby states that (1) the discrimination stems from the definition of persons eligible for access to the TSS, (2) on the assumption that this definition indirectly discriminates against women such discrimination can be detected by a purely legal analysis, and (3) that it is immaterial whether she can point to a comparator with her present employer, ELS, in order to identify the alleged discrimination because the discrimination stems from the conditions governing access over which ELS has no control.

c 60. Ms Allonby points out that the court in cases of unequal treatment is satisfied by statistics proving that a practice or condition applied disproportionately disadvantages women. In such situations a comparator who does the same work for the same undertaking or establishment is not required.

d 61. In support of her claim she relies on the judgments in *Rinner-Kühn v FWW Spezial-Gebäudereinigung GmbH & Co KG*<sup>12</sup> and *R v Secretary of State for Employment, ex p Seymour-Smith*<sup>13</sup> in which the discrimination stemmed from legislation. She points out that the same approach has been followed in the case of sector-wide occupational pension schemes, as for example in the *Fisscher v Voorhuis Hengelo BV*<sup>14</sup> judgment in which the court held that the right to access  
e to a scheme came within the substantive scope of art 141 EC, that the trustees of the pension scheme must, like employers, comply with the provisions of that article and that workers discriminated against may assert their rights directly against those trustees.

f 62. Ms Allonby observes that the judgments in *Fisscher's case*<sup>15</sup> and *Bilka-Kaufhaus GmbH v Weber von Hartz*<sup>16</sup> concerned access to a pension scheme. In that connection the work carried out by the women concerned was not directly in issue. That is in contrast to cases concerning equal benefits under pension schemes. In those cases it may be necessary to determine if the woman is receiving less pension in respect of the same work or work of equal value. Even in such cases the court has not found it necessary to confine its judgment to circumstances in which there is an actual comparator if it is clear  
g from the terms of the scheme itself that either men or women receive unequal pensions for equal work carried out in the past.

h 63. She states that as a consequence of the provisions of the TSS a lecturer employed under a contract of employment doing the same work receives more pay by way of pension from his employer than she receives from her employer. She refers to the judgment in *Liefting v Amsterdam University Hospital*<sup>17</sup> and states that in that case, just as in the present case, the employer of a man and a woman may be different. In both cases the discriminator is the legislator and manager of the pension scheme. None the less, Ms Allonby is of the opinion that the pension is in each case pay as it is received from employment and is

i 12 Case 171/88 [1989] IRLR 493, [1989] ECR 2743.

13 Case C-167/97 [1999] All ER (EC) 97, [1999] ECR I-623.

14 Case C-128/93 [1995] All ER (EC) 193, [1994] ECR I-4541 (opinion), [1994] ECR I-4583.

15 Cited at footnote 13, above.

16 Case 170/84 [1986] IRLR 317, [1986] ECR 1607.

17 Case 23/83 [1984] ECR 3225.



paid by the employer. She states that the same principle may be deduced from the judgment in *Bestuur van het Algemeen Burgerlijk Pensioenfonds v Beune*<sup>18</sup>. a

64. Ms Allonby takes the view that the judgment in the *Coloroll* case<sup>19</sup> on which the United Kingdom government relies in support of its assertion that art 141 EC is confined to situations in which there is a sexually mixed workforce is of no avail to it. In her view that case concerned an occupational pension scheme covering only one workplace which employed only men. For those reasons there could therefore be no discrimination. In contrast the TSS is a nationwide scheme for both male and female teachers. b

65. The United Kingdom government considers that for the same reasons as in connection with the first question the reply to the first part of the second question must also be negative. Mr Johnson and his colleagues are eligible to join the scheme because the College has decided to employ them under a contract of service. Conversely, Ms Allonby and her colleagues cannot join the scheme because ELS has opted to engage them under a contract to provide services. As has been established by the courts, the College has no control over ELS as regards the levels of fees paid by it; it certainly could not be suggested that the College controlled whether persons under contract to ELS were eligible to join the TSS. According to the United Kingdom government, all persons working for ELS are employed under a contract to provide services and are therefore excluded from the TSS. Ms Allonby cannot rely on art 141 EC because she can point to no comparator. c

66. Likewise the United Kingdom government points to the consequences of the view put forward by Ms Allonby. An agency such as ELS providing staff would then be obliged under art 141 EC to ensure that the same pension conditions as those applicable to clients' employees were applied to staff on its database. That would be unworkable. The duty would not only arise in the case of sectoral pension schemes but also where clients have their own occupational pension schemes, which is normal in the private sector in the United Kingdom. It would be impossible for such an agency to secure for its staff membership of a client's pension scheme. It would be equally impossible for it to set up its own pension scheme under which benefits for different periods of service were calculated in different ways according to the terms of each ELS client's pension scheme. d

67. As far as the second part of this question is concerned the United Kingdom government observes that in the national proceedings statistical evidence has yet to be produced which would enable the courts to determine the existence of discrimination. The United Kingdom government doubts whether Ms Allonby can demonstrate that since in regard to ELS alone there is equality as between men and women. On the basis of that relationship of equality it cannot be stated that appreciably more women than men are affected by the contracting-out of tasks. The United Kingdom government further doubts whether the court's case law in *Rinner-Kühn's* case, *Liefting's* case and *Beune's* case confers on Ms Allonby entitlement to join the TSS—and thus obliges ELS to pay contributions in respect of her—even though ELS is not practising any inequality on the ground of sex as between the male and female lecturers on its database. In the United Kingdom government's view the answer in that connection is negative. e

18 Case C-7/93 [1995] All ER (EC) 97, [1994] ECR I-4471.

19 Cited at footnote 7, above. f

a 68. The United Kingdom government refers to the court's case law<sup>20</sup> under which pension benefits may constitute pay within the meaning of art 141 EC when they emanate at least indirectly from the employer. It follows from this that art 141 EC is infringed if an employer discriminates on the ground of sex in the payment of pensions. The trustee of an occupational pension scheme shares the employer's duty to ensure that this does not occur<sup>21</sup>. For he has the express duty of carrying out the employer's obligations. A trustee must therefore pay in such manner as complies with the employer's obligation but his duty does not extend further than that.

b 69. The United Kingdom government points out that Ms Allonby's argument implies that the terms of a pension scheme can infringe art 141 EC without there being any inequality on the ground of sex in pay as between the employees of any participating employer. That is impossible to reconcile, c the United Kingdom government submits, with the grounds on which occupational pensions fall within the scope of art 141 EC. In its view a pension scheme and its trustee cannot infringe art 141 EC if there is no breach of that article by a participating employer.

d 70. The United Kingdom government further points to another illogical consequence of the view contended for on behalf of Ms Allonby. An employer, in this case ELS, who is according equal treatment to all its lecturers, whether male or female, on terms not entitling them to join the TSS would be obliged in pursuance of the principle of equal treatment to pay employer's pension contributions for all lecturers of both sexes on its database. In the United e Kingdom government's view that inverts the relationship between an employer and a trustee, as explained by the court in the *Coloroll* case. Ms Allonby's argument contrives to impose via the trustee liability under art 141 EC on an employer to participate in a pension scheme, although that employer is not practising pay discrimination and also does not wish to participate in a pension scheme.

f 71. It points out that the TSS was set up as a pension scheme for employees of public educational establishments which also offers employees of private establishments the possibility of joining provided an application is made under a specific procedure by the employer concerned. However, establishments such as ELS which engage lecturers on the basis of contracts to provide services g have never manifested a desire to participate. It further points out that the United Kingdom has a form of state pension and it is for employers to set up pension schemes in substitution thereof but that it is by no means desirable that they should be compelled to do so.

h 72. As far as the definition of 'employment' is concerned the United Kingdom government pointed out that there is a difference under national law between a contract of service and a contract to provide services. The fact that the 1970 Act sought to create a right of action for both persons engaged under a contract of service and for persons engaged under a contract to provide services in no way implies in its view a policy decision that persons engaged under a contract to provide services should at all times be treated in the same way as employees.

i 73. Likewise the Commission considers that if Ms Allonby cannot rely on art 141 EC for the purpose of her claim to equal pay nor can she in regard to

20 Judgments in *Bilka's* case (cited at footnote 15, above) and *Beune's* case (cited at footnote 17, above).

21 Judgments in the *Coloroll* case (paras 17–24), cited at footnote 7, above, and *Barber's* case (paras 28, 29), cited at footnote 4, above.

pension entitlement. For occupational pensions come within art 141 EC *a*  
because they constitute pay by the employer. One cannot be viewed in isolation  
of the other. It observes that the choice made by ELS to engage all lecturers on  
the basis of contracts to provide services with the consequence that they  
cannot join the TSS has nothing to do with discrimination on the ground of  
sex. The Commission also points out that Ms Allonby's claim would result in a *b*  
change not only in regard to her but in regard to all staff.

#### *Assessment*

74. I make the observations set out below concerning the question whether  
in connection with her claim to entitlement to join the TSS Ms Allonby may  
compare herself with Mr Johnson or whether a comparator is at all necessary. *c*

75. As to the first part of the second question I am at one with the view put  
forward by Ms Allonby, the Commission and the United Kingdom government,  
namely that the reply in that connection must be the same as the reply to the  
first question. Pay for the purposes of art 141 EC may be defined as all existing  
and future consideration in cash or in kind which the worker receives directly  
or indirectly from his employer. The court has held that pension benefits come *d*  
within that definition. Accordingly, if Ms Allonby may not in respect of one  
component of her remuneration compare herself with a specific comparator  
then nor may she in respect of another component of her remuneration.

76. Since pension benefits come within the concept of pay that means that in  
that connection no distinction on the ground of sex may be made (1) in regard  
to entitlement to membership and (2) in regard to the grant of benefits. An *e*  
employer who did so would be acting in breach of art 141 EC.

77. In the discussion of the first question it was established that as a result of  
termination of her employment Ms Allonby now no longer gives lectures at  
the College on the basis of a contract of employment with the College but as  
a self-employed person through the intermediary of ELS under a contract to  
provide services. If she had still been employed by the College as a part-time *f*  
employee she would have been entitled to join the TSS. The change in her  
status on the basis of which she carries out her activities has however altered  
the situation.

78. Irrespective of the situation concerning the status of employee as  
opposed to self-employed person, it is the case that a comparator or a *g*  
comparative framework is necessary in order to determine whether there is  
discrimination on the ground of sex. That is true also of entitlement to  
membership. In dealing with the first question I already observed that the  
situation may be unsatisfactory but that Ms Allonby, as the law currently  
stands, cannot by reliance on the direct effect of art 141 EC compare herself  
with a comparator employed by the College. *h*

79. Even though Ms Allonby cannot rely directly on art 141 EC in order to  
compare her situation with that of Mr Johnson, that does not mean that there  
cannot be indirect discrimination stemming from a sector-wide or legislative  
scheme. In the present case the TSS regulations exclude lecturers who teach  
under an agreement to provide services. There may be (indirect) discrimination *i*  
if it appears that appreciably more women than men are affected by this  
condition of membership. Whether that is the case and whether there is an  
objective justificatory ground are however matters for the national court.

80. In that connection I wish to make the following observations. The first is  
that by means of the 1970 Act the United Kingdom is in compliance with its  
obligations under Directive 75/117. Secondly, following the judgment in



- a *Barber's* case and subsequent judgments the United Kingdom enacted the 1995 Act in order to enshrine the principle of equal treatment in pension legislation as well. The occupational pension scheme for teachers, a national scheme, was set up by the state and is governed by the 1995 Act and the TSS regulations. The latter excludes working relationships under a contract to provide services. The exclusion gives rise to a number of problems which I will discuss below.
- b 81. I am not persuaded by the arguments put forward by the United Kingdom government to the effect that there can be no discrimination. Naturally I share the view that no charge in that connection may be levelled against ELS or the College. The problem does not lie there. For the problem is in the legislation itself. That is also why Ms Allonby has addressed her claim primarily to the Secretary of State, not so much in his capacity as trustee but rather in his capacity as legislator. The United Kingdom government's observation to the effect that the position of a trustee of a pension fund mirrors the obligations of the employer under art 141 EC is in itself indeed correct but disregards the fact that the discrimination may also stem from the wording of the legislation itself.
- c
- d 82. By way of illustration I would observe that, in the event that the College had attempted to resolve its financial problems by offering its part-time employees thenceforth only contracts to provide services the College would have been required to offer to those employees pro rata the same pay as it offered to its full-time staff. The 1970 Act so provides. None the less part-time workers who are not employed by the College would not be entitled to join the
- e TSS since they do not satisfy the condition of membership. A situation then arises in which employees and self-employed persons *cannot* be treated equally since the latter are not eligible for the deferred pay in the form of pension benefits. If statistical evidence can then be found to show that women are more seriously affected by this unequal treatment than men art 141 EC may be directly relied on.
- f 83. In that light I consider there to be an inherent inconsistency in the United Kingdom's reasoning reproduced at para 72, above. It is said that the 1970 Act pursues the same objective as art 141 EC, namely a prohibition of pay discrimination on the ground of sex and, in order to secure the effectiveness of that prohibition, places employees and self-employed persons on an equal footing; that being so, it is difficult to maintain that, in respect of pension benefits, which constitute deferred pay, there is no requirement for such parity.
- g 84. Moreover, it may be inferred from paras 50 and 109 of the order for reference that the Employment Appeal Tribunal ruled that in such a case the contract to provide services must under the terms of the 1970 Act be deemed to be a contract of employment for occupational pension purposes. In such a situation Ms Allonby would have been entitled to claim access on the basis of the 1995 Act. However, the fact remains that the TSS as a sector-wide scheme treats lecturers under a contract of employment and lecturers who offer their services as self-employed persons unequally. In so doing this scheme is precisely encouraging educational establishments to have recourse to arrangements such as those underlying the main proceedings. The fact that the 1970 Act expressly
- i places both categories of persons on an equal footing in the matter of pay and that the TSS makes a distinction thus creates a situation which, on the supposition that relatively more women than men are affected by it, impinges on the substance of art 141 EC. In such a case the national legislature is under a legal duty to ensure that both categories of persons may join the pension scheme under the same conditions.

85. The United Kingdom government's argument that an employer is not obliged to set up its own occupational pension scheme or to participate in it is not relevant at this stage. Moreover, Ms Allonby considers that private educational establishments are also obliged to contribute to the occupational pension fund in question but that establishments such as ELS on account of the definition used now have no choice. The question arising is whether Ms Allonby on the basis of statistical evidence can show whether the definition used in the TSS regulations is indirectly discriminatory. If she is successful in that, and there is no objective justification, the legislature will be required to enact an amendment. Whether she is then successful in her claim against ELS for it to contribute to the TSS in respect of her is a separate matter. In light of the foregoing I consider that the reply to the question referred must be affirmative.

#### V—CONCLUSION

86. On the basis of the foregoing considerations I suggest that the Court of Justice should reply as follows to the questions referred by the Court of Appeal (Civil Division) (England and Wales):

(1) In a situation such as that in the main proceedings where differences are established as between the pay of lecturers employed by the College and the pay of lecturers who under contracts for services with a third party provide services at the College, art 141(1) EC cannot be relied on against the College or that third party because the pay differences including entitlement to join a pension scheme cannot be attributed to a single source and there is therefore no entity which can be held responsible for that difference and its elimination.

(2) Article 141(1) EC can be relied on against a statutory occupational pension scheme which is solely open to persons who provide educational services under a contract of employment and is not open to lecturers who teach under contracts for the provision of individual services if it appears that appreciably more women than men are affected by that restriction and there is no objective justificatory ground for it.

13 January 2004. **The COURT OF JUSTICE** delivered the following judgment.

1. By order of 22 June 2001, received at the Court of Justice of the European Communities on 3 July 2001, the Court of Appeal (Civil Division) (England and Wales) referred to the Court of Justice for a preliminary ruling under art 234 EC (formerly art 177 of the EC Treaty) two questions on the interpretation of art 141 EC (formerly art 119 of the EC Treaty).

2. Those questions were raised in proceedings brought by Ms Allonby, who works as a lecturer, against Accrington and Rossendale College (the College), Education Lecturing Services, trading as Protocol Professional (ELS), and the Secretary of State for Education and Employment (the Secretary of State) concerning equal pay for men and women.

#### LEGAL BACKGROUND

##### *Community law*

3. According to art 2 EC, the Community is to have as its task to promote, inter alia, equality between men and women.

4. Under art 141(1) EC, each member state is to ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.

a 5. The first subparagraph of art 141(2) EC states:

‘For the purpose of this Article, “pay” means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer.’

b 6. Article 5 of Council Directive (EEC) 75/117 (on the approximation of the laws of the member states relating to the application of the principle of equal pay for men and women) (OJ 1975 L45 p 19) provides:

‘Member States shall take the necessary measures to protect employees against dismissal by the employer as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal pay.’

c 7. Article 6 of that directive provides:

‘Member States shall, in accordance with their national circumstances and legal systems, take the measures necessary to ensure that the principle of equal pay is applied. They shall see that effective means are available to take care that this principle is observed.’

d 8. Article 2(1) of Council Directive (EEC) 86/378 (on the implementation of the principle of equal treatment for men and women in occupational social security schemes) (OJ 1986 L225 p 40), as amended by Council Directive (EC) 96/97 (OJ 1997 L46 p 20) (Directive 86/378) provides:

“Occupational social security schemes” means schemes not governed by Directive 79/7/EEC whose purpose is to provide workers, whether employees or self-employed, in an undertaking or group of undertakings, area of economic activity, occupational sector or group of sectors with benefits intended to supplement the benefits provided by statutory social security schemes or to replace them, whether membership of such schemes is compulsory or optional.’

f 9. Article 5(1) of Directive 86/378 provides:

‘Under the conditions laid down in the following provisions, the principle of equal treatment implies that there shall be no discrimination on the basis of sex, either directly or indirectly, by reference in particular to marital or family status, especially as regards:

- the scope of the schemes and the conditions of access to them;
- the obligation to contribute and the calculation of contributions ...’

g 10. Article 6(1) of that directive states:

‘Provisions contrary to the principle of equal treatment shall include those based on sex, either directly or indirectly, in particular by reference to marital or family status, for:

- (a) determining the persons who may participate in an occupational scheme;
- (b) fixing the compulsory or optional nature of participation in an occupational scheme ...’

#### *Domestic law*

11. In the United Kingdom, the right to equal pay for men and women is laid down by the Equal Pay Act 1970, s 1 of which provides:



*'Requirement of equal treatment for men and women in same employment.—*(1) If the terms of a contract under which a woman is employed at an establishment in Great Britain do not include (directly or by reference to a collective agreement or otherwise) an equality clause they shall be deemed to include one.

(2) An equality clause is a provision which relates to terms (whether concerned with pay or not) of a contract under which a woman is employed (the "woman's contract"), and has the effect that ... (c) where a woman is employed on work which, not being work in relation to which paragraph (a) or (b) above applies, is, in terms of the demands made on her (for instance under such headings as effort, skill and decision), of equal value to that of a man in the same employment—(i) if (apart from the equality clause) any term of the woman's contract is or becomes less favourable to the woman than a term of a similar kind in the contract under which that man is employed, that term of the woman's contract shall be treated as so modified as not to be less favourable, and (ii) if (apart from the equality clause) at any time the woman's contract does not include a term corresponding to a term benefiting that man included in the contract under which he is employed, the woman's contract shall be treated as including such a term ...

(6) Subject to the following subsections, for purposes of this section—(a) "employed" means employed under a contract of service or of apprenticeship or a contract personally to execute any work or labour, and related expressions shall be construed accordingly ... (c) two employers are to be treated as associated if one is a company of which the other (directly or indirectly) has control or if both are companies of which a third person (directly or indirectly) has control, and men shall be treated as in the same employment with a woman if they are men employed by her employer or any associated employer at the same establishment or at establishments in Great Britain which include that one and at which common terms and conditions of employment are observed either generally or for employees of the relevant classes.'

12. The Pensions Act 1995 contains provisions which the United Kingdom has been required to adopt as a result of the court's decision in *Barber v Guardian Royal Exchange Assurance Group* Case C-262/88 [1990] 2 All ER 660, [1990] ECR I-1889 and of a number of decisions which followed. Section 62 of that Act, which s 63(4) requires to be construed as one with s 1 of the 1970 Act, provides *inter alia* as follows:

*'The equal treatment rule.—*(1) An occupational pension scheme which does not contain an equal treatment rule shall be treated as including one.

(2) An equal treatment rule is a rule which relates to the terms on which—(a) persons become members of the scheme, and (b) members of the scheme are treated.'

13. The Secretary of State administers an occupational pension scheme for teachers (the Teachers' Superannuation Scheme 1988, hereinafter the TSS, governed by the Teachers' Superannuation (Consolidation) Regulations 1988, SI 1988/1652, and the Teachers' Superannuation (Amendment) Regulations 1993, SI 1993/114). The terms thereof confine membership to employment under a contract of employment, whether full-time or part-time,

a thereby restricting membership of the TSS to teachers with a contract of employment. Moreover, only certain categories of establishment come within its scope.

14. According to the explanations given by the United Kingdom government at the hearing, the TSS is a scheme for persons employed by public bodies in the teaching sector. It has been expressly extended to certain categories of employees of private entities by virtue of a procedure which the employer applies in order to be accepted as an employer participating in that fund.

15. According to s 9(1) and (2) of the Sex Discrimination Act 1975:

c *'Discrimination against contract workers.*—(1) This section applies to any work for a person ("the principal") which is available for doing by individuals ("contract workers") who are employed not by the principal himself but by another person, who supplies them under a contract made with the principal.

d (2) It is unlawful for the principal, in relation to work to which this section applies, to discriminate against a woman who is a contract worker—(a) in the terms on which he allows her to do that work, or (b) by not allowing her to do it or continue to do it, or (c) in the way he affords her access to any benefits, facilities or services or by refusing or deliberately omitting to afford her access to them, or (d) by subjecting her to any other detriment.'

e THE MAIN PROCEEDINGS

f 16. These proceedings arise out of the dismissal, by non-renewal of their contracts of employment, of a number of lecturers of hourly-paid lecturers employed by the College, including Ms Allonby, and the College's decision to engage hourly-paid lecturers only through ELS, which offered lecturers the possibility of being registered as self-employed persons for teaching assignments at institutes of further education.

g 17. Ms Allonby was originally employed by the College as a part-time lecturer in office technology. She was employed from 1990 to 1996 under a succession of one-year contracts under which she was paid by the hour at a rate determined by the level at which she was teaching.

h 18. By 1996, the College's financial obligations had become increasingly more onerous because of legislative changes which required part-time lecturers to be accorded equal or equivalent benefits to full-time lecturers, in particular as regards retirement pensions. The College employed 341 part-time lecturers. It decided that in order to reduce its overheads it would terminate or not renew their contracts of employment, and instead would retain their services as sub-contractors. This was done in Ms Allonby's case by terminating her employment with effect from 29 August 1996 and offering her re-engagement through ELS.

i 19. ELS operated as an agency, holding a database of available lecturers. Colleges could call on ELS to provide contract lecturers, mentioning the person concerned by name if they so wished. Ms Allonby, and others like her who had to register with ELS if they wanted to continue to work as part-time lecturers, thereby became self-employed. Their pay became a proportion of the fee agreed between ELS and the College. Their income fell and they lost a series of benefits linked to their employment, ranging from sick pay to a career structure. ELS is not an employer contributing to the TSS.

20. Of the 341 hourly-paid part-time lecturers who were made redundant by the College in 1996, 110 were men and 231 were women. Among the College's full-time salaried lecturers, the male:female ratio had gone from 74:40 in the year 1994/1995 to 55:50 in 1995/1996. a

21. ELS's database contained almost as many men as women, namely 18,050 compared with 19,909 on the most recent count available to the tribunal hearing the present case at first instance. b

22. Ms Allonby, supported by her union and, on appeal, by the Equal Opportunities Commission, brought proceedings against the College for a redundancy payment and for redress for unfair dismissal and indirect sex discrimination by reason of the dismissal.

23. Ms Allonby brought a further set of proceedings alleging, first, that the College was discriminating against her as a contract worker contrary to s 9 of the 1975 Act, that ELS was obliged by law to pay her equally—that is, pro rata—with a full-time lecturer at the College and that the state, represented by the Secretary of State, was acting unlawfully in denying her access, as a self-employed worker, to the TSS. Both sets of proceedings are in the nature of a test case for others similarly affected. c

24. The redundancy claim was settled amicably. d

25. In July 1997, the employment tribunal (United Kingdom) decided, as a preliminary issue, that Ms Allonby was not entitled to use as a comparator for equal pay purposes a male lecturer employed full-time by the College. In April 1998 that tribunal decided that the dismissal by the College was unfair but attracted no redress, and that it constituted indirect sex discrimination but was justifiable. It also held that the claim against the College under s 9 of the 1975 Act and those against ELS and the Secretary of State all failed. All those decisions were upheld in March 2000 by the Employment Appeal Tribunal (United Kingdom) which, however, gave permission to appeal on all issues. e

26. In the first two claims before the national court, Ms Allonby alleged that her dismissal by the College constituted unlawful indirect sex discrimination and that, by thereafter denying her benefits available to salaried lecturers, the College was discriminating against her as a contract worker on the ground of her sex. Those two claims were remitted for reconsideration by the employment tribunal. f

27. Regarding the other claims, the national court made the following findings. g

28. Against ELS Ms Allonby claims that art 141 EC entitles her, when she works at the College, to a rate of remuneration equal to that of a male lecturer employed by the College on work which is to be taken to be of equal value. Ms Allonby seeks against ELS a rate of pay equal to that of employed lecturers at the College by means of a comparison with a named teacher, Mr R Johnson. h

29. According to the national court, the material circumstances relating to that equal pay claim are the following:

—Ms Allonby and Mr Johnson undertake lecturing work of presumptively equal value at the College although not always on the same site;

—Mr Johnson is employed by the College as a lecturer and is paid by the College at a rate which the College sets; i

—Ms Allonby is engaged by ELS on a self-employed basis. She works on specific assignments agreed by her with ELS, at the College or elsewhere. She has no contractual relationship with the College;

—the College agrees with ELS the fee which it will pay for each lecturer. ELS agrees with Ms Allonby the fee which she is to receive for each assignment and



a sets the conditions under which its lecturers are to work. The College has no direct control over ELS in those or other matters;

—the College and ELS employ both male and female staff.

b 30. Against ELS, the College and the Secretary of State Ms Allonby claims access to the TSS. She claims that right either (i) by comparison with a male lecturer employed by the College or (ii) since that pension scheme was set up pursuant to statute, without such comparison if she can show statistically that among the teachers who satisfy all the other conditions for membership, female teachers who can comply with the requirement of being employed under a contract of employment in order to be entitled to membership of the TSS are proportionally much less numerous than male teachers who can do so. Neither the existence of such proof nor the question of objective justification c has yet been determined by the courts in the present case. However, the referring court considers that the least inconvenient course is to refer the questions to the court and then, if the answer makes it appropriate, to order the material facts to be found, thus avoiding duplication of effort.

d 31. According to the national court, the material circumstances relating to the claim for access to the TSS are the following:

—the TSS was set up by the Secretary of State under powers conferred by primary legislation;

—it is a condition of membership of the TSS that the member be an employee and be engaged as a teacher in a specified category of educational institution. The College is in one of these categories;

e —no self-employed person is eligible to be a member of the TSS;

—the TSS provides old age pensions and other benefits calculated principally by reference to the duration of the member's employment and to a reference salary earned in employment to which the TSS relates, which need not have been the same employment throughout but must have been at eligible establishments;

f —the rates of pay which determine the level of benefits under the TSS may differ between employers;

—the benefits payable under the TSS are funded by contributions from the members of the TSS and their employers;

g —no lecturer engaged by ELS is engaged as an employee. In consequence, none is eligible for membership of the TSS.

32. It appears from the explanations given by the United Kingdom government that it is open to ELS to contribute to the TSS in respect of teachers employed by it.

h THE QUESTIONS REFERRED TO THE COURT

i 33. The first question which arises for the Court of Appeal is whether two people working in the same service or establishment, albeit under contracts with different employers, must nevertheless be regarded as working in the same employment for the purposes of art 141 EC, at least where the work is done for the purposes and benefit of the employer whose establishment it is. According to the national court, only if the answer is No is there no conflict between art 141 EC and s 1(6) of the 1970 Act.

34. It is clear, first, that Ms Allonby's contract is not with the College but with ELS and, second, that ELS and the College are not associated employers within the meaning of s 1(6)(c) of the 1970 Act. Mr Johnson is not then

'employed by [the same] employer ... at the same establishment' within the meaning of that provision. He is employed by the College, albeit at the same establishment. a

35. According to the Court of Appeal, the way s 1(6) of the 1970 Act is written makes it possible to construe 'the same employment' in s 1(2)(c) as also covering work in the same establishment or service. However, the original wording of that Act makes that interpretation improbable. Ms Allonby has therefore to fall back on Community law, whether as an aid to the construction of the 1970 Act or as directly effective law. b

36. For the national court, there is no doubt that, if a comparison with Mr Johnson is to be made, the inequalities are numerous: he has, but she has not, security against unfair dismissal and dismissal for redundancy, and rights to sick pay. Ms Allonby does not argue that her right to equality with Mr Johnson extends beyond occasions when ELS allocates Ms Allonby to work at the College. But if the argument succeeds there, it should succeed—or at least be available—in relation to other establishments which obtain her services through ELS. c

37. Second, the Court of Appeal raises the question whether Ms Allonby may, on the basis of art 141 EC, claim access to the TSS. It explains in that connection that, in the context of her employment with ELS, Ms Allonby, having only a contract for services, has no access to the TSS. d

38. The national court states that if Ms Allonby can rely on Mr Johnson as her comparator, she will be entitled in principle to succeed in this aspect of her claim and that in any event she submits that she is entitled to equality of treatment without providing a male comparator. Ms Allonby relies on the Employment Appeal Tribunal's decision—with which the referring court agrees—that, contrary to the view of the employment tribunal, Ms Allonby's contract with ELS, is by virtue of s 1(6)(a) of the 1970 Act, a contract of employment for occupational pension purposes. e

39. In those circumstances the Court of Appeal (Civil Division) (England and Wales) stayed proceedings ([2001] EWCA Civ 529, [2001] IRLR 364, [2001] ICR 1189) and referred the following questions to the Court of Justice for a preliminary ruling: f

'(1) Does Article 141 EC have direct effect so as to enable a woman to claim equal pay with a man in the circumstances of this case? g

(2) Does Article 141 EC have direct effect so as to entitle Ms Allonby to claim access to the pension scheme either (i) by comparing herself with Mr Johnson or (ii) by showing statistically that a considerably smaller proportion of female than of male teachers who are otherwise eligible to join the TSS can comply with the requirement of being employed under a contract of employment, and by establishing that the requirement is not objectively justified?' h

40. Ms Allonby informed the court at the hearing on 28 January 2003 that the claims which had been remitted to the employment tribunal had been settled amicably between her and the College, with payment of compensation but no admission of liability. i

#### THE FIRST QUESTION

41. The national court submitted the first question to enable it to rule on Ms Allonby's claim for entitlement to remuneration from ELS equal to that of a male lecturer employed by the College.

**a** 42. Accordingly, this question must be construed as seeking to ascertain whether, in circumstances such as those of the main proceedings, art 141(1) EC must be interpreted as meaning that a woman whose contract of employment with an undertaking has not been renewed and who is immediately made available to her previous employer through another undertaking to provide the same services is entitled to rely, vis-à-vis the intermediary undertaking, on the principle of equal pay, using as a basis for comparison the remuneration received for equal work or work of the same value by a man employed by the woman's previous employer.

**b** 43. It must be borne in mind at the outset that art 141(1) EC can be relied on only by workers within the meaning of that provision.

**c** 44. However, even if that condition is satisfied, the first question cannot be answered in the affirmative.

45. Admittedly, there is nothing in the wording of art 141(1) EC to suggest that the applicability of that provision is limited to situations in which men and women work for the same employer. The principle established by that article may be invoked before national courts, in particular in cases of discrimination arising directly from legislative provisions or collective labour agreements, as well as in cases in which work is carried out in the same establishment or service, whether private or public (see, inter alia, *Defrenne v Sabena* Case 43/75 [1981] 1 All ER 122, [1976] ECR 455 (para 40) (the *Defrenne II* case) and *Lawrence v Regent Office Care Ltd* Case C-320/00 [2002] IRLR 822, [2002] ECR I-7325 (para 17)).

**d** 46. However, where the differences identified in the pay conditions of workers performing equal work or work of equal value cannot be attributed to a single source, there is no body which is responsible for the inequality and which could restore equal treatment. Such a situation does not come within the scope of art 141(1) EC. The work and the pay of those workers cannot therefore be compared on the basis of that provision (see *Lawrence's* case (para 18)).

**e** 47. It is clear from the order for reference that the male worker referred to by Ms Allonby is paid by the College under conditions determined by the College, whereas ELS agreed with Ms Allonby on the pay which she would receive for each assignment.

**f** 48. The fact that the level of pay received by Ms Allonby is influenced by the amount which the College pays ELS is not a sufficient basis for concluding that the College and ELS constitute a single source to which can be attributed the differences identified in Ms Allonby's conditions of pay and those of the male worker paid by the College.

**g** 49. Moreover, it is clear from the order for reference that ELS and the College are not associated employers within the meaning of s 1(6)(c) of the 1970 Act.

**h** 50. Therefore, the answer to the first question must be that, in circumstances such as those of the main proceedings, art 141(1) EC must be interpreted as meaning that a woman whose contract of employment with an undertaking has not been renewed and who is immediately made available to her previous employer through another undertaking to provide the same services is not entitled to rely, vis-à-vis the intermediary undertaking, on the principle of equal pay, using as a basis for comparison the remuneration received for equal work or work of the same value by a man employed by the woman's previous employer.

**i**



## THE SECOND QUESTION

51. The second question, which is in several parts, concerns membership of the TSS. a

52. First, it must be borne in mind that, according to settled case law, a pension scheme such as the TSS at issue in the main proceedings, which essentially relates to the employment of the person concerned, forms part of the pay received by that person and comes within the scope of art 141 EC (to that effect, see in particular *Bilka-Kaufhaus GmbH v Weber von Hartz* Case 170/84 [1986] IRLR 317, [1986] ECR 1607 (para 22), *Barber v Guardian Royal Exchange Assurance Group* Case C-262/88 [1990] 2 All ER 660, [1990] ECR I-1889 (para 28), *Bestuur van het Algemeen Burgerlijk Pensioenfonds v Beune* Case C-7/93 [1995] All ER (EC) 97, [1994] ECR I-4471 (para 46) and *Deutsche Telekom AG v Vick* Joined cases C-234/96 and C-235/96 [2000] ECR I-799 (para 32)). b

53. Moreover, art 141 EC covers not only entitlement to benefits paid by an occupational pension scheme but also the right to be a member of such a scheme (see, in particular, *Fisscher v Voorhuis Hengelo BV* Case C-128/93 [1995] All ER (EC) 193, [1994] ECR I-4583 (para 12)). c

*Part (a) of the second question* d

54. Part (a) of the second question seeks to ascertain whether art 141(1) EC must be interpreted as meaning that a woman in circumstances such as those of the main proceedings is entitled to rely, vis-à-vis the intermediary undertaking and/or vis-à-vis her previous employer, on the principle of equal pay in order to secure entitlement to membership of an occupational pension scheme for teachers, set up under state legislation, of which only teachers with a contract of employment may become members, using as a basis for comparison the remuneration, including such a right of membership, received for equal work or work of the same value by a man employed by the woman's previous employer. e

55. As far as the relationship between Ms Allonby and ELS is concerned, the same reasoning as that applied to the first question must be followed. f

56. As regards her relationship with the College, it must be held that, following the amicable settlement reached between Ms Allonby and the College while the case was pending before the court, the question whether Ms Allonby suffered indirect discrimination on grounds of sex as a result of her dismissal and the question whether, if appropriate, she may still claim elements of remuneration from the College on the basis of art 141(1) EC no longer arise. g

57. Accordingly, the answer to part (a) of the second question must be that art 141(1) EC must be interpreted as meaning that a woman in circumstances such as those of the main proceedings is not entitled to rely on the principle of equal pay in order to secure entitlement to membership of an occupational pension scheme for teachers set up by state legislation of which only teachers with a contract of employment may become members, using as a basis for comparison the remuneration, including such a right of membership, received for equal work or work of the same value by a man employed by the woman's previous employer. h

*Part (b) of the second question* i

58. Part (b) of the second question concerns, first, the state, represented by the Secretary of State, and, second, ELS, as an intermediary undertaking.

59. It is concerned with possible discrimination deriving from legislation.

*a* The first part of part (b) of the second question

60. In so far as the state is concerned, the national court seeks in essence to ascertain whether the requirement of being employed under a contract of employment as a precondition for membership of a pension scheme for teachers, set up by state legislation, must be disapplied where it is shown that, among the teachers who fulfil the other conditions for membership, a clearly lower percentage of women than of men are able to satisfy that condition and it is established that that condition is not objectively justified.

*b*

61. In order to answer this question, it is necessary, first, to interpret the concept of 'worker' within the meaning of art 141(1) EC, second, to determine precisely the category of persons who may be included in the comparison and, third, to examine the consequences of possible incompatibility of the condition at issue with that provision.

—The concept of 'worker' within the meaning of art 141(1) EC

62. The criterion on which art 141(1) EC is based is the comparability of the work done by workers of each sex (see, to that effect, *Defrenne v SA Belge de Navigation Aérienne (SABENA)* Case 149/77 [1978] ECR 1365 (para 22) (the *Defrenne III* case)). Accordingly, for the purpose of the comparison provided for by art 141(1) EC, only women and men who are workers within the meaning of that article can be taken into consideration.

*d*

63. In that connection, it must be pointed out that there is no single definition of worker in Community law: it varies according to the area in which the definition is to be applied (see *Martinez Sala v Freistaat Bayern* Case C-85/96 [1998] ECR I-2691 (para 31)).

*e*

64. The term 'worker' within the meaning of art 141(1) EC is not expressly defined in the EC Treaty. It is therefore necessary, in order to determine its meaning, to apply the generally recognised principles of interpretation, having regard to its context and to the objectives of the Treaty.

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65. According to art 2 EC, the Community is to have as its task to promote, among other things, equality between men and women. Article 141(1) EC constitutes a specific expression of the principle of equality for men and women, which forms part of the fundamental principles protected by the Community legal order (see, to that effect, *Deutsche Post AG v Sievers* Joined cases C-270/97 and C-271/97 [2000] ECR I-929 (para 57)). As the court held in the *Defrenne II* case (para 12), the principle of equal pay forms part of the foundations of the Community.

*g*

66. Accordingly, the term 'worker' used in art 141(1) EC cannot be defined by reference to the legislation of the member states but has a Community meaning. Moreover, it cannot be interpreted restrictively.

*h*

67. For the purposes of that provision, there must be considered as a worker a person who, for a certain period of time, performs services for and under the direction of another person in return for which he receives remuneration (see, in relation to free movement of workers, in particular *Lawrie-Blum v Land Baden-Württemberg* Case 66/85 [1986] ECR 2121 (para 17), and *Martinez Sala's* case (para 32)).

*i*

68. Pursuant to the first paragraph of art 141(2) EC, for the purpose of that article, 'pay' means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer. It is clear from that definition that the authors of the Treaty did not intend that the term 'worker', within the meaning of art 141(1) EC, should include

independent providers of services who are not in a relationship of subordination with the person who receives the services (see also, in the context of free movement of workers, *Meeusen v Hoofddirectie van de Informatie Beheer Groep* Case C-337/97 [1999] ECR I-3289 (para 15)).

69. The question whether such a relationship exists must be answered in each particular case having regard to all the factors and circumstances by which the relationship between the parties is characterised.

70. Provided that a person is a worker within the meaning of art 141(1) EC, the nature of his legal relationship with the other party to the employment relationship is of no consequence in regard to the application of that article (see, in the context of free movement of workers, *Bettray v Staatssecretaris van Justitie* Case 344/87 [1989] ECR 1621 (para 16) and *Raulin v Minister van Onderwijs en Wetenschappen* Case C-357/89 [1992] ECR I-1027 (para 10)).

71. The formal classification of a self-employed person under national law does not exclude the possibility that a person must be classified as a worker within the meaning of art 141(1) EC if his independence is merely notional, thereby disguising an employment relationship within the meaning of that article.

72. In the case of teachers who are, vis-à-vis an intermediary undertaking, under an obligation to undertake an assignment at a college, it is necessary in particular to consider the extent of any limitation on their freedom to choose their timetable, and the place and content of their work. The fact that no obligation is imposed on them to accept an assignment is of no consequence in that context (see to that effect, in relation to free movement of workers, *Raulin's case* (paras 9, 10)).

—The category of persons who may be included in the comparison

73. When it is necessary to consider whether a set of rules conforms with the requirements of art 141(1) EC, it is in principle the scope of those rules which determines the category of persons who may be included in the comparison.

74. Thus, in the case of company pension schemes which are limited to the undertaking in question, the court has held that a worker cannot rely on art 119 of the EC Treaty (arts 117 to 120 of the EC Treaty have been replaced by arts 136 to 143 EC) in order to claim pay to which he could be entitled if he belonged to the other sex in the absence, now or in the past, in the undertaking concerned of workers of the other sex who perform or performed comparable work (see *Coloroll Pension Trustees Ltd v Russell* Case C-200/91 [1995] All ER (EC) 23, [1994] ECR I-4389 (para 103)). On the other hand, in the case of national legislation, in *Rinner-Kühn v FWW Spezial-Gebäudereinigung GmbH & Co KG* Case 171/88 [1989] IRLR 493, [1989] ECR 2743 (para 11), the court based its reasoning on statistics for the numbers of male and female workers at national level.

75. In order to show that the requirement of being employed under a contract of employment as a precondition for membership of the TSS—a condition deriving from state rules—constitutes a breach of the principle of equal pay for men and women in the form of indirect discrimination against women, a female worker may rely on statistics showing that, among the teachers who are workers within the meaning of art 141(1) EC and fulfil all the conditions for membership of the pension scheme except that of being employed under a contract of employment as defined by national law, there is a much higher percentage of women than of men.



a 76. If that is the case, the difference of treatment concerning membership of the pension scheme at issue must be objectively justified. In that regard, no justification can be inferred from the formal classification of a self-employed person under national law.

—Legal consequences

b 77. Where it is found that the requirement of being employed under a contract of employment as a precondition for membership of a pension scheme is not in conformity with art 141(1) EC, the condition concerned must be disapplied, in view of the primacy of Community law (see, to that effect, *Amministrazione delle Finanze dello Stato v Simmenthal SpA* Case 106/77 [1978] ECR 629 (para 24)).

c 78. Having regard to the observations submitted by the United Kingdom government at the hearing on 28 January 2003, it should be added that, under art 6(1)(b) of Directive 86/378, which specifies the scope of art 141 EC as far as employees are concerned, the compulsory or optional nature of membership of an occupational pension scheme must be fixed without discrimination on grounds of sex.

d 79. In view of the foregoing considerations, the answer to the first part of part (b) of the second question must be that, in the absence of any objective justification, the requirement, imposed by state legislation, of being employed under a contract of employment as a precondition for membership of a pension scheme for teachers is not applicable where it is shown that, among the teachers who are workers within the meaning of art 141(1) EC and fulfil all the other conditions for membership, a much lower percentage of women than of men is able to fulfil that condition. The formal classification of a self-employed person under national law does not change the fact that a person must be classified as a worker within the meaning of that article if his independence is merely notional.

f *The second part of part (b) of the second question*

g 80. As far as ELS is concerned, the national court seeks to ascertain in essence whether the applicability of art 141(1) EC vis-à-vis an undertaking is subject to the condition that the worker concerned can be compared with a worker of the other sex who is or has been employed by the same employer and has received higher pay for equal work or for work of equal value and that a woman cannot therefore invoke statistics in order to claim, on the basis of that provision, eligibility for membership of a pension scheme set up under state legislation.

h 81. In that connection it must be held that a woman may rely on statistics to show that a clause in state legislation is contrary to art 141(1) EC because it discriminates against female workers. Where that provision is not applicable, the consequences are binding not only on the public authorities or social agencies but also on the employer concerned.

i 82. If, for example, an employer employs only workers for whom normal working time does not exceed ten hours a week or 45 hours a month and, regardless of the sex of the worker, he does not continue to pay remuneration in the event of sickness because a law which discriminates indirectly against women, such as the law at issue in *Rinner-Kühn's* case so permits, female workers can nevertheless invoke art 141(1) EC against their employer in order to enforce rights which national legislation confers on workers whose normal working time is longer and to ensure that the discriminatory condition is not applied.

83. In such cases, it is the legislature that is the sole source of the difference in treatment referred to in para 18 of *Lawrence's* judgment. a

84. The answer to the second part of part (b) of the second question must therefore be that art 141(1) EC must be interpreted as meaning that where state legislation is at issue, the applicability of that provision vis-à-vis an undertaking is not subject to the condition that the worker concerned can be compared with a worker of the other sex who is or has been employed by the same employer and who has received higher pay for equal work or work of equal value. b

#### COSTS

85. The costs incurred by the United Kingdom and German governments and by the Commission of the European Communities, which have submitted observations to the court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. c

On those grounds, the Court of Justice, in answer to the questions referred to it by the Court of Appeal (Civil Division) (England and Wales) by order of 22 June 2001, hereby rules: d

(1) In circumstances such as those of the main proceedings, art 141(1) EC must be interpreted as meaning that a woman whose contract of employment with an undertaking has not been renewed and who is immediately made available to her previous employer through another undertaking to provide the same services is not entitled to rely, vis-à-vis the intermediary undertaking, on the principle of equal pay, using as a basis for comparison the remuneration received for equal work or work of the same value by a man employed by the woman's previous employer. e

(2) Article 141(1) EC must be interpreted as meaning that a woman in circumstances such as those of the main proceedings is not entitled to rely on the principle of equal pay in order to secure entitlement to membership of an occupational pension scheme for teachers set up by state legislation of which only teachers with a contract of employment may become members, using as a basis for comparison the remuneration, including such a right of membership, received for equal work or work of the same value by a man employed by the woman's previous employer. f

(3) In the absence of any objective justification, the requirement, imposed by state legislation, of being employed under a contract of employment as a precondition for membership of a pension scheme for teachers is not applicable where it is shown that, among the teachers who are workers within the meaning of art 141(1) EC and fulfil all the other conditions for membership, a much lower percentage of women than of men is able to fulfil that condition. The formal classification of a self-employed person under national law does not change the fact that a person must be classified as a worker within the meaning of that article if his independence is merely notional. g

(4) Article 141(1) EC must be interpreted as meaning that where state legislation is at issue, the applicability of that provision vis-à-vis an undertaking is not subject to the condition that the worker concerned can be compared with a worker of the other sex who is or has been employed by the same employer and who has received higher pay for equal work or work of equal value. h

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# R (on the application of Wells) v Secretary of State for Transport, Local Government and the Regions

(Case C-201/02)

COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES (FIFTH CHAMBER)

JUDGES JANN (RAPPORTEUR) (ACTING FOR THE PRESIDENT OF THE FIFTH CHAMBER), EDWARD AND LA PERGOLA

ADVOCATE GENERAL LÉGER

12 JUNE, 25 SEPTEMBER 2003, 7 JANUARY 2004

*European Community – Environment – Projects likely to significantly affect environment – Development consent – Environmental impact assessment – Registration of dormant permission to continue mining operation – Competent authorities permitting continuation of mining operations under old mining permission without carrying out environmental impact assessment – Whether competent authority required to carry out environmental impact assessment – Council Directive (EEC) 85/337, arts 1(2), 2(1) – Planning and Compensation Act 1991, s 22.*

Registration of an old mining permission had been granted by the competent national authorities of the United Kingdom to the owners of a quarry, pursuant to s 22<sup>a</sup> of the Planning and Compensation Act 1991. The quarry was situated in an area recognised to be environmentally extremely sensitive and at no time had the competent authorities examined whether it had been necessary to carry out an environmental impact assessment. In due course, the claimant, who was the owner of property located proximate to the quarry, brought proceedings before the national court for revocation or modification of the planning permission. The national court decided to stay the proceedings and refer to the Court of Justice of the European Communities certain questions<sup>b</sup> concerning the interpretation of arts 1(2) and 2(1)<sup>c</sup> of Council Directive (EEC) 85/337 (on the assessment of the effects of certain public and private projects on the environment), which provided that before member

<sup>a</sup> Section 22 provides, so far as relevant: '(1) In this section and Schedule 2 to this Act, "old mining permission" means any planning permission for development ... involving the depositing of mineral waste, which was deemed to be granted under Part III of the Town and Country Planning Act 1947 ... (2) An old mining permission shall, if an application under that Schedule to determine the conditions to which the permission is to be subject is finally determined, have effect as from the final determination as if granted on the terms required to be registered. (3) If no such development has, at any time in the period of two years ending with 1st May 1991, been carried out to any substantial extent anywhere in, on or under the land to which an old mining permission relates, that permission shall not authorise any such development to be carried out at any time after the coming into force of this section unless—(a) the permission has effect in accordance with subsection (2) above; and (b) the development is carried out after such an application is finally determined. (4) An old mining permission shall—(a) if no application for the registration of the permission is made under that Schedule, cease to have effect on the day following the last date on which such an application may be made; and (b) if such an application is refused, cease to have effect on the day following the date on which the application is finally determined ...'

<sup>b</sup> The questions referred by the national court are set out at judgment para 32, below

<sup>c</sup> Articles 1(2) and 2(1) are set out at judgment paras 4 and 5, below, respectively



states granted development consent for a project likely to have significant effects on the environment, an assessment as to the effects of the project was to be carried out. a

**Held** – (1) For the purposes of art 2(1) of the directive, decisions permitting the resumption of mining operations constituted a ‘development consent’ within the meaning of art 1(2), such that an assessment of the environmental effects of such operations was to be carried out. The directive required an assessment of the environmental effects of the project in question for new consents, namely those sought after the expiry of the time limit laid down for implementation of the directive. In the main proceedings, had the owners of the quarry wished to resume its workings, they were obliged under the Act to have the old mining permission registered and to seek decisions determining new planning conditions and approving matters reserved by those conditions. Had they not done so, the permission would have ceased to have effect and there would no longer have been consent to work the quarry within the meaning of art 2(1). Further, it would undermine the effectiveness of the directive to regard as mere modification of an existing consent the adoption of decisions which, in circumstances such as those in the main proceedings, replaced not only the terms but the very substance of a prior consent, such as the old mining permission. Accordingly, decisions such as the decision determining new conditions and the decision approving matters reserved by the new conditions for the working of the quarry had to be considered to constitute, as a whole, a new consent within the meaning of art 2(1) of the directive (see judgment paras 44–47, 53, below). b  
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(2) Where a consent procedure comprised several stages, the requisite environmental impact assessment was to be carried out as soon as it was possible to identify and assess all the effects which the project might have on the environment. Since an environmental impact assessment had to be carried out before consent was given and since national authorities were to take account of the environmental effects of a project at the earliest possible stage in the proceedings, it followed that where national law provided that a consent procedure was to be carried out in several stages, one involving a principle decision and the other involving an implementing decision which could not extend beyond the parameters set by the principal decision, the effects which the project might have on the environment had to be identified and assessed at the time of the procedure relating to the principal decision. It was only if those effects were not identifiable until the time of the procedure relating to the implementing decision that the assessment should be carried out in the course of that procedure (see judgment paras 49, 52, 53, below). f  
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(3) In circumstances such as those in the main proceedings, an individual might, where appropriate, rely on art 2(1) of the directive. Having regard to the principle of legal certainty, directives might only create rights for individuals, not obligations. Therefore, an individual could not rely on a directive against a member state where the state obligation was directly linked to the performance of an obligation falling on a third party. However, mere repercussions on the rights of third parties did not justify preventing an individual from invoking the provisions of a directive against the member state concerned. In the main proceedings, the obligation on the member state concerned to ensure that the competent authorities carried out an assessment of the environmental effects of the working of the quarry was not directly linked to the performance of any obligation which would fall, pursuant to the h  
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- a directive, on the quarry owners. The fact that mining operations had to be halted to await the results of the assessment was the consequence of the belated performance of that state's obligation, but such a consequence could not be described as an inverse direct effect of the provisions of that directive in relation to the quarry owners (see judgment paras 56–58, 61, below).
- b (4) Pursuant to art 10 EC (formerly art 5 of the EC Treaty), the competent authorities of a member state were obliged to take, within the scope of their competence, all general or particular measures for remedying the failure to carry out an assessment of the environmental effects of a project as provided for in art 2(1) of the directive. The competent authorities of a member state were to take, within the sphere of their competence, all the general or particular measures that were necessary to ensure that projects were examined
- c in order to determine whether they were likely to have significant effects on the environment and, if so, to ensure that they were subject to an impact assessment. In the main proceedings, if the working of the quarry should have been subject to an assessment of its environmental effects in accordance with the requirements of the directive, the competent authorities were obliged to
- d take all general or particular measures for remedying the failure to carry out such an assessment. Further, it was for the national court to determine whether it was impossible under domestic law for a consent already granted to be revoked or suspended in order to subject the project to an assessment of its environmental effects, in accordance with the requirements of the directive or, alternatively, if the individual so agreed, whether compensation for the harm
- e suffered was appropriate (see judgment paras 64, 66–69, 70, below).

### Notes

For development consent and assessment, see 38 *Halsbury's Laws* (4th edn reissue) para 9.

- f For the Planning and Compensation Act 1991, s 22, see 46 *Halsbury's Statutes* (4th edn) (2004 reissue) 1051.

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- g *Amministrazione delle Finanze dello Stato v Simmenthal SpA* Case 106/77 [1978] ECR 629, ECJ.
- Arcaro (Criminal proceedings against)* Case C-168/95 [1997] All ER (EC) 82, [1996] ECR I-4705, ECJ.
- Becker v Finanzamt Münster-Innenstadt* Case 8/81 [1982] ECR 53, ECJ.
- h *BP Supergas Anonimos Etairia Geniki Emporiki-Viomichaniki kai Antiprosopion v Greece* Case C-62/93 [1995] All ER (EC) 684, [1995] ECR I-1883, ECJ.
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- Faccini Dori v Recreb Srl* Case C-91/92 [1995] All ER (EC) 1, [1994] ECR I-3325, ECJ. **b**
- Factortame Ltd v Secretary of State for Transport (No 2)* Case C-213/89 [1991] 1 All ER 70, [1991] 1 AC 603, [1990] 3 WLR 818, [1990] ECR I-2433, ECJ.
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- Furlanis Construzioni Generali SpA v Azienda Nazionale Autonoma Strade (ANAS)* Case C-143/94 [1995] ECR I-3633, ECJ.
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- Kampelmann v Landschaftsverband Westfalen-Lippe, Stadtwerke Witten GmbH v Schade, Haseley v Stadtwerke Altena GmbH* Joined cases C-253–258/96 [1998] IRLR 333, [1997] ECR I-6907, ECJ. **d**
- Kolpinghuis Nijmegen BV (Criminal proceedings against)* Case 80/86 [1987] ECR 3969, ECJ.
- Luxembourg v Linster* Case C-287/98 [2000] ECR I-6917, ECJ.
- Marshall v Southampton and South West Hampshire Area Health Authority (Teaching)* Case 152/84 [1986] 2 All ER 584, [1986] QB 401, [1986] 2 WLR 780, [1986] ECR 723, ECJ. **e**
- Meilicke v ADV/ORGAG AG* Case C-83/91 [1992] ECR I-4871, ECJ.
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- R v Medicines Control Agency, ex p Smith & Nephew Pharmaceuticals Ltd* Case C-201/94 (1996) 34 BMLR 141, [1996] ECR I-5819, ECJ.
- R v North Yorkshire CC, ex p Brown* [1999] 1 All ER 969, [2000] 1 AC 397, [1999] 2 WLR 452, HL. **g**
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- Verband deutscher Daihatsu-Händler eV v Daihatsu Deutschland GmbH* Case C-97/96 [1997] ECR I-6843, ECJ. **h**
- World Wildlife Fund (WWF) v Autonome Provinz Bozen* Case C-435/97 [1999] ECR I-5613, ECJ.

## Reference **i**

By order of 12 February 2002, the High Court of Justice of England and Wales, Queen's Bench Division (Administrative Court), referred to the Court of Justice of the European Communities for a preliminary ruling under art 234 EC (formerly art 177 of the EC Treaty) five questions (set out in judgment para 32, below) on the interpretation of Council Directive (EEC) 85/337 (on



- a the assessment of the effects of certain public and private projects on the environment). Those questions were raised in proceedings between Delena Wells and the Secretary of State for Transport, Local Government and the Regions (the Secretary of State) concerning the grant of a new consent for mining operations at Conygar Quarry without an environmental impact assessment having first been carried out. Written observations were submitted on behalf of: Mrs Wells by R Gordon QC and J Pereira, Barrister, instructed by R Buxton, Solicitor; the United Kingdom government by P Ormond, acting as agent, D Elvin QC and J Maurici, Barrister; the Commission of the European Communities by X Lewis, acting as agent, and N Khan, Barrister. Oral observations were made on behalf of: Mrs Wells, represented by R Gordon and J Pereira, instructed by S Ring, Solicitor; the United Kingdom government, represented by R Caudwell, acting as agent, and D Elvin; and the Commission, represented by X Lewis and N Khan. The language of the case was English. The facts are set out in the opinion of the Advocate General.

d 25 September 2003. **The Advocate General (P Léger)** delivered the following opinion<sup>1</sup>.

1. In the present case, the High Court of Justice of England and Wales, Queen's Bench Division (Administrative Court), has referred for a preliminary ruling five questions on the interpretation of Council Directive (EEC) 85/337<sup>2</sup>. Those questions were raised in proceedings between Delena Wells and the United Kingdom authorities concerning resumption of the working of Conygar Quarry, a site for the extraction of construction materials which is located near Mrs Wells' dwelling house.

2. Conygar Quarry, consent for the working of which was granted in 1947, had not been operational for a number of years when Mrs Wells purchased her house in 1984. In 1997 and 1999 the competent authorities established the conditions under which the quarry could be worked again. However, they did not first carry out an environmental impact assessment in respect of the proposed operations, as provided for in Directive 85/337.

3. By its questions, the national court seeks to ascertain, first, whether the provisions of the directive must be applied in the present case and, second, whether Mrs Wells may bring proceedings against the state because the directive has not been applied.

#### I—LEGAL CONTEXT

##### A—Community law

4. Directive 85/337 falls within the framework of the action programmes of the European Communities on the environment, according to which the correct approach is to prevent the creation of pollution or nuisances at source, rather than subsequently trying to counteract their effects<sup>3</sup>. It has the objective of ensuring that development consent for public and private projects which are likely to have significant effects on the environment is granted only after prior assessment of those effects<sup>4</sup>. A further aim is that the assessment be conducted

1 Original language: French.

2 On the assessment of the effects of certain public and private projects on the environment (OJ 1985 L175 p 40).

3 First recital in the preamble.

4 Sixth recital in the preamble.

on the basis of information supplied by the developer and by the authorities and the people concerned by the project<sup>5</sup>. a

5. 'Development consent' is defined in art 1(2) of the directive as 'the decision of the competent authority or authorities which entitles the developer to proceed with the project'. In accordance with the same provision, the term 'project' covers, *inter alia*, 'interventions in the natural surroundings and landscape including those involving the extraction of mineral resources'. b

6. Article 2(1) of the directive provides:

'Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue *inter alia*, of their nature, size or location are made subject to an assessment with regard to their effects.'

c

7. Article 4(1) provides that the projects specified in annex I must systematically be the subject of an environmental impact assessment<sup>6</sup>. Article 4(2) states that projects referred to in annex II are to be assessed only where 'Member States consider that their characteristics so require'. The extraction of construction materials is included in annex II. d

8. Directive 85/337 sets out in arts 5 to 10 and annex III the information necessary for the assessment and the procedure to be followed. In accordance with those provisions, the assessment is to be carried out on the basis of information supplied by the developer. That information must be communicated to the authorities concerned and made available to the public. Those authorities and the public are given an opportunity to express their opinion. The authorities empowered to grant consent for the project must take into consideration all the information gathered in the course of the assessment procedure. Finally, the public must be informed of the decision adopted and of any conditions attached thereto. e

#### *B—National law* f

9. In order to meet construction needs after the 1939–45 war, Interim Development Orders (IDOs) were adopted in the United Kingdom from 1946 expressly authorising mineral extraction operations<sup>7</sup>.

10. In 1991 the Planning and Compensation Act 1991<sup>8</sup> entered into force. Section 22 of the Act laid down a special set of rules for old mining permissions granted under an IDO. g

11. According to those rules, any person with an interest in the land or minerals benefiting from an old mining permission has to apply for its registration with the mineral planning authority<sup>9</sup> before 25 March 1992. If this is not done, the old mining permission definitively ceases to have effect<sup>10</sup>. Then, in the 12 months following registration, such a person must apply to the MPA for determination, on the basis of the conditions set out in his h

<sup>5</sup> Sixth recital in the preamble.

<sup>6</sup> Examples of such projects are oil refineries, thermal and nuclear power stations, chemical installations and motorway construction. i

<sup>7</sup> Order for reference, footnote 2.

<sup>8</sup> Hereinafter the 1991 Act.

<sup>9</sup> Hereinafter the MPA.

<sup>10</sup> Order for reference, paras 16 and 42.

a application, of the conditions to which that permission is subject. The permission likewise definitively ceases to have effect if this requirement is not observed.

b 12. The 1991 Act draws a distinction between what are termed 'active' and 'dormant' permissions. Permissions are dormant if no development was carried out to any substantial extent in the period of two years ending on 1 May 1991. In the case of active permissions, operations may continue and are subject to new conditions once they have been approved. In the case of dormant permissions, no operations may resume until the conditions have been finally determined.

c 13. The MPA must determine the conditions to which the permission is to be subject within a period of three months, failing which the conditions set out in the application are deemed to be approved. If the MPA defines the conditions within the prescribed period, they may include 'any conditions which may be imposed on a grant of planning permission for development consisting of the winning and working of minerals or involving the depositing of mineral waste'<sup>11</sup>.

d 14. If the conditions differ from those set out in the application, the applicant may appeal to the Secretary of State for Transport, Local Government and the Regions<sup>12</sup>. The decision of the Secretary of State may be challenged within a time limit of six weeks<sup>13</sup>. Also, permissions granted under an IDO for which new conditions have been determined pursuant to the 1991 Act may be modified or revoked before the operations authorised by the permission have been completed<sup>14</sup>.

## II—FACTS

### A—Background to the dispute

f 15. In 1947 permission to work Conygar Quarry was granted under an IDO. In 1991 quarrying works, which had stopped many years earlier, resumed for a short period. The resumption resulted in blasting operations, movements of heavy goods vehicles on the lane running past Mrs Wells' house and crushing operations. Those workings caused cracking to Mrs Wells' house and forced her to keep her windows shut<sup>15</sup>.

g 16. In accordance with the 1991 Act, the operators of Conygar Quarry had their old mining permission registered on 24 August 1992. The permission was classified as dormant, because no operations had taken place in the two years preceding 1 May 1991. The operators also applied to the MPA for it to determine the conditions of the permission. By determination made on 22 December 1994, the MPA imposed on them conditions more stringent than those proposed in their application<sup>16</sup>.

h 17. The operators exercised their right of appeal to the Secretary of State. On 25 June 1997 he issued his decision letter in which he imposed 54 conditions on

i 11 Order for reference, para 46.

12 Hereinafter the Secretary of State.

13 Order for reference, para 50.

14 Order for reference, para 52.

15 Order for reference, para 12.

16 Order for reference, para 17.



the planning permission. He also left some issues to be decided by the MPA, such as the monitoring of noise and of blasting on the site. Those matters were approved by the MPA on 8 July 1999<sup>17</sup>. a

18. No environmental impact assessment within the meaning of Directive 85/337 was carried out prior to adoption of the decision of the Secretary of State of 25 June 1997 and that of the MPA of 8 July 1999. At that time the United Kingdom authorities took the view that the directive did not apply to the determination of new planning conditions under the 1991 Act<sup>18</sup>. However, on 11 February 1999 the House of Lords held, in *R v North Yorkshire CC, ex p Brown* [1999] 1 All ER 969, [2000] 1 AC 397, that the determination of such conditions was a grant of development consent for the purposes of art 1(2) of the directive<sup>19</sup>. As a result of that decision, United Kingdom legislation was amended in order to make the determination of new planning conditions under the 1991 Act subject to environmental impact assessment in accordance with the directive. That amendment entered into force on 15 December 2000. b  
c

### *B—The main proceedings*

19. By letter of 10 June 1999, Mrs Wells requested the Secretary of State to take action to remedy the lack of an environmental impact assessment in respect of the resumption of operations at Conygar Quarry. Mrs Wells received no reply to her request. She then brought proceedings in the High Court. d

20. Pursuant to an undertaking given to the High Court, the Secretary of State responded to the letter of 10 June 1999 by letter of 28 March 2001. He declined to revoke or modify the planning permission in question or to order discontinuance of any mineral operations. The reasons given by him for that decision included that Community law did not allow him to take action directly against the quarry operators and to remove their development rights. He also stated that the appropriate procedure would have been for Mrs Wells to contest the new planning conditions in 1997. He added that, given the time that had passed, it would run counter to the principle of legal certainty and be disproportionate to call those conditions into question. e  
f

21. Mrs Wells requested the High Court to quash that decision.

### III—THE QUESTIONS REFERRED FOR A PRELIMINARY RULING

22. The High Court ([2001] EWHC Admin 227, [2001] 14 EGCS 147) decided to stay proceedings and refer the following questions to the Court of Justice for a preliminary ruling: g

(1) Whether an approval of a new set of conditions on an existing permission granted by an [IDO] pursuant to section 22 and Schedule 2 of the [1991 Act] is a “development consent” for the purposes of the EIA [Environmental Impact Assessment] Directive. h

(2) Whether, following the approval of a new scheme of conditions on an IDO “old mining permission” under the [1991 Act], the approval of further matters required under the new scheme of conditions is itself capable of being a “development consent” for the purposes of the EIA Directive. i

<sup>17</sup> Order for reference, paras 27 and 29.

<sup>18</sup> Order for reference, para 20.

<sup>19</sup> Order for reference, footnote 6.

a (3) If the answer to (1) is “yes” but (2) is “no”, is the Member State nevertheless under a continuing duty to remedy its failure to require EIA, and if so, how?

(4) Whether (i) it is open to individual citizens to challenge the State’s failure to require EIA, or whether (ii) that may be prohibited under the limitations imposed by the Court on the doctrine of direct effect e.g. by  
b “horizontal direct effect” or by the imposition of burdens or obligations on individuals by an emanation of the State.

(5) If the answer to (4)(ii) is “yes” what are the limits of such prohibitions on direct effect in the present circumstances and what steps may the UK lawfully take consistent with the EIA Directive?

#### c IV—APPRAISAL

##### A—Preliminary observations

23. Before considering the questions referred for a preliminary ruling, it appears to me that it is necessary to make two observations. The first relates to whether the working of Conygar Quarry constitutes a project subject to prior  
d assessment of its environmental effects under Directive 85/337. As indicated above, under art 4(2) of the directive and annex II thereto projects for the extraction of construction materials are subject to prior assessment of their environmental effects only where member states consider that their characteristics so require. Accordingly, member states have a discretion as to whether such projects must be assessed<sup>20</sup>.

e 24. Here, the Secretary of State did not indicate in the decision to which the main proceedings relate that the project comprising the working of Conygar Quarry had to be excluded from the assessment procedure in question pursuant to art 4 of the directive. Nor is the significance of the effects of such a project on the environment contested by the United Kingdom government in  
f its observations submitted to the court. I will therefore proceed on the premiss, implicitly accepted by the parties and the national court, that the resumption of extraction of construction materials at Conygar Quarry is likely to have significant effects on the environment.

25. The second observation relates to the admissibility of the first two questions referred for a preliminary ruling. The Commission of the European  
g Communities calls their admissibility into question on the ground that they are not relevant for disposing of the main proceedings. It states, first, that the main proceedings relate to the Secretary of State’s refusal to revoke or modify the planning permission for Conygar Quarry, which implies that development consent has indeed been granted at some point or another. Second, those questions are posited on the assumption that identifying the precise stage at  
h which development consent has been granted is a question of Community law whereas the court stated in *Burgemeester en Wethouders van Haarlemmerliede en Spaarnwoude v Gedeputeerde Staten van Noord-Holland*<sup>21</sup>, at paras 20 and 21, that it is a question of national law.

i <sup>20</sup> Their discretion is not unlimited. In *World Wildlife Fund (WWF) v Autonome Provinz Bozen Case C-435/97* [1999] ECR I-5613, the court held that the limits of that discretion are to be found in the obligation, set out in art 2(1) of Directive 85/337, that projects likely, by virtue inter alia of their nature, size or location, to have significant effects on the environment are to be subject to an impact assessment. It also indicated that it is for the national court to assess whether, having regard to the project in question, the competent authorities exceeded their discretion by excluding the project from the assessment procedure.

<sup>21</sup> Case C-81/96 [1998] ECR I-3923.

26. I consider that those arguments are not well founded. First of all, it is settled case law that, in the context of the co-operation between the Court of Justice and the national courts provided for by art 234 EC (formerly art 177 of the EC Treaty), it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the court. The court has taken that to mean that a request from a national court may be dismissed only where it is obvious that the interpretation of Community law requested by that court has no bearing on the real situation or on the subject matter of the case<sup>22</sup>.

27. That is not so here. It is apparent from the grounds of the order for reference that the first question referred for a preliminary ruling is intended to enable it to be established whether the determination of the planning conditions for Conygar Quarry pursuant to the 1991 Act is to be regarded as a development consent within the meaning of art 1(2) of Directive 85/337. The answer to that question determines whether the directive is applicable in the main proceedings and, consequently, whether the competent authorities in the United Kingdom were required to carry out a prior assessment of the environmental effects.

28. The second question submitted for a preliminary ruling refers to the fact that the planning conditions for Conygar Quarry were determined in two stages, first in the Secretary of State's decision of 25 June 1997 and then when, on 8 July 1999, the MPA approved the matters which had been reserved for subsequent approval. By this question, the national court seeks to ascertain which of those decisions constitutes the development consent envisaged by art 1(2) of the directive. The answer to this question determines whether, prior to the second decision, the competent authorities in the United Kingdom should have carried out an environmental impact assessment.

29. Both the questions at issue thus appear to me to be entirely relevant for the purpose of disposing of the main proceedings.

30. As to the argument that the concept of development consent as defined in Directive 85/337 has already been interpreted by the court to be a matter for national law, it is difficult to see how that argument could result in the two questions being inadmissible. Those questions concern the interpretation of a provision of Community law and, as we have seen, they are relevant for the purpose of disposing of the main proceedings. Accordingly, the interpretation previously provided by the court could possibly result in the questions at issue being answered under the simplified procedure laid down by art 104(3) of the Rules of Procedure, but not in their being dismissed as inadmissible.

31. For those reasons, I suggest that the court should find the first two questions referred for a preliminary ruling to be admissible and answer them.

*B—The first question referred for a preliminary ruling*

32. By its first question, the national court essentially asks whether art 1(2) of Directive 85/337 is to be interpreted as meaning that the determination of planning conditions attaching to an old mining permission constitutes a development consent within the meaning of that provision where the old

<sup>22</sup> For a recent application, see *Cofidis SA v Jean-Louis Fredout* Case C-473/00 [2002] ECR I-10875 (para 20 and the case law cited).



a mining permission was deprived of effect in 1991 and operations cannot resume until those planning conditions have been finally determined.

33. It is to be remembered that the term 'development consent' is defined in art 1(2) of the directive as 'the decision of the competent authority or authorities which entitles the developer to proceed with the project' in question.

b 34. The Commission's primary submission is that that term is purely national in nature. It bases that view on paras 20 and 21 of the judgment in the *Gedeputeerde Staten van Noord-Holland* case and on the wording of the definition of the term. The United Kingdom government and Mrs Wells do not agree with that view. Neither do I.

c 35. It is admittedly apparent from the wording of the definition of development consent that it is the national law of each member state that establishes the moment from which the developer is granted the right to proceed with the project in question. It is thus national law that determines the procedural rules and the conditions for obtaining development consent. However, that renvoi to national law cannot, in my view, be interpreted as requiring that the scope of 'development consent' also be left to the discretion of each member state. Directive 85/337 is designed to remove the disparities between the laws in force in the various member states with regard to the assessment of the environmental effects of public and private projects<sup>23</sup>. The directive also explains that it is necessary to harmonise 'the principles of the assessment of environmental effects ... in particular with reference to the projects which should be subject to assessment'<sup>24</sup>. It would therefore be clearly contrary to the objectives of the directive and to the principle of uniform application of Community law to accept that the member states may, by defining the concept of development consent very restrictively, take outside the directive projects likely to have significant effects on the environment.

f 36. This analysis does not appear to me to be inconsistent with the view taken by the court in the *Gedeputeerde Staten van Noord-Holland* case. In that case, the court was asked whether Directive 85/337 is to be interpreted as permitting member states to waive the obligations concerning environmental impact assessments in the case of projects listed in annex I where (i) the projects have already been the subject of a consent granted prior to 3 July 1988, the date by which the directive was to have been transposed into national law; g (ii) the consent was not preceded by an environmental assessment in accordance with the requirements of the directive; and (iii) a fresh consent procedure was formally initiated after 3 July 1988.

h 37. As the court mentioned in para 21 of the judgment, the national court considered it established that the project at issue had been the subject of a new consent for the purposes of art 1(2) of the directive. It was in that context that, in para 20, the court noted as a preliminary point that 'it is for the national court to determine in each case and on the basis of the applicable national law whether approval of the development plan constitutes consent within the meaning of Article 1(2)'. That statement does not in my view preclude the concept of consent from being characterised as autonomous. In other words, it i is for the national court to determine, on the basis of the applicable national

23 Second recital in the preamble.

24 Seventh recital in the preamble.

law and taking account of the criteria supplied by the court, whether a development consent has been issued for the purposes of art 1(2) of the directive. a

38. Moreover, the court has already provided criteria for interpreting the concept of development consent, thereby confirming indirectly that it must have a Community meaning. Thus, in the WWF case the court found it necessary to specify the conditions that had to be met in order to fall within the derogation provided for in art 1(5) of the directive, according to which the directive does not 'apply to projects the details of which are adopted by a specific act of national legislation'. The court held, in particular, that the legislative act in question must display the same characteristics as a development consent as defined by art 1(2) of the directive. It specified that the act must lay down the project in detail, that is to say in a sufficiently precise and detailed manner so as to include, 'like development consent, following their consideration by the legislature, all the elements of the project relevant to the environmental impact assessment'<sup>25</sup>. b  
c

39. The term 'development consent' in Directive 85/337 must therefore also have an autonomous dimension. d

40. So far as concerns the substance of the answer to be given to the first question submitted for a preliminary ruling, there are two opposing propositions. The United Kingdom submits that the approval of new conditions attaching to an existing consent granted under an IDO does not constitute a development consent for the purposes of the directive. It contends that the situation in the present case may be equated to that of 'pipeline' projects, that is to say projects in respect of which the consent procedure was initiated before 3 July 1988, the date by which the directive was to have been transposed into national law, and was still in progress on that date. It points out that the court has accepted that the directive does not apply to such projects. e

41. Mrs Wells and the Commission argue that the situation in the present case cannot be equated to that of 'pipeline' projects and that a new development consent within the meaning of Directive 85/337 has indeed been issued. I agree with that analysis. f

42. The case law relating to 'pipeline' projects emerged in the court's judgment in *European Commission v Germany*<sup>26</sup> and was then set out in more precise terms in the *Gedeputeerde Staten van Noord-Holland* case. Under that case law, the principle stated in art 2(1) of the directive, according to which projects likely to have significant effects on the environment are to be subject to environmental assessment, does not apply to projects in respect of which the consent procedure was initiated before 3 July 1988 and was still in progress on that date. That solution was adopted because the directive does not lay down transitional provisions for such projects. In addition, the directive is primarily designed to cover large-scale projects which will most often require a long time to complete. The court held that it would therefore not be appropriate for procedures which were already complex at national level and which were formally initiated prior to 3 July 1988 to be made more cumbersome and time-consuming by reason of the specific requirements of the directive, and for situations already established to be affected<sup>27</sup>. g  
h  
i

<sup>25</sup> Paragraph 59.

<sup>26</sup> Case C-431/92 [1995] ECR I-2189 (para 32).

<sup>27</sup> See the *Gedeputeerde Staten van Noord-Holland* case (paras 23, 24), cited at footnote 21, above.

a 43. In the present case, the resumption of the working of Conygar Quarry following the decisions of the Secretary of State and the MPA in 1997 and 1999 cannot be regarded as a project in respect of which the consent procedure had been initiated before 3 July 1988 and was still in progress on that date. It is clear from the order for reference that the operators of Conygar Quarry obtained an actual planning permission in 1947, under an IDO, and that that permission  
b was still valid on 3 July 1988. However, the permission was deprived of effect pursuant to the 1991 Act because, under that Act, the fact that there had been no operations to any substantial extent in the two years preceding 1 May 1991 meant that there could be no resumption of operations until the new conditions governing them had been finally determined<sup>28</sup>.

c 44. Also, it is apparent from the facts and law at issue in the main proceedings that after 3 July 1988 the operators of Conygar Quarry engaged in the necessary procedures with the competent national authorities in order to be permitted once again to extract materials from that site. It is also apparent that it was the decisions made by the Secretary of State on 25 June 1997 and by the MPA on 8 July 1999 that allowed them to resume operations and that those  
d decisions set out in a precise and detailed manner the conditions under which the operations could be carried out. Furthermore, those decisions could be challenged. I deduce therefrom that the operators of Conygar Quarry did obtain a fresh decision from the competent authorities entitling them to proceed with their project for the extraction of materials, as envisaged by the definition of development consent set out in art 1(2) of Directive 85/337<sup>29</sup>.

e 45. This analysis appears to me to be consistent with the objectives of the directive which, according to the sixth recital in its preamble and as provided in art 2, seeks to subject to prior assessment any project likely to have significant effects on the environment. The analysis is also consonant with the court's case law seeking to give the directive a broad scope. Thus, in *Aannemersbedrijf PK Kraaijeveld BV v Gedeputeerde Staten van Zuid-Holland*<sup>30</sup> the court held that the  
f mere fact that Directive 85/337 does not expressly refer to modifications to projects included in annex II, as opposed to modifications to projects included in annex I, does not justify the conclusion that they are not covered by the directive. It stated that the concept of modifications to projects is covered by the directive, even in relation to projects included in annex II, on the ground  
g that the directive's purpose would be undermined if modifications to development projects were so construed as to enable certain works to escape the requirement of an impact assessment although, by reason of their nature, size or location, such works were likely to have significant effects on the environment<sup>31</sup>.

h 46. In view of all of the foregoing, I suggest that the court's answer to the first question referred for a preliminary ruling should be that art 1(2) of Directive 85/337 is to be interpreted as meaning that the determination of planning conditions attaching to an old mining permission constitutes a development consent within the meaning of that provision where the old mining permission was deprived of effect in 1991 and operations cannot resume until those planning conditions have been finally determined.  
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28 See para 12 of this opinion.

29 That is also the conclusion reached by the House of Lords in *Ex parte Brown*, cited above.

30 Case C-72/95 [1997] All ER (EC) 134, [1996] ECR I-5403.

31 See para 39.



*C—The second question referred for a preliminary ruling*

47. In its second question, the national court seeks to ascertain, should the first question be answered in the affirmative, whether, if the planning conditions attaching to an old mining permission have been imposed in two stages, determination of the detailed conditions at the second stage is capable of constituting development consent within the meaning of art 1(2) of Directive 85/337. a

48. The national court states that the problem arises because, in accordance with domestic law, the principle of permitting operations to resume was established when the principal conditions were determined by the Secretary of State on 25 June 1997. This means that the determination by the MPA of the matters reserved for its approval could not extend beyond the parameters established by the Secretary of State. However, operations were unable to resume without the MPA's approval on 8 July 1999 of those matters<sup>32</sup>. b

49. It is apparent from the court's case law that the fact that the working of Conygar Quarry could not resume without the MPA's determining the matters reserved for its approval is not the decisive criterion for deciding whether or not the determination of those matters constitutes development consent within the meaning of Directive 85/337. The decisive factor, where the administrative procedure applicable to the implementation of a project covered by the directive involves several stages, concerns when, in the course of that procedure, the objectives of the directive may be regarded as having been achieved. c

50. In *Luxembourg v Linster*<sup>33</sup>, the court was asked to interpret the concept of a specific act of national legislation in art 1(5) of Directive 85/337, the effects of which are comparable to those of a development consent within the meaning of the directive. The case involved deciding whether the term specific act of national legislation covers a law, adopted by a parliament after public debate, which authorises construction of a motorway but without laying down its route. The court ruled that that term covers such a law— d

'where the legislative process has enabled the objectives pursued by Directive 85/337, including that of supplying information, to be achieved, and the information available to the parliament at the time when the details of the project were adopted was equivalent to that which would have been submitted to the competent authority in an ordinary procedure for granting consent for a project.'<sup>34</sup> e

The court considered that, even if the route of the planned motorway was not laid down by the legislative act in question, it was possible, for example where several alternative routes were studied in detail on the basis of information supplied by the developer and by the authorities and members of the public concerned, for those alternatives to have been recognised by the legislature as having an equivalent environmental impact<sup>35</sup>. f

51. In addition, according to the first recital in its preamble, Directive 85/337 has the objective that the competent authority should take account of the environmental impact of the project in question at the earliest possible stage in the decision-making process. g

<sup>32</sup> Order for reference, para 8.

<sup>33</sup> Case C-287/98 [2000] ECR I-6917.

<sup>34</sup> Paragraph 3 of the operative part.

<sup>35</sup> See *Linster's* case (para 58).

a 52. I deduce from those factors that where, as in the present case, the consent procedure is in two stages, one involving determination of the principal planning conditions and the other involving determination of some detailed conditions, the environmental impact assessment is to take place at the first stage. In light of the view taken by the court in *Linster's* case, cited above, it is also possible to accept that development consent within the meaning of art 1(2) of Directive 85/337 is granted on determination of the principal conditions if the directive's objectives have been achieved. That implies that all the elements of the project in question which are likely to have environmental effects must have been subject to prior assessment under the conditions laid down by the directive<sup>36</sup>.

c 53. It is to be remembered in this regard that, according to the sixth recital in the preamble to the directive, that assessment must be conducted on the basis of the information supplied by the developer and the opinions of the authorities and people concerned. Under art 5(2) of the directive and Annex III thereto, the minimum information to be supplied by the developer is to consist of a description of the project comprising information on the site, design and size of the project, a description of the measures envisaged in order to avoid, reduce and, if possible, remedy significant adverse effects, and the data required to identify and assess the main effects which the project is likely to have on the environment<sup>37</sup>. It is also apparent from arts 6 and 8 that that information must be made available to the public concerned, that the public concerned must have been given the opportunity to express an opinion and that all those matters must be taken into account by the competent authority in the consent procedure for the project.

f 54. It is therefore only if the environmental impact of the conditions remaining to be determined has already been assessed by the competent authority, in accordance with the above-mentioned detailed rules, in the course of adoption of the decision determining the principal conditions that that decision may be regarded as the development consent envisaged by art 1(2) of Directive 85/337. If that is not the case, the assessment will have to be supplemented in order to settle the remaining conditions and it is the decision determining those conditions that will have to be regarded as the development consent within the meaning of the directive.

g 55. It is for national courts to decide, in the particular circumstances of the case, at what stage of the administrative procedure the objectives of Directive 85/337 were achieved<sup>38</sup>. In the present case, as no environmental impact assessment was carried out, it is difficult to see how the national court could take the view that the objectives of the directive were achieved on the adoption by the Secretary of State of the decision of 25 June 1997. Consequently, if the conditions determined by the MPA in its decision of 8 July 1999 were likely to have significant effects on the environment<sup>39</sup>, the MPA, pursuant to the directive, was required to have a prior assessment of those effects carried out. It will be for the national court to appraise whether the conditions determined by the MPA on 8 July 1999 were likely to have significant effects on the environment.

i 36 See, to this effect, the *WWF* case (para 60), cited in footnote 20, above.

37 See *Linster's* case (para 55), cited in footnote 33, above.

38 See *Linster's* case (para 58).

39 It is indicated in the order for reference (para 27) that the operators of Conygar Quarry had to submit to the MPA, inter alia, proposed improvements to access, a detailed scheme of working, a scheme for monitoring of blasting and a scheme of noise monitoring.

56. In view of the foregoing, I suggest that the court's answer to the second question referred for a preliminary ruling should be that art 1(2) of Directive 85/337 is to be interpreted as meaning that, if the planning conditions attaching to an old mining permission have been imposed in two stages, determination of the detailed conditions at the second stage constitutes development consent within the meaning of that provision where those latter conditions are likely to have effects on the environment and those effects were not assessed by the competent authority in accordance with the detailed rules prescribed by the directive in the course of adoption of the decision determining the principal conditions.

*D—The third question referred for a preliminary ruling*

57. The national court has asked the third question referred for a preliminary ruling only in the event that the first question is answered in the affirmative and the second question is answered in the negative. In view of the answer which I propose to give to the second question, I consider that there is no need to answer the third question.

*E—The fourth question referred for a preliminary ruling*

58. By this question, the national court asks, in essence, whether arts 1(2) and 2(1) of Directive 85/337 are to be interpreted as meaning that, where their provisions have not been complied with, individuals may rely on them before the court of a member state against national authorities or whether the limits imposed by the court on the direct effect of directives preclude decisions incompatible with those provisions from being set aside or modified.

59. As is apparent from the order for reference, this question arises because the Secretary of State contends that adoption of the measures sought by the claimant, such as revocation of the planning permission or modification of the conditions governing it, would oblige the United Kingdom government to take measures having adverse consequences for the operators of Conygar Quarry. According to the Secretary of State, that would run counter to the limits laid down by the court on the direct effect of directives. He points out that the court stated in *Marshall v Southampton and South West Hampshire Area Health Authority (Teaching)*<sup>40</sup> that a directive may not of itself impose obligations on an individual. He also observes that it held in *Criminal proceedings against Kolpinghuis Nijmegen BV*<sup>41</sup> that a national authority may not rely, as against an individual, upon a provision of a directive whose necessary implementation in national law has not yet taken place.

60. Like the claimant and the Commission, I consider that the Secretary of State's line of argument cannot be followed and that the first part of the fourth question should be answered in the affirmative. I found that assessment on the following matters.

61. It is settled case law that where a member state has failed to implement a directive by the end of the period prescribed or to implement it correctly, the provisions of the directive which, so far as their subject matter is concerned, are unconditional and sufficiently precise may be relied upon by individuals against that member state before national courts<sup>42</sup>. It is also settled case law

<sup>40</sup> Case 152/84 [1986] 2 All ER 584, [1986] ECR 723.

<sup>41</sup> Case 80/86 [1987] ECR 3969.

<sup>42</sup> See *Becker v Finanzamt Münster-Innenstadt* Case 8/81 [1982] ECR 53 and *Kampelmann v Landschaftsverband Westfalen-Lippe, Stadtwerke Witten GmbH v Schade, Haseley v Stadtwerke Altena GmbH*



a that where the directive in question confers a genuine discretion on the member states, individuals may request the national courts to review whether the member states have exceeded it. That last possibility has been recognised by the court, in particular, in the context of interpretation of Directive 85/337, in its judgments in the *Kraaijeveld* case, the *WWF* case and *Linster's* case.

b 62. In the present case, it is not in dispute that Mrs Wells is entitled to invoke the provisions of Directive 85/337. Mrs Wells' ability to do so may be deduced from the above-mentioned judgments in that she, like the applicants in the cases which gave rise to those judgments, is asking the national court to review whether a measure of domestic law is consistent with the directive, a review which is capable of resulting in that measure being declared invalid. Such an ability could also follow, in my view, from the fact that the provisions of the directive requiring the member states to make consent for projects likely to have significant effects on the environment subject to a prior assessment of those effects in the context of which the persons concerned must have the opportunity to express their opinion are sufficiently precise.

c 63. The corollary of that entitlement conferred on individuals is the duty of the member states, laid down by art 10 EC (formerly art 5 of the EC Treaty), to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations on them under Community law. Among these is the obligation to nullify the unlawful consequences of a breach of Community law<sup>43</sup>. That law is binding on all the authorities of the member states, including judicial authorities. It has been consistently held that the national courts, whose task it is to apply the provisions of Community law in areas within their jurisdiction, must ensure that those rules take full effect and must protect the rights which they confer on individuals<sup>44</sup>. The national court must therefore set aside any measure of national law preventing Community rules from having full force and effect<sup>45</sup>. That obligation is owed in light of the principles of direct effect and of precedence of Community law<sup>46</sup>.

f 64. It follows that, where the provisions of Directive 85/337 have not been complied with, the national courts and national administrative authorities have the task, as the court held in the *Kraaijeveld* case and the *WWF* case, of taking all the measures, whether general or particular, necessary in order for an environmental impact assessment to be carried out in respect of the project in question.

g 65. In my view, the limits on the direct effect of directives imposed by the court's case law cannot, in any event, prevent that obligation from being performed. It is appropriate to recall those limits.

h 66. In *Marshall's* case the court indicated that a directive's binding nature, apparent from art 249 EC (formerly art 189 of the EC Treaty), exists only in relation to each member state to which the directive is addressed. It deduced therefrom that a directive may not of itself impose obligations on an individual and that a provision of 'a directive may not be relied upon as such against such

i Joined cases C-253-258/96 [1998] IRLR 333, [1997] ECR I-6907 (para 37). For a recent example, see *Criminal proceedings against Steffensen* Case C-276/01 [2003] ECR I-3735 (para 38).

43 See *Francovich v Italy* Joined cases C-6/90 and C-9/90 [1991] ECR I-5357 (para 36).

44 See *Amministrazione delle Finanze dello Stato v Simmenthal SpA* Case 106/77 [1978] ECR 629 (para 16) and *Francovich's* case (para 32).

45 See the *Simmenthal* case (para 22) and *Factortame Ltd v Secretary of State for Transport (No 2)* Case C-213/89 [1991] 1 All ER 70, [1990] ECR I-2433 (para 20).

46 See the *Simmenthal* case (paras 14-18) and the *Factortame* case (para 18).

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a person<sup>47</sup>. The case law has drawn two inferences from this statement that a directive can have only 'ascending' vertical effect. First, directives do not have 'horizontal' direct effect, that is to say they cannot be invoked as such by an individual in proceedings against another individual. According to the court, the effect of extending the case law on the possibility of relying on directives against public authorities to the sphere of relations between individuals 'would be to recognise a power in the Community to enact obligations for individuals with immediate effect, whereas it has competence to do so only where it is empowered to adopt regulations'<sup>48</sup>. Second, directives cannot have 'descending' vertical direct effect, which means that a national authority may not rely, as against an individual, upon a provision of a directive whose implementation in national law has not yet taken place<sup>49</sup>.

67. In my view, neither of those principles in the case law constitutes an obstacle to the adoption by the competent national authorities of the measures sought by Mrs Wells such as revocation of the planning permission or modification of the conditions established in 1997 and 1999.

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68. First, the principle that directives do not have horizontal direct effect does not amount to an obstacle because the main proceedings are not between Mrs Wells and the operators of Conygar Quarry but between her and a state entity<sup>50</sup>. A classic case of 'vertical' direct effect of directives is therefore involved. In such a case, it is perfectly conceivable that the judicial decision which, following the judgment interpreting Community law pronounced by the Court of Justice, must be delivered by the court having jurisdiction, and then any decision adopted pursuant to the national judgment by the competent administrative authorities, will have repercussions on the rights of individuals. In light of the court's case law, even certainty that that will be so is no justification for denying the applicant the right to rely on provisions of a directive which has not been transposed into national law or has been transposed incorrectly. Thus, in *Fratelli Costanzo SpA v Comune di Milano*<sup>51</sup> the court accepted the right of a tenderer for a public works contract to plead the provisions of a directive in proceedings with a municipality challenging the latter's decision to award the contract to a competitor<sup>52</sup>. Likewise, in *R v*

47 See para 48.

48 See *Faccini Dori v Recreb Srl* Case C-91/92 [1995] All ER (EC) 1, [1994] ECR I-3325 (para 24). See also *El Corte Inglés SA v Blázquez Rivero* Case C-192/94 [1996] ECR I-1281 (para 20) and *Collino v Telecom Italia SpA* Case C-343/98 [2001] All ER (EC) 405, [2000] ECR I-6659 (para 20).

49 See *Pretore di Salò v Persons Unknown* Case 14/86 [1987] ECR 2545 (para 19) and the *Kolpinghuis Nijmegen* case (para 10), cited in footnote 41, above.

50 The court has extended the scope of the 'vertical' direct effect of directives by holding that their provisions are enforceable not only against the member state as such, but also against organisations or bodies which are subject to the authority or control of the state or have special powers beyond those which result from the normal rules applicable to relations between individuals, such as local or regional authorities or other bodies which, irrespective of their legal form, have been given responsibility, by the public authorities and under their supervision, for providing a public service (see *Kampelmann's* case (para 46), cited in footnote 42, above).

51 Case 103/88 [1989] ECR 1839.

52 The national court asked the Court of Justice whether administrative authorities, including municipal authorities, are under the same obligation as a national court to apply the provisions of the directive in question and to refrain from applying provisions of national law which conflict with them. Very logically, the court held that 'it would ... be contradictory to rule that an individual may rely upon the provisions of a directive ... in proceedings ... seeking an order against the administrative authorities, and yet to hold that those authorities are under no obligation to apply the provisions of the directive and refrain from applying provisions of national law which conflict with them' (para 31).

a *Medicines Control Agency, ex p Smith & Nephew Pharmaceuticals Ltd*<sup>53</sup> it considered that a business could plead the provisions of a directive in order to challenge the validity of a marketing authorisation for a medicinal product granted to a competitor.

b 69. Nor, second, can the principle that directives do not have descending vertical direct effect constitute an obstacle to adoption of the measures sought. It is to be remembered that this principle is intended to prevent a member state from relying on a directive's provisions when, contrary to its obligations pursuant to the directive itself and art 10 EC, it has not taken the measures necessary for transposition of the directive into national law. The principle is thus intended to prevent the state in question from deriving an advantage from its own failure to act<sup>54</sup>. However, it cannot constitute an obstacle to performance, by the national authorities, of their obligation to nullify the consequences of breach of a directive's provisions, first, by setting aside the national measures incompatible with those provisions and, second, by taking the measures necessary in order for the requirements contained therein to be implemented. In such a case the state does not impose obligations on an individual to its own advantage on the basis of an untransposed directive, but adopts all the measures necessary for implementing that directive.

c 70. Acceptance of the converse proposition would mean that a member state which has not transposed a directive into national law within the prescribed period or has transposed it incorrectly would then be precluded from making good its failure wherever implementation of Community law would have the effect of imposing obligations on individuals or compromising their rights. The consequence of such an interpretation of the principle that directives do not have descending vertical direct effect would, without a doubt, be to undermine the principle of primacy of Community law enshrined by the court, in its fundamental judgment in *Costa v ENEL*<sup>55</sup>, as a condition of the Community's very existence.

f 71. It follows that the limits laid down by the court on the direct effect of directives do not constitute obstacles preventing Mrs Wells from relying on the provisions of Directive 85/337 before national courts or the state judicial and administrative authorities from taking all appropriate measures to nullify the unlawful consequences of the breach of that directive and to ensure that its requirements are observed so far as concerns the working of Conygar Quarry. In the absence of Community rules concerning the conditions under which that obligation is to be performed, it will be for those authorities to fulfil it in accordance with the rules of national law, within the limits, resulting from the principles of equivalence and effectiveness, which circumscribe the procedural autonomy of the national systems<sup>56</sup>.

g 72. In view of the foregoing, I suggest that the court's answer to the fourth question referred for a preliminary ruling should be that arts 1(2) and 2(1) of

53 Case C-201/94 (1996) 34 BMLR 141, [1996] ECR I-5819.

i 54 The court has inferred therefrom, in particular, that a directive cannot, of itself and independently of a national law adopted by a member state for its implementation, have the effect of determining or aggravating the liability in criminal law of persons who act in contravention of the provisions of that directive (see the *Pretore di Salò* case (para 20), cited in footnote 49, above, the *Kolpinghuis Nijmegen* case (para 13), cited in footnote 41, above, and *Criminal proceedings against Arcaro* Case C-168/95 [1997] All ER (EC) 82, [1996] ECR I-4705 (para 37)).

55 Case 6/64 [1964] ECR 585 at 594.

56 See *Preston v Wolverhampton Healthcare NHS Trust*, *Fletcher v Midland Bank plc* Case C-78/98 [2000] All ER (EC) 714, [2000] ECR I-3201 (para 31).



Directive 85/337 are to be interpreted as meaning that, where their provisions have not been complied with, individuals may rely on them before the court of a member state against the national authorities and the limits laid down by the court on the direct effect of directives do not preclude decisions incompatible with those provisions from being set aside or modified. a

*F—The fifth question referred for a preliminary ruling* b

73. The national court has asked this question only if the answer to the preceding question were to be that the limits imposed by the court on the direct effect of directives preclude decisions incompatible with the provisions of Directive 85/337 from being set aside or modified. In view of the answer which I have proposed that the court give to that question, I consider it unnecessary to answer the fifth question. c

**V—CONCLUSION**

74. In view of the foregoing considerations, I propose that the Court of Justice should answer as follows the questions asked by the national court: d

(1) Article 1(2) of Council Directive (EEC) 85/337 (on the assessment of the effects of certain public and private projects on the environment) is to be interpreted as meaning that the determination of planning conditions attaching to an old mining permission constitutes a development consent within the meaning of that provision where the old mining permission was deprived of effect in 1991 and operations cannot resume until those planning conditions have been finally determined. e

(2) If the planning conditions have been imposed in two stages, determination of the detailed conditions at the second stage constitutes development consent within the meaning of art 1(2) of Directive 85/337 where those latter conditions are likely to have significant effects on the environment and those effects were not assessed by the competent authority in accordance with the detailed rules prescribed by the directive in the course of adoption of the decision determining the principal conditions. f

(3) Articles 1(2) and 2(1) of Directive 85/337 are to be interpreted as meaning that, where their provisions have not been complied with, individuals may rely on them before the court of a member state against national authorities and the limits laid down by the court on the direct effect of directives do not preclude decisions incompatible with those provisions from being set aside or modified. g

7 January 2004. **The COURT OF JUSTICE (Fifth Chamber)** delivered the following judgment. h

1. By order of 12 February 2002, received at the Court of Justice of the European Communities on 6 May 2002, the High Court of Justice of England and Wales, Queen's Bench Division (Administrative Court), referred to the Court of Justice for a preliminary ruling under art 234 EC (formerly art 177 of the EC Treaty) five questions on the interpretation of Council Directive (EEC) 85/337 (on the assessment of the effects of certain public and private projects on the environment) (OJ 1985 L175 p 40). i

2. Those questions were raised in proceedings between Mrs Wells and the Secretary of State for Transport, Local Government and the Regions (hereinafter the Secretary of State) concerning the grant of a new consent for

- a mining operations at Conygar Quarry without an environmental impact assessment having first been carried out.

#### LEGAL CONTEXT

##### *Community legislation*

- b 3. As stated in the fifth recital in its preamble, Directive 85/337 is intended to introduce general principles for the assessment of environmental effects with a view to supplementing and co-ordinating development consent procedures for public and private projects likely to have a major effect on the environment.

4. Article 1(2) of the directive defines 'development consent' as 'the decision of the competent authority or authorities which entitles the developer to proceed with the project'.

- c 5. Article 2(1) of the directive states:

'Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue *inter alia*, of their nature, size or location are made subject to an assessment with regard to their effects.

- d These projects are defined in Article 4.'

6. In Article 4, the directive divides projects into two wide categories: those likely by their nature to give rise to significant effects on the environment and those which will not necessarily do so in all cases. Article 4(2) thus provides:

- e 'Projects of the classes listed in Annex II shall be made subject to an assessment, in accordance with Articles 5 to 10, where Member States consider that their characteristics so require.

To this end Member States may *inter alia* specify certain types of projects as being subject to an assessment or may establish the criteria and/or thresholds necessary to determine which of the projects of the classes listed in Annex II are to be subject to an assessment in accordance with Articles 5 to 10.'

- f 7. Point 2(c) of Annex II to the directive refers to projects for 'extraction of minerals other than metalliferous and energy-producing minerals, such as marble, sand, gravel, shale, salt, phosphates and potash'.

- g *National legislation*

8. Prior to the Town and Country Planning Act 1947, the Town and Country Planning (General Interim Development) Order 1946 empowered the competent authorities to grant, by interim development orders, consents for mineral extraction (old mining permissions) in order to respond to the need for construction materials which arose during the period immediately following the 1939-45 war.

- h 9. Since then, the Town and Country Planning Act, as enacted in 1947 and in its subsequent versions, has constituted the principal legal instrument relating to land planning in the United Kingdom.

- i 10. The Act lays down general rules concerning both the grant of planning permission and the modification or revocation of such permission.

11. Thus, under ss 97 and 100 of the Town and Country Planning Act 1990, the competent authorities have the power to revoke or modify any permission on planning grounds. The power to revoke a permission may be exercised at any time before the operations authorised have been completed.

12. By virtue of paras 1 and 11 of Sch 9 to the Town and Country Planning Act 1990, the competent authorities may by order require discontinuance of the use of land for the winning and working of minerals or impose certain conditions on the continuance of such use. a

13. Section 22 of the Planning and Compensation Act 1991 lays down a special set of rules for old mining permissions.

14. Section 22(3) of the 1991 Act provides that if no development has, at any time in the period of two years ending on 1 May 1991, been carried out to any substantial extent, operations may not resume until 'the conditions to which the [old mining] permission is to be subject' have been determined and registered in accordance with s 22(2). On the other hand, if no application for registration is made before 25 March 1992, the old mining permission will cease to have effect (s 22(4) of the Act and para 1(3) of Sch 2 thereto). b  
c

15. Schedule 2 to the 1991 Act describes in detail the procedures for determining the registration conditions.

16. Under paras 1 and 2 of Sch 2 to the 1991 Act, applications for registration and for determination of planning conditions are to be made to the competent mineral planning authority (hereinafter MPA). d

17. If the conditions determined by the MPA differ from those set out in the application, the applicant may appeal to the Secretary of State (para 5(2) of Sch 2 to the 1991 Act).

18. In accordance with s 22(7) of the 1991 Act, the provisions relating to old mining permissions are to have effect as if they were included in the 1990 Act. That presumption has the effect of integrating the provisions relating to old mining permissions into the general land use planning regime, in so far as no specific provision was adopted in the 1991 Act. e

19. Under the Town and Country Planning (Assessment of Environmental Effects) Regulations 1988, SI 1988/1199, mining permissions granted pursuant to the 1990 Act are subject to environmental impact assessment in accordance with Directive 85/337. The regime prescribed in s 22 of the 1991 Act for old mining permissions was not, on the other hand, considered to be subject to such an environmental impact assessment procedure. f

#### THE MAIN PROCEEDINGS AND THE QUESTIONS REFERRED FOR A PRELIMINARY RULING

20. In 1947 an old mining permission was granted for Conygar Quarry by interim development order under the 1946 order. g

21. Conygar Quarry is divided into two sections, of slightly more than 7.5 hectares each, separated by a road on which Mrs Wells' house is situated. Mrs Wells bought her house in 1984, that is to say 37 years after the permission had been granted, but at a time when the quarry had long since been dormant. However, in June 1991 operations recommenced for a short period. h

22. The site is recognised to be environmentally extremely sensitive. The area in or adjacent to which the quarry lies is subject to several designations of nature and environmental conservation importance.

23. At the beginning of 1991, the owners of Conygar Quarry applied to the competent MPA for registration of the old mining permission under the 1991 Act. i

24. Registration was granted by a decision of 24 August 1992, which stated that no development could lawfully be carried out unless and until an application for the determination of new planning conditions had been made to the MPA and finally determined (the registration decision).



a 25. The owners of Conygar Quarry therefore applied to the competent MPA for determination of new planning conditions.

26. After the MPA, by decision of 22 December 1994, had imposed more stringent conditions than those submitted by the owners of Conygar Quarry, the latter exercised their right of appeal to the Secretary of State.

b 27. By decision of 25 June 1997 (hereinafter, together with the decision of 22 December 1994, the decision determining new conditions), the Secretary of State imposed 54 planning conditions, leaving some matters to be decided by the competent MPA.

28. Those matters were approved by the competent MPA by decision of 8 July 1999 (hereinafter the decision approving matters reserved by the new conditions).

c 29. Neither the Secretary of State nor the competent MPA examined whether it was necessary to carry out an environmental impact assessment pursuant to Directive 85/337. At no time was a formal environmental statement considered.

d 30. By letter of 10 June 1999, Mrs Wells requested the Secretary of State to take appropriate action, namely revocation or modification of the planning permission, to remedy the lack of an environmental impact assessment in the consent procedure. Since she received no reply to her request, she brought proceedings before the High Court of Justice.

e 31. Pursuant to an undertaking given to the High Court at the first hearing, the Secretary of State, by letter of 28 March 2001, provided a reasoned response to Mrs Wells' letter, in which he declined to revoke or modify the planning permission. Mrs Wells then amended her initial application to include a challenge to the decision contained in the letter of 28 March 2001.

f 32. Since the High Court of Justice of England and Wales, Queen's Bench Division (Administrative Court) ([2001] EWHC Admin 227, [2001] 14 EGCS 147), considered that interpretation of Community law was needed in the case before it, it decided to stay proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

g '(1) Whether an approval of a new set of conditions on an existing permission granted by an Interim Development Order ("old mining permission") pursuant to section 22 and Schedule 2 of the Planning and Compensation Act 1991 is a "development consent" for the purposes of the EIA [Environmental Impact Assessment] Directive.

h (2) Whether, following the approval of a new scheme of conditions on an IDO "old mining permission" under the Planning and Compensation Act 1991, the approval of further matters required under the new scheme of conditions is itself capable of being a "development consent" for the purposes of the EIA Directive.

(3) If the answer to (1) is "yes" but (2) is "no", is the Member State nevertheless under a continuing duty to remedy its failure to require EIA, and if so, how?

i (4) Whether (i) it is open to individual citizens to challenge the State's failure to require EIA, or whether (ii) that may be prohibited under the limitations imposed by the Court on the doctrine of direct effect e.g. by "horizontal direct effect" or by the imposition of burdens or obligations on individuals by an emanation of the State.

(5) If the answer to (4)(ii) is “yes” what are the limits of such prohibitions on direct effect in the present circumstances and what steps may the UK lawfully take consistent with the EIA Directive?’

CONSIDERATION OF THE QUESTIONS REFERRED FOR A PRELIMINARY RULING  
*The first and second questions: the obligation to carry out an environmental impact assessment*

33. By its first two questions, which it is appropriate to consider together, the referring court essentially asks whether art 2(1) of Directive 85/337, read in conjunction with art 4(2) thereof, is to be interpreted as meaning that, in the context of applying provisions such as s 22 of the 1991 Act and Sch 2 to that Act, the decisions adopted by the competent authorities, whose effect is to permit the resumption of mining operations, involve a ‘development consent’ within the meaning of art 1(2) of that directive, so that the competent authorities are obliged, where appropriate, to carry out an assessment of the environmental effects of such operations.

#### *Classification as a ‘development consent’*

##### —Admissibility

34. While recognising that Community law favours giving an autonomous interpretation to concepts used in Community measures, the Commission of the European Communities contends that in *Burgemeester en Wethouders van Haarlemmerliede en Spaarnwoude v Gedeputeerde Staten van Noord-Holland* Case C-81/96 [1998] ECR I-3923 the court held that the question of when ‘development consent’ is granted is a question of national law. In the Commission’s submission, the court did not resile from that position in *World Wildlife Fund (WWF) v Autonome Provinz Bozen* Case C-435/97 [1999] ECR I-5613 and *Luxembourg v Linster* Case C-287/98 [2000] ECR I-6917. The question whether certain procedural measures in national law are development consents for the purpose of Directive 85/337 is therefore inadmissible.

35. As to that, a question referred by a national court for a preliminary ruling is inadmissible only if it is quite obvious that the question does not concern the interpretation of Community law or that it is hypothetical (see, inter alia, *Meilicke v ADV/ORGa AG* Case C-83/91 [1992] ECR I-4871 (paras 25, 32), *BP Supergas Anonimos Etairia Geniki Emporiki-Viomichaniki kai Antiprossopeion v Greece* Case C-62/93 [1995] All ER (EC) 684, [1995] ECR I-1883 (para 10) and *Furlanis Construzioni Generali SpA v Azienda Nazionale Autonoma Strade (ANAS)* Case C-143/94 [1995] ECR I-3633 (para 12)).

36. That is not the case here.

37. The question whether the decision determining new conditions and the decision approving matters reserved by the new conditions constitute development consent within the meaning of art 1(2) of Directive 85/337 is a question concerning the interpretation of Community law. The court has consistently held that, in light of both the principle that Community law should be applied uniformly and the principle of equality, the terms of a provision of Community law which makes no express reference to the law of the member states for the purpose of determining its meaning and scope is normally to be given throughout the Community an autonomous and uniform interpretation which must take into account the context of the provision and the purpose of the legislation in question (see *Ekro BV Vee- en Vleeshandel v Produktschap voor Vee en Vlees* C-327/82 [1984] ECR 107 (para 11), and *Linster’s* case (para 43)).

a 38. Accordingly, the question whether the decision determining new conditions and the decision approving matters reserved by the new conditions constitute development consent within the meaning of art 1(2) of Directive 85/337 is admissible.

—Substance

b 39. The United Kingdom government contends that neither the decision determining new conditions nor the decision approving matters reserved by the new conditions constitutes development consent within the meaning of art 1(2) of the directive.

c 40. It states with regard to the decision determining new conditions that development was authorised many years before the directive created obligations for the member states. The determination of conditions under the 1991 Act involves merely the detailed regulation of activities for which the principal consent has already been given. In the United Kingdom government's submission, the reasoning with regard to the decision determining new conditions and the decision approving matters reserved by  
d the new conditions is therefore the same as in 'pipeline' cases (see para 43 of this judgment). For reasons of legal certainty, the directive does not apply to such projects.

e 41. As regards the decision approving matters reserved by the new conditions, the United Kingdom government observes that the decision likely to affect the environment had already been taken and the approval of details may not extend beyond the parameters set by the initial determination of the scheme of planning conditions.

f 42. As to those submissions, under art 2(1) of Directive 85/337 projects likely to have significant effects on the environment, as referred to in art 4 of the directive read in conjunction with Annexes I and II thereto, must be made subject to an assessment with regard to such effects before consent is given.

g 43. This does not apply only where consent was granted before 3 July 1988 (an old consent), that is to say before the time limit laid down for implementation of Directive 85/337, or where consent was granted after 3 July 1988 but the consent procedure was initiated before that date ('pipeline' projects) (see, to this effect, *European Commission v Germany* Case C-431/92 [1995] ECR I-2189 (para 32) and the *Gedeputeerde Staten van Noord-Holland* case (para 23)). The directive thus requires an assessment of the environmental effects of the project in question in the case of new consents.

h 44. In the main proceedings, the owners of Conygar Quarry were obliged under the 1991 Act, if they wished to resume working of the quarry, to have the old mining permission registered and to seek decisions determining new planning conditions and approving matters reserved by those conditions. Had they not done so, the permission would have ceased to have effect.

i 45. Without new decisions such as those referred to in the previous paragraph, there would no longer have been 'consent', within the meaning of art 2(1) of Directive 85/337, to work the quarry.

i 46. It would undermine the effectiveness of that directive to regard as mere modification of an existing 'consent' the adoption of decisions which, in circumstances such as those of the main proceedings, replace not only the terms but the very substance of a prior consent, such as the old mining permission.

47. Accordingly, decisions such as the decision determining new conditions and the decision approving matters reserved by the new conditions for the



working of Conygar Quarry must be considered to constitute, as a whole, a new 'consent' within the meaning of art 2(1) of the directive, read in conjunction with art 1(2) thereof. a

48. It should be added that, since those decisions were adopted on 25 June 1997 and 8 July 1999 respectively, an old consent granted before 3 July 1988 is not in issue. Nor is this a 'pipeline' case since the applications leading to the decisions were submitted in 1993 or 1994 and in 1997 or 1998 respectively. b

*The time at which the environmental impact assessment must be carried out*

49. Given that, in the context of a consent procedure comprising several stages, merely establishing that there is a 'development consent' within the meaning of Directive 85/337 cannot provide the referring court with a complete answer as regards the obligation on member states to carry out an assessment of the environmental effects of the project at issue, it is necessary to consider the question as to when such an assessment must be carried out. c

50. As provided in art 2(1) of the directive, the environmental impact assessment must be carried out 'before consent is given'. d

51. According to the first recital in the preamble to the directive, the competent authority is to take account of the environmental effects of the project in question 'at the earliest possible stage' in the decision-making process.

52. Accordingly, where national law provides that the consent procedure is to be carried out in several stages, one involving a principal decision and the other involving an implementing decision which cannot extend beyond the parameters set by the principal decision, the effects which the project may have on the environment must be identified and assessed at the time of the procedure relating to the principal decision. It is only if those effects are not identifiable until the time of the procedure relating to the implementing decision that the assessment should be carried out in the course of that procedure. e

53. The answer to the first two questions must therefore be that art 2(1) of Directive 85/337, read in conjunction with art 4(2) thereof, is to be interpreted as meaning that, in the context of applying provisions such as s 22 of the 1991 Act and Sch 2 to that Act, the decisions adopted by the competent authorities, whose effect is to permit the resumption of mining operations, comprise, as a whole, a 'development consent' within the meaning of art 1(2) of that directive, so that the competent authorities are obliged, where appropriate, to carry out an assessment of the environmental effects of such operations. f

In a consent procedure comprising several stages, that assessment must, in principle, be carried out as soon as it is possible to identify and assess all the effects which the project may have on the environment. g

*The fourth and fifth questions: the ability of individuals to invoke the provisions of Directive 85/337* h

54. By its fourth and fifth questions, which it is appropriate to consider together, the referring court essentially asks whether, in circumstances such as those of the main proceedings, an individual may, where appropriate, rely on art 2(1) of the directive, read in conjunction with arts 1(2) and 4(2) thereof, or whether the principle of legal certainty precludes such an interpretation. i

a The 'direct effect' of art 2(1) of Directive 85/337, read in conjunction with arts 1(2) and 4(2)

55. According to the United Kingdom government, acceptance that an individual is entitled to invoke art 2(1) of the directive, read in conjunction with arts 1(2) and 4(2) thereof, would amount to 'inverse direct effect' directly obliging the member state concerned, at the request of an individual, such as Mrs Wells, to deprive another individual or individuals, such as the owners of Conygar Quarry, of their rights.

b 56. As to that submission, the principle of legal certainty prevents directives from creating obligations for individuals. For them, the provisions of a directive can only create rights (see *Marshall v Southampton and South West Hampshire Area Health Authority (Teaching)* Case 152/84 [1986] 2 All ER 584, [1986] ECR 723 (para 48)). Consequently, an individual may not rely on a directive against a member state where it is a matter of a state obligation directly linked to the performance of another obligation falling, pursuant to that directive, on a third party (see, to this effect, *ECSC v Acciaierie e Ferriere Busseni SpA (in liq)* Case C-221/88 [1990] ECR I-495 (paras 23–26), and *Verband deutscher Daihatsu-Händler eV v Daihatsu Deutschland GmbH* Case C-97/96 [1997] ECR I-6843 (paras 24, 26)).

c 57. On the other hand, mere adverse repercussions on the rights of third parties, even if the repercussions are certain, do not justify preventing an individual from invoking the provisions of a directive against the member state concerned (see to this effect, in particular, *Fratelli Costanzo SpA v Comune di Milano* Case 103/88 [1989] ECR 1839 (paras 28–33), the WWF case (paras 69, 71), *CIA Security International SA v Signalson SA* Case C-194/94 [1996] All ER (EC) 557, [1996] ECR I-2201 (paras 40–55), *R v Medicines Control Agency, ex p Smith & Nephew Pharmaceuticals Ltd* Case C-201/94 (1996) 34 BMLR 141, [1996] ECR I-5819 (paras 33–39) and *Unilever Italia SpA v Central Foos SpA* Case C-443/98 [2000] ECR I-7535 (paras 45–52)).

d 58. In the main proceedings, the obligation on the member state concerned to ensure that the competent authorities carry out an assessment of the environmental effects of the working of the quarry is not directly linked to the performance of any obligation which would fall, pursuant to Directive 85/337, on the quarry owners. The fact that mining operations must be halted to await the results of the assessment is admittedly the consequence of the belated performance of that state's obligations. Such a consequence cannot, however, as the United Kingdom claims, be described as 'inverse direct effect' of the provisions of that directive in relation to the quarry owners.

e The period that elapsed between the decision determining new conditions and Mrs Wells' request that the situation be remedied

59. The United Kingdom government further submits that the considerable period which has elapsed since the decision determining new conditions in 1997 renders revocation of that decision contrary to the principle of legal certainty. The claimant in the main proceedings should have challenged the decision in due time before the competent court.

f 60. As to that submission, the final stage of the planning consent procedure was not completed when the claimant in the main proceedings submitted her request to the Secretary of State. It cannot therefore be contended that revocation of the consent would have been contrary to the principle of legal certainty.

61. Accordingly, the answer to the fourth and fifth questions must be that, in circumstances such as those of the main proceedings, an individual may, where appropriate, rely on art 2(1) of Directive 85/337, read in conjunction with arts 1(2) and 4(2) thereof.

*The third question: the obligation to remedy the failure to carry out an environmental impact assessment*

62. By its third question, the referring court essentially seeks to ascertain the scope of the obligation to remedy the failure to carry out an assessment of the environmental effects of the project in question.

63. The United Kingdom government contends that, in the circumstances of the main proceedings, there is no obligation on the competent authority to revoke or modify the permission issued for the working of Conygar Quarry or to order discontinuance of the working.

64. As to that submission, it is clear from settled case law that under the principle of co-operation in good faith laid down in art 10 EC (formerly art 5 of the EC Treaty) the member states are required to nullify the unlawful consequences of a breach of Community law (see, in particular, *Humblet v Belgian State* Case 6/60 [1960] ECR 559 at 569 and *Francovich v Italy* Joined cases C-6/90 and C-9/90 [1991] ECR I-5357 (para 36)). Such an obligation is owed, within the sphere of its competence, by every organ of the member state concerned (see, to this effect, *Germany v EC Commission* Case C-8/88 [1990] ECR I-2321 (para 13)).

65. Thus, it is for the competent authorities of a member state to take, within the sphere of their competence, all the general or particular measures necessary to ensure that projects are examined in order to determine whether they are likely to have significant effects on the environment and, if so, to ensure that they are subject to an impact assessment (see, to this effect, *Aannemersbedrijf PK Kraaijeveld BV v Gedeputeerde Staten van Zuid-Holland* Case C-72/95 [1997] All ER (EC) 134, [1996] ECR I-5403 (para 61) and the WWF case (para 70)). Such particular measures include, subject to the limits laid down by the principle of procedural autonomy of the member states, the revocation or suspension of a consent already granted, in order to carry out an assessment of the environmental effects of the project in question as provided for by Directive 85/337.

66. The member state is likewise required to make good any harm caused by the failure to carry out an environmental impact assessment.

67. The detailed procedural rules applicable are a matter for the domestic legal order of each member state, under the principle of procedural autonomy of the member states, provided that they are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not render impossible in practice or excessively difficult the exercise of rights conferred by the Community legal order (principle of effectiveness) (see to this effect, inter alia, *SCS Peterbroeck Van Campenhout & Cie v Belgium* Case C-312/93 [1996] All ER (EC) 242, [1995] ECR I-4599 (para 12) and *Preston v Wolverhampton Healthcare NHS Trust, Fletcher v Midland Bank plc* Case C-78/98 [2000] All ER (EC) 714, [2000] ECR I-3201 (para 31)).

68. So far as the main proceedings are concerned, if the working of Conygar Quarry should have been subject to an assessment of its environmental effects in accordance with the requirements of Directive 85/337, the competent authorities are obliged to take all general or particular measures for remedying the failure to carry out such an assessment.



*a* 69. In that regard, it is for the national court to determine whether it is possible under domestic law for a consent already granted to be revoked or suspended in order to subject the project in question to an assessment of its environmental effects, in accordance with the requirements of the directive, or alternatively, if the individual so agrees, whether it is possible for the latter to claim compensation for the harm suffered.

*b* 70. The answer to the third question must therefore be that under art 10 EC the competent authorities are obliged to take, within the sphere of their competence, all general or particular measures for remedying the failure to carry out an assessment of the environmental effects of a project as provided for in art 2(1) of Directive 85/337.

*c* The detailed procedural rules applicable in that context are a matter for the domestic legal order of each member state, under the principle of procedural autonomy of the member states, provided that they are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not render impossible in practice or excessively difficult the exercise of rights conferred by the Community legal order (principle of effectiveness).

*d* In that regard, it is for the national court to determine whether it is possible under domestic law for a consent already granted to be revoked or suspended in order to subject the project to an assessment of its environmental effects, in accordance with the requirements of Directive 85/337, or alternatively, if the individual so agrees, whether it is possible for the latter to claim compensation for the harm suffered.

*e*

#### COSTS

*f* 71. The costs incurred by the United Kingdom government and the Commission, which have submitted observations to the court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court.

*g* On those grounds, the Court of Justice (Fifth Chamber), in answer to the questions referred to it by the High Court of Justice of England and Wales, Queen's Bench Division (Administrative Court), by order of 12 February 2002, hereby rules:

*h* (1) Article 2(1) of Council Directive (EEC) 85/337 (on the assessment of the effects of certain public and private projects on the environment), read in conjunction with art 4(2) thereof, is to be interpreted as meaning that, in the context of applying provisions such as s 22 of the Planning and Compensation Act 1991 and Sch 2 to that Act, the decisions adopted by the competent authorities, whose effect is to permit the resumption of mining operations, comprise, as a whole, a 'development consent' within the meaning of art 1(2) of that directive, so that the competent authorities are obliged, where appropriate, to carry out an assessment of the environmental effects of such operations.

*i* In a consent procedure comprising several stages, that assessment must, in principle, be carried out as soon as it is possible to identify and assess all the effects which the project may have on the environment.

(2) In circumstances such as those of the main proceedings, an individual may, where appropriate, rely on art 2(1) of Directive 85/337, read in conjunction with arts 1(2) and 4(2) thereof.

(3) Under art 10 EC the competent authorities are obliged to take, within the sphere of their competence, all general or particular measures for remedying the failure to carry out an assessment of the environmental effects of a project as provided for in art 2(1) of the directive. a

The detailed procedural rules applicable in that context are a matter for the domestic legal order of each member state, under the principle of procedural autonomy of the member states, provided that they are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not render impossible in practice or excessively difficult the exercise of rights conferred by the Community legal order (principle of effectiveness). b

In that regard, it is for the national court to determine whether it is possible under domestic law for a consent already granted to be revoked or suspended in order to subject the project to an assessment of its environmental effects, in accordance with the requirements of the directive, or alternatively, if the individual so agrees, whether it is possible for the latter to claim compensation for the harm suffered. c

*a* Landelijke Vereniging tot Behoud van  
de Waddenzee and another v  
Staatssecretaris van Landbouw and  
*b* another (Coöperatieve  
Producentenorganisatie van de  
Nederlandse Kokkelvisserij UA,  
*c* interveniënde)  
(Case C-127/02)

COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES (GRAND CHAMBER)

*d* JUDGES SKOURIS (PRESIDENT), JANN, TIMMERMANS, GULMAN (RAPPORTEUR),  
PUISSOCHET AND CUNHA RODRIGUES (PRESIDENTS OF CHAMBERS), SCHINTGEN,  
VON BAHN AND SILVA DE LAPUERTA  
ADVOCATE GENERAL KOKOTT

18 NOVEMBER 2003, 29 JANUARY, 7 SEPTEMBER 2004

*e* *European Community – Environment – Projects likely to significantly affect  
environment – Special areas of conservation – Environmental impact assessment –  
Licensing of operations in special area of conservation – Competent authorities  
granting licence to carry out mechanical cockle fishing without carrying out  
environmental impact assessment – Whether competent authority required to carry  
out environmental impact assessment – Council Directive (EEC) 92/43, art 6(3).*

*f* Licences had been issued to an operator by the competent authorities of the  
Netherlands to carry out mechanical cockle fishing in a special area of  
conservation. In due course, certain nature protection organisations brought  
an action before the national court claiming that the cockle fishing, as  
*g* authorised, caused permanent damage to the geomorphology, flora and fauna  
of the seabed in the relevant area and that such fishing reduced the fish stocks  
of birds that fed on shellfish, thereby causing a decline in their populations.  
The national court decided to stay the proceedings and refer to the Court of  
Justice of the European Communities a number of questions<sup>a</sup> pursuant to  
art 234 EC (formerly art 177 of the EC Treaty) concerning the interpretation of  
*h* art 6(3)<sup>b</sup> of Council Directive (EEC) 92/43 (on the conservation of natural  
habitats and of wild fauna and flora) (the Habitats Directive), which provided  
that any plan or project not directly concerned with or connected to the  
management of a special area of conservation but likely to have a significant  
effect thereon was to be the subject of an appropriate assessment.

*i* **Held** – (1) Mechanical fishing which had been carried on for many years but for  
which a licence had been granted annually for a limited period, with each  
licence entailing a new assessment both of the possibility of carrying on that

<sup>a</sup> The questions referred by the national court are set out at judgment para 19, below

<sup>b</sup> Article 6 of the directive is set out at judgment para 5, below



activity and of the site where it might be carried on, fell within the concept of 'plan' or 'project' within the meaning of art 6(3) of the Habitats Directive. A definition of the concept of 'project' was to be found within art 1(2) of Council Directive (EEC) 85/337 (on the assessment of the effects of certain public and private projects on the environment), and that definition was relevant for the purposes of the Habitats Directive and it encompassed an activity such as cockle fishing. Further, even though such an activity had been carried on periodically for several years on the site concerned and a licence had had to be obtained for it every year, at the time of each application the activity was to be considered as a distinct plan or project within the meaning of the Habitats Directive (see judgment paras 23–26, 28, 29, below).

(2) Whereas art 6(3) of the Habitats Directive established a procedure intended to ensure, by means of a preliminary examination, that a plan or project which was not directly connected with or necessary to the management of the site concerned, but which was likely to have a significant effect on it, was authorised only to the extent that it would not adversely affect the integrity of that site; art 6(2) established an obligation of general protection consisting in avoiding deterioration and disturbances which might have significant effects in the light of the directive's objectives. Since authorisation of a plan or project granted in accordance with art 6(3) necessarily assumed that it was considered not likely to affect adversely the integrity of the site concerned and, consequently, not likely to give rise to deterioration or significant disturbances within the meaning of art 6(2), the fact that a plan or project had been established according to the procedure laid down in art 6(3) rendered superfluous, as regards the action to be taken on the protected site under the plan or project, a concomitant application of the rule of general protection laid by art 6(2). However, it could not be precluded that such a plan or project subsequently proved likely to give rise to such deterioration or disturbance and, in such a situation, application of art 6(2) made it possible to satisfy the essential objective of the preservation and protection of the quality of the environment (see judgment paras 35–38, below).

(3) For the purposes of art 6(3) of the Habitats Directive, any plan or project not directly connected with or necessary to the management of a site was to be the subject of an appropriate assessment where it could not be excluded, on the basis of objective information, that the plan or project would have a significant effect on that site, either individually, or in combination with other plans or projects. The triggering of the environmental protection mechanism provided for in art 6(3) did not presume that the plan or project considered definitively had significant effects on the site concerned, but it followed from the mere probability that such an effect attached to that plan or project. Further, in the light of the precautionary principle, such a risk existed if it could not be excluded on the basis of objective information that the plan or project would have significant effects on the site concerned. Such an interpretation, which implied that in case of doubt as to the absence of significant effects an assessment had to be carried out, made it possible to ensure effectively that plans or projects which affected adversely the integrity of the site concerned were not authorised, thereby contributed to achieving the main aim of the directive, namely the ensuring of biodiversity through the conservation of natural habitats and of wild flora and fauna (see judgment paras 41, 43–45, below).

(4) For the purposes of art 6(3) of the Habitats Directive, where a plan or project not directly concerned with or necessary to the management of the site

a was likely to undermine the site's conservation objectives, it had necessarily to be considered likely to have a significant effect on that site. The assessment of that risk had to be made in the light of, *inter alia*, the characteristics and specific environmental conditions of the site concerned by such a plan or project (see judgment paras 47–49, below).

b (5) For the purposes of art 6(3) of the Habitats Directive, an appropriate assessment of the implications for the site concerned of the plan or project implied that, prior to its approval, all the aspects of the plan or project which could, by themselves or in combination with other plans or projects, affect the site's conservation objectives had to be identified in the light of the best scientific knowledge in the field. Although art 6(3) did not define any particular method for carrying out an 'appropriate assessment', it was clear that the  
c authorisation criteria laid by art 6(3) integrated the precautionary principle and made it possible effectively to prevent adverse effects on the integrity of the protected sites as the result of the plans or projects being considered. A less stringent authorisation criterion could not as effectively ensure the fulfilment of the objective of site protection intended under that provision. Therefore, in  
d the main proceedings, the competent national authorities, taking account of the conclusions of the appropriate assessment of the implications of mechanical cockle fishing for the site concerned, in the light of the site's conservation objectives, were to authorise such activity only if they had made certain that it would not adversely affect the integrity of that site. That was the case where no reasonable scientific doubt remained as to the absence of such  
e effects. Otherwise, mechanical cockle fishing could, where appropriate, be authorised under art 6(4) of the directive (see judgment paras 52, 54, 56–60, below).

(6) Where a national court was called upon to ascertain the lawfulness of an authorisation for a plan or project within the meaning of art 6(3), it might  
f determine whether the limits on the discretion of the competent national authorities set out by that provision had been complied with, even though it had not been transposed into the legal order of the member state concerned despite the expiry of the time limit laid down for that purpose. Member states and their institutions were obliged by directives themselves and by art 249 EC (formerly art 189 of the EC Treaty) to take all measures necessary to achieve the result prescribed by a directive and that duty was binding, for matters  
g within their jurisdiction, on national courts. Having regard to the requirement that the competent national authorities were to authorise mechanical cockle fishing only if they had made certain, on the basis of there being no reasonable scientific doubt, that it would not adversely affect the integrity of the site concerned, it followed that art 6(3) of the Habitats Directive might be taken  
h into account by the national court in determining whether a national authority which had granted an authorisation relating to a plan or project had kept within the limits of the discretion set by the provision in question (see judgment paras 65, 67, 69, 70, below).

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### Notes

For environmental controls for the protection of European sites, see 36(1) *Halsbury's Laws* (4th edn reissue) para 686, and development and consent assessment, see 38 *Halsbury's Laws* (4th edn reissue) para 9.

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- f*

## Reference

- By a decision of 27 March 2002, the Raad van State (Council of State), Netherlands, referred under art 234 EC (formerly art 177 of the EC Treaty) to the Court of Justice of the European Communities for a preliminary ruling questions (set out at judgment para 19, below) concerning the interpretation of art 6 of Council Directive (EEC) 92/43 (on the conservation of natural habitats and of wild fauna and flora) (the Habitats Directive). The reference was made in proceedings between the Landelijke Vereniging tot Behoud van de Waddenzee (National association for conservation of the Waddenzee; the Waddenvereniging) and the Nederlandse Vereniging tot Bescherming van Vogels (Netherlands association for the protection of birds; the Vogelbeschermingsvereniging) on the one hand and the Staatssecretaris van Landbouw, Natuurbeheer en Visserij (Secretary of State for agriculture, nature conservation and fisheries; the Secretary of State) on the other in respect of licences which the latter had issued to the Coöperatieve Producentenorganisatie van de Nederlandse Kokkelvisserij UA (Cooperative producers' association of Netherlands cockle fisheries; the PO Kokkelvisserij) for the mechanical fishing of cockles in the special protection area (SPA) of the Waddenzee, classified within the meaning of art 4 of Council Directive (EEC) 79/409 (on the conservation of wild birds) (the Birds Directive). Observations were submitted on behalf of: Landelijke Vereniging tot Behoud van de
- g*
- h*
- i*

Waddenzee, by CAM Rombouts, Advocaat; Nederlandse Vereniging tot Bescherming van Vogels, by AJ Durville, Advocaat; Coöperatieve Producentenorganisatie van de Nederlandse Kokkelvisserij UA, by G van der Wal, Advocaat; the Netherlands government, by HG Sevenster and NAJ Bel, acting as agents; the Commission of the European Communities, by G Valero Jordana, acting as agent, and J Stuyck, Avocat. The language of the case was Dutch. The facts are set out in the opinion of the Advocate General.

29 January 2004. **The Advocate General (J Kokott)** delivered the following opinion<sup>1</sup>.

## I—INTRODUCTION

1. This reference for a preliminary ruling from the Netherlands Raad van State (Netherlands Council of State) concerns the interpretation and application of art 6 of Council Directive (EEC) 92/43 (on the conservation of natural habitats and of wild fauna and flora)<sup>2</sup> (the Habitats Directive). The case relates to the grant of authorisations for the mechanical fishing of cockles (*cerastoderma edule*) in the Netherlands Wadden Sea, which is a protected area for birds under Council Directive (EEC) 79/409 (on the conservation of wild birds)<sup>3</sup> (the Birds Directive).

2. The Raad van State seeks to ascertain whether the annual authorisation of cockle fishing is to be regarded as agreement to a plan or project. This would mean that the procedure for authorising plans or projects laid down in art 6(3) of the Habitats Directive would be applicable. If this is so, the Raad van State seeks further clarification as to the application of this provision.

3. Firstly, it seeks clarification of the relationship between art 6(3) of the Habitats Directive and art 6(2) thereof, which imposes on member states the general obligation to avoid deterioration and significant disturbance of Natura 2000 sites. Secondly, it seeks to ascertain the conditions under which it must be assumed that a plan or project is likely to have a significant effect on such a site, thus making it necessary to carry out an appropriate assessment of its implications for the site in view of the site's conservation objectives. It also raises the question whether the competent authority may authorise a plan or project where there is at least no obvious doubt as to the absence of significant adverse effects.

4. In the event that there is no plan or project within the meaning of art 6(3) of the Habitats Directive and therefore art 6(2) thereof must be applied, the Raad van State accordingly asks whether the granting of authorisation complies with the requirements of that provision as long as there is at least no obvious doubt as to the absence of significant adverse effects.

5. Thirdly, the Raad van State seeks to ascertain whether art 6(2) and (3) of the Habitats Directive are directly applicable.

## II—LEGAL FRAMEWORK

6. Under art 4 of the Birds Directive, the member states are to designate special protection areas for the species listed in Annex I thereto and for regularly occurring migratory species not listed therein.

<sup>1</sup> Original language: German.

<sup>2</sup> OJ 1992 L206 p 7.

<sup>3</sup> OJ 1979 L103 p 1.

- a 7. Under art 7 of the Habitats Directive, the obligations arising under art 6(2), (3) and (4) thereof are to be applied to these special protection areas.
8. Article 6 of the Habitats Directive provides as follows:

b '1. For special areas of conservation, Member States shall establish the necessary conservation measures involving, if need be, appropriate management plans specifically designed for the sites or integrated into other development plans, and appropriate statutory, administrative or contractual measures which correspond to the ecological requirements of the natural habitat types in Annex I and the species in Annex II present on the sites.

c 2. Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.

d 3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

e 4. If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected.'

### g III—FACTS, PROCEDURE AND QUESTIONS SUBMITTED FOR A PRELIMINARY RULING

9. The Wadden Sea is an important habitat for many bird species. Therefore, the Netherlands has designated the majority of the Netherlands Wadden Sea a special protection area within the meaning of the Birds Directive. The eider duck (*somateria mollissima*) and the oyster-catcher (*haematopus ostralegus*) are of particular interest in the present case since cockles form a significant part of their food. Both species are present in the Wadden Sea throughout the year but their numbers are at their greatest in the winter on account of the influx of overwintering birds. There are around 150,000 eider ducks and around 200,000 oyster-catchers in the Wadden Sea at that time.

h 10. For many decades cockles have been fished in the Wadden Sea using the mechanical methods at issue in this case. To this end use is made of trawls, that is to say metal cages which are dragged over the seabed by a ship. The upper 4 to 5 cm of the surface are scraped into the cage by a 1 m-wide metal plate. A pipe, from which a powerful water jet emerges, is attached directly in front of the sharp edge. This pulverises the surface so that a mixture of water, sand, cockles and other organisms enter the trawl. The sieved content of the trawl is then sucked on board hydraulically.



11. Since 1975 fishing for cockles in the Wadden Sea has been subject to authorisation in order to avoid overfishing. Initially the law on nature conservation required only an exemption to which no further conditions were attached. Since 1998 this activity has required an annually renewable authorisation under art 12 of the *Natuurbeschermingswet* (Nature Conservation Law). a

12. On the basis of this law, the *Staatssecretaris van Landbouw, Natuurbeheer en Visserij* (Secretary of State for Agriculture, Nature Conservancy and Fisheries) granted, in 1999 and 2000, the *Coöperatieve Producentenorganisatie van Nederlandse Kokkelvisserij UA* (Cooperative Producers Organisation for Netherlands Cockle Fisheries (PO Kokkelvisserij)) an authorisation, subject to certain conditions, for the mechanical fishing of cockles in the Wadden Sea. b  
c

13. In addition to art 12 of the Nature Conservation Law, these authorisations are based on other rules concerning cockle fishing in the Wadden Sea. Under the 'Key Planning Decision for the Wadden Sea' (*Planologische Kernbeslissing Waddenzee*; the Wadden Sea decision), authorisation is precluded 'where, on the basis of the best available information, there appears to be obvious (in Dutch: "duidelijke") doubt as to the absence of a possible significant adverse effect on the ecosystem'. d

14. A government decision of 21 January 1993, that is to say the *Structuurnota Zee- en kustvisserij—'Vissen naar evenwicht'* (Regional economic plan for sea and coastal fishing entitled 'Fishing for Balance'; 'the regional economic plan'), contains further guidelines inter alia on cockle fishing in the Wadden Sea. Accordingly, certain sections of the Wadden Sea are closed permanently to this activity. In years in which food is scarce a total of 60% of the average food requirement of birds in the form of cockles and mussels is reserved for these birds. This quota has since been increased to 70% for years in which food is scarce on account of scientific uncertainty as to the cause of a possible shortage of shellfish for the mass death of eider ducks in the winter of 1999/2000. The reason stated why 100% of the average food requirement is not reserved is that the birds also use alternative sources of food (eg Baltic clams, surf clams and shore crabs). Since 1997 work has been carried out on a comprehensive study into the effects of mollusc fishing whose conclusions are to be taken as a guide for future policy. e  
f

15. The plaintiffs, that is to say the *Landelijke Vereniging tot Behoud van de Waddenzee* (Waddenvereniging) and the *Nederlandse Vereniging tot Bescherming van Vogels* (Vogelbescherming), two non-governmental organisations which have undertaken to conserve nature, are challenging the authorisations for 1999 and 2000. g

16. They take the view that cockle fishing is likely to affect the Wadden Sea as a habitat in the following respects: h

—adverse effects on sediment quality as a consequence of the silt being churned up and fine sediment being lost,

—destruction or impairment of the re-establishment of mussel beds and seagrass meadows, and

—shortage of food resources for birds as a consequence of overfishing. i

17. On the basis of the information and studies before it the Raad van State concluded that when the defendant granted the authorisations in question it appraised and took account of the available scientific information in accordance with the requirements of Netherlands law. Although there was a considerable need for clarification as regards the consequences of the cockle

*a* fishing, the defendant had taken sufficient account of the precautionary principle by placing restrictions thereon, in particular by closing large sections of the Wadden Sea to cockle fishing and laying down fishing quotas having regard to the food requirement of the birds.

18. However, the Raad van State is uncertain whether this action complies with the requirements of the Birds Directive and the Habitats Directive.  
*b* Therefore, it has submitted the following questions to the Court of Justice for a preliminary ruling:

(1)(a) Are the words “plan or project” in Article 6(3) of [the Habitats Directive] to be interpreted as also covering an activity which has already been carried on for many years but for which an authorisation is in principle granted each year for a limited period, with a fresh assessment being carried out on each occasion as to whether, and if so in which sections of the area, the activity may be carried on?

*c* (b) If the answer to Question (1)(a) is in the negative, must the relevant activity be regarded as a “plan or project” if the intensity of this activity has increased over the years or an increase in it is made possible by the authorisations?

*d* (2)(a) If it follows from the answer to Question (1) that there is a “plan or project” within the meaning of Article 6(3) of the Habitats Directive, is Article 6(3) of the Habitats Directive to be regarded as a special application of the rules in Article 6(2) or as a provision with a separate, independent purpose in the sense that, for example: (i) Article 6(2) relates to existing use and Article 6(3) to new plans or projects, or (ii) Article 6(2) relates to management measures and Article 6(3) to other decisions, or (iii) Article 6(3) relates to plans or projects and Article 6(2) to other activities?

*e* (b) If Article 6(3) of the Habitats Directive is to be regarded as a special application of the rules in Article 6(2), can the two subparagraphs be applicable cumulatively?

*f* (3)(a) Is Article 6(3) of the Habitats Directive to be interpreted as meaning that there is a “plan or project” once a particular activity is likely to have an effect on the site concerned (and an “appropriate assessment” must then be carried out to ascertain whether or not the effect is “significant”) or does this provision mean that an “appropriate assessment” has to be carried out only where there is a (sufficient) likelihood that a “plan or project” will have a significant effect?

*g* (b) On the basis of which criteria must it be determined whether or not a plan or project within the meaning of Article 6(3) of the Habitats Directive not directly connected with or necessary to the management of the site is likely to have a significant effect thereon, either individually or in combination with other plans or projects?

*h* (4)(a) When Article 6 of the Habitats Directive is applied, on the basis of which criteria must it be determined whether or not there are “appropriate steps” within the meaning of Article 6(2) or an “appropriate assessment”, within the meaning of Article 6(3), in connection with the certainty required before agreeing to a plan or project?

*i* (b) Do the terms “appropriate steps” or “appropriate assessment” have independent meaning or, in assessing these terms, is account also to be taken of Article 174(2) EC and in particular the precautionary principle referred to therein?

(c) If account must be taken of the precautionary principle referred to in Article 174(2) EC, does that mean that a particular activity, such as the cockle fishing in question, can be authorised where there is no obvious doubt as to the absence of a possible significant effect or is that permissible only where there is no doubt as to the absence of such an effect or where the absence can be ascertained?

(5) Do Article 6(2) or Article 6(3) of the Habitats Directive have direct effect in the sense that individuals may rely on them in national courts and those courts must provide the protection afforded to individuals by the direct effect of Community law, as was held *inter alia* in [*SCS Peterbroeck Van Campenhout & Cie v Belgium*]<sup>4</sup>?

#### IV—ASSESSMENT

##### A—Question (1): the words ‘plan or project’

19. By questions (1)(a) and (b) the Raad van State seeks clarification of the words ‘plan or project’. The answer to this question determines the manner in which this case is considered further. If the annual grant of authorisations for cockle fishing has to be regarded as agreement to a plan or project, art 6(3) of the Habitats Directive must be applied.

##### 1—Submissions of the parties

20. Waddenvereniging, Vogelbescherming and, in the written proceedings also the Commission of the European Communities, take the view that the annual decision on cockle fishing in the Wadden Sea must be regarded as agreement to a plan or project. A broad interpretation must be placed on the words ‘plan and project’. Vogelbescherming in particular goes so far as to contend that it must be considered that there is a plan or project in the case of any authorisation but that, conversely, the use of these words cannot be ruled out on the grounds that no authorisation is required. In the view of the Commission, it must always be considered that there is a plan or project where a particular activity is likely, by its nature, to have a significant effect on a site.

21. All three parties rely on the fact that each year a fresh decision must be taken on cockle fishing and that refusal to grant authorisation is also conceivable in principle. The Commission’s guidelines<sup>5</sup> refer explicitly to fishing even where no authorisation is necessary in that regard. The effects of cockle fishing can vary depending on a large number of factors, in particular population development.

22. Waddenvereniging and Vogelbescherming also note that the catches of 10,000 tonnes first fixed in 1999 had never been attained in previous years. Consequently an extension of fishing had been authorised. Furthermore, Vogelbescherming refers to a 1998 judgment of the Raad van State which resulted in an authorisation of the type in question being granted for the first time in 1999. In that respect Vogelbescherming also refers to the judgment in *Aannemersbedrijf PK Kraaijeveld BV v Gedeputeerde Staten van Zuid-Holland*<sup>6</sup>, according to which the decisive factor as regards the approval of a project, in

<sup>4</sup> Case C-312/93 [1996] All ER (EC) 242, [1995] ECR I-4599.

<sup>5</sup> ‘Managing Natura 2000 Sites. The provisions of art 6 of the “Habitats” Directive 92/43/EEC’ (the guidelines).

<sup>6</sup> Case C-72/95 [1997] All ER (EC) 134, [1996] ECR I-5403.



a the context of the directive on environmental impact assessment, is the significance of its effect on the environment<sup>7</sup>.

b 23. The Netherlands government also recommends a broad interpretation of the words 'plan' and 'project' but would like—in the same way as PO Kokkelvisserij—to limit the application of art 6(3) of the Habitats Directive to new plans and projects. It contends that at the time a special protection area is designated only existing plans and projects are subject to art 6(2) of the Habitats Directive. This applies to activities such as cockle fishing which were already carried on in the past, irrespective of whether or not authorisations must be renewed annually.

c 24. The Netherlands government emphasises that the cockle fishing has no notable effect on a special protection area and the Wadden Sea was therefore designated as such in spite of the fishing. Moreover, it concludes that the authorisation to expand an existing plan or project—or an existing activity—could constitute a new plan or project which would have to be assessed under art 6(3) of the Habitats Directive having regard to the effects of the previous activity.

d 25. PO Kokkelvisserij alone takes the view that there is no new project or plan even where existing activities are expanded. Furthermore, it contends that in any event the cockle fishing was not expanded overall but merely adapted each year to the prevailing circumstances. Between 1980 and 2000 between 0 (1991 and 1996) and 9.3 million kilograms of cockles were caught each year. Seven million kilograms or more were caught in 1980, 1983, 1984, 1988, 1998, e and 1999 and less than 2 million kilograms in 1987, 1991, 1996 and 1997. No increase can be discerned. On the contrary, the catches varied from year to year. The annual differences can be attributed solely to the prevailing conditions, in particular population development. Relative to biomass values of over 20% were reached in 1984, 1985, 1986 and 1990, whilst the maximum values since have been around 10%. Therefore, from this perspective it can f even be concluded that there has been a reduction in fishing.

g 26. At the hearing the Commission pointed to the possibility that there could be a management plan within the meaning of art 6(1) of the Habitats Directive which provides for the cockle fishing in part or in full. A plan or project exists only in so far as a step goes beyond this management plan since art 6(3) of the Habitats Directive is expressly applicable only to steps not directly connected with or necessary to the management of the site. However, even in the absence of a management plan it can be concluded that there is a plan or project only if the annual authorisation of an activity carried on relates to new elements, for example new technologies or intensification.

## h 2—Opinion

i 27. Article 6 of the Habitats Directive is intended to ensure that the natural wealth in the Natura 2000 network—the natural habitats and species numbers in the relevant protection areas—remains intact. To this end, art 6(1) provides for conservation measures, that is to say positive action. In general terms art 6(2) requires that deterioration and disturbance likely to have significant effect be avoided.

<sup>7</sup> Council Directive (EEC) 85/337 (on the assessment of the effects of certain public and private projects on the environment) (OJ 1985 L175 p 40), as amended by Council Directive (EC) 97/11 (amending Directive 85/337 on the assessment of the effects of certain public and private projects on the environment) (OJ 1997 L73 p 5).

28. Article 6(3) and (4) of the Habitats Directive lay down particular rules on plans and projects. Under art 6(3), a measure should, as a rule, be authorised only if it will not adversely affect the integrity of a Natura 2000 site. In order to be able to determine whether this will be the case, an appropriate assessment of its implications for the site must be made in view of the site's conservation objectives. Under art 6(4), adverse effects on the integrity of sites are, by way of exception, permitted under certain circumstances, if compensatory measures are taken. Where no appropriate assessment is necessary, there are, under art 6(3) and (4) of the Habitats Directive, no further limitations on the plan or project concerned. a

29. The requirements for an appropriate assessment are laid down in the first sentence of art 6(3) of the Habitats Directive. In this multi-stage assessment the words 'plan' and 'project' are the initial filter which removes measures which are not subject to an appropriate assessment. Before an appropriate assessment becomes necessary, other limiting conditions must be assessed, namely the direct connection with the management of the site referred to by the Commission and the likelihood of significant effect on the site mentioned in the third question submitted for a preliminary ruling. Each of these criteria has its own function and justification. In that respect the words 'plan' and 'project' are primarily a formal condition for the application of art 6(3) of the Habitats Directive. In view of the structure of the first sentence of art 6(3) of the Habitats Directive considerations relating to nature conservation arise in principle only during the two subsequent stages of the assessment. b

30. For unintentional damage to Natura 2000 sites to be avoided effectively, all potentially harmful measures must, where possible, be subject to the procedure laid down in art 6(3) of the Habitats Directive. Therefore, the terms 'plan' and 'project' should be interpreted broadly, not restrictively. This is also consistent with the wording, which expressly refers to any<sup>8</sup> plan or project in almost all language versions<sup>9</sup>. c

31. The question how the words 'plan' and 'project' should be defined in detail may be left open here since mechanical cockle fishing was regarded as a plan or project when it commenced—a matter on which none of the parties has cast doubt. On account of its wide-ranging effects on the upper layer of the seabed it is in principle comparable, in terms of its environmental impact, with the extraction of mineral resources. In that respect it would therefore have to be regarded as another intervention and thus as a project within the meaning of art 1(2) of the directive on environmental impact assessment. That provision defines a project as the execution of construction works or of other installations or schemes or other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources<sup>10</sup>. Without wishing to apply this definition of 'project' definitively to the Habitats Directive, it is at least appropriate and adequate in the present case. In this case the question whether the authorisation relates to one or several projects, or even to a plan co-ordinating various projects, can be left open. It makes no difference as regards the legal consequences. d

<sup>8</sup> The German and Portuguese versions are exceptions. e

<sup>9</sup> As regards the term 'plan', see also the opinion of Advocate General Fenelly in *European Commission v France* Case C-256/98 [2000] ECR I-2487 at 2489 (para 33). f

<sup>10</sup> Conversely, the definition of 'plans and programmes' set out in art 2(a) of EP and Council Directive (EC) 2001/42 (on the assessment of the effects of certain plans and programmes on the environment) (OJ 2001 L197 p 20) contains no substantive clarification but limits the definition to the results of particular decision-making procedures. g

- a 32. Doubts as to the existence of a plan or a project could arise from that fact that cockle fishing has already been carried on in its present form for many years. However, neither the term 'plan' nor the term 'project' would preclude a measure renewed at regular intervals from being regarded on each occasion as a separate plan or project.
- b 33. Netherlands law also appears to proceed from this basis. Cockle fishing cannot be carried on without the annual grant of an authorisation. Therefore, it requires authorisation by the competent authorities. However, the procedure for authorising plans and projects arises from art 6(3) of the Habitats Directive. Nevertheless, the applicability of art 6(3) of the Habitats Directive cannot be based solely on the fact that the Netherlands has granted no permanent authorisation but rather renews the authorisation annually. If the need for an appropriate assessment turned solely on whether national law provided for permanent authorisation or annually renewable authorisation for the relevant measure, there would be an incentive to grant authorisations relating to special protection areas for an unlimited period in order to circumvent the application of art 6(3) of the Habitats Directive.
- c 34. However, such circumvention of art 6(3) of the Habitats Directive would be incompatible with Community law. In the same way as other directives on the environment, the Habitats Directive provides that certain measures require authorisation by the authorities<sup>11</sup>. The legislature clarified this matter subsequently in the directive on environmental assessment<sup>12</sup>.
- e 35. Since the Habitats Directive does not stipulate which activities are to be authorised in which form, it is primarily for the member states to lay down the relevant rules. However, in laying down the requirements relating to authorisation they must take account of the likelihood of Natura 2000 sites being affected. Temporary authorisations which have to be reviewed on a regular basis are particularly appropriate where the possible effects cannot be assessed with sufficient accuracy at the time of the initial authorisation but instead depend on variable circumstances.
- f 36. Cockle fishing in the Wadden Sea appears to be a typical example of an activity whose authorisation should be reviewed annually. The availability of cockles varies from year to year depending on weather conditions. It does not appear possible to rule out the possibility of overfishing<sup>13</sup>. In winter cockles are very important as a food for eider ducks and oyster-catchers. Therefore, at least annual management is necessary to balance exploitation of the cockle stocks and the food requirement of the birds. Consequently, the Netherlands practice of renewing authorisations for cockle fishing annually satisfies the requirements of art 6(3) of the Habitats Directive.
- g 37. However, in principle the need, in terms of nature conservation, for an authorisation requirement is not a condition for regarding an activity subject to authorisation as a plan or project. Such considerations are necessary only where, in the absence of such a requirement, there are grounds for assuming that such activity should be classified as a plan or project.
- h

i 11 See *EC Commission v Italy* Case C-360/87 [1991] ECR I-791 (para 31) and *European Commission v Belgium* Case C-230/00 [2001] ECR I-4591 (para 16), in which the court declared tacit authorisation or refusal of requests for authorisation as incompatible with the requirement relating to examination laid down in various other directives on the environment.

12 See art 2(1) of the directive on environmental assessment which was introduced by Directive 97/11.

13 This is emphasised by the fact that natural mussel beds in the Netherlands Wadden Sea have obviously declined.



38. Precisely in the case of repeated measures this interpretation of the terms 'plan' and 'project' does not, furthermore, lead to disproportionate harm. If the effects remain the same from year to year, at the next stage of the assessment it can easily be determined, with reference to the assessments in previous years, that no significant effect is likely. However, where such reference is not possible on account of changing circumstances, the need to carry out more comprehensive fresh assessments cannot be ruled out and is actually also justified. a

39. The answer to the first question must therefore be that the words 'plan and project' in art 6(3) of the Habitats Directive also cover an activity which has already been carried on for many years but for which an authorisation is in principle granted each year for a limited period. b

40. In view of this conclusion there is no need to comment on question (1)(b) which asks whether any difference is made by the fact that the activity increases or authorisation opens up the possibility of an increase. However, it should be noted that the extension of an existing activity, which must be regarded as a plan or project, can in principle be classified as a new plan or new project. Therefore, such extension would have to be assessed to ascertain whether it was likely to have a significant effect on a Natura 2000 site, either individually or together with other plans or projects (including the existing activity). If necessary, the further stages in the procedure laid down in art 6(3) and (4) of the Habitats Directive would have to be carried out. c

*B—Question (2): the relationship between art 6(2) and (3) of the Habitats Directive* e

41. The second question relates to the relationship between art 6(2) and (3) of the Habitats Directive. The Raad van State seeks to ascertain how a distinction is to be drawn between these two provisions and whether they can be applied cumulatively. It proposes various possible ways of drawing a distinction, that is to say:

- art 6(2) relates to existing use and art 6(3) to new plans or projects, f
- art 6(2) relates to management measures and art 6(3) to other decisions, or
- art 6(3) relates to plans or projects and art 6(2) to other activities.

#### *1—Submissions of the parties*

42. Vogelbescherming takes the view that these provisions differ clearly from one another in terms of their nature and scope. Article 6(3) lays down the procedure for authorising projects at a particular time, whilst art 6(2) imposes a permanent obligation to take positive action to avoid deterioration of sites. g

43. It considers that the alternative interpretations put forward by the Raad van State are inadequate. The first alternative raises difficult questions concerning the distinction to be drawn between existing plans or projects. The second alternative fails to appreciate that administrative measures can be of different kinds and would primarily fall within the scope of art 6(1). Furthermore, not all measures necessary to conserve the site could be based on art 6(3). The third alternative is correct in so far as it subjects plans and projects to art 6(3), but fails to understand that art 6(2) cannot be limited to activities. On the contrary, natural developments could also give rise to obligations to act under art 6(2). h

44. In the view of Vogelbescherming and Waddenvereniging, the two subparagraphs could also be applied cumulatively, for example where, in spite of an appropriate assessment, a project authorised under sub-para (3) subsequently had unforeseen adverse effects on a site which necessitated i

a measures under sub-para (2). However, Vogelbescherming considers that it would not make sense simultaneously to apply sub-para (2) in connection with authorisation under sub-para (3).

b 45. In the view of the Netherlands government, the purpose of both provisions is to conserve the relevant sites, with sub-para (2) concerning all measures and sub-para (3) only new plans and projects likely to have a significant effect on the relevant sites. A special regime was expressly provided for in respect of such sites. However, it does not make sense to apply the two provisions cumulatively.

c 46. PO Kokkelvisserij essentially refers to the Commission's comments in its guidelines<sup>14</sup>. Accordingly, it concludes that plans or projects must be assessed under sub-para (3) and other measures under sub-para (2). Although both provisions relate to the conservation objectives of the site concerned, they cannot be applied cumulatively.

d 47. Finally, the Commission takes the view that sub-para (3) has independent meaning in so far as this provision relates to plans and projects, whilst sub-para (2) concerns a general obligation to avoid deterioration and significant disturbance. Subparagraph (2) applies to activities which require no prior authorisation. In any event sub-para (3) is not a special rule vis-à-vis sub-para (2).

## 2—Opinion

e 48. The fields of application of art 6(2) and (3) are evident from the wording thereof. Subparagraph (2) relates to deterioration and disturbance and sub-para (3) to plans and projects. Accordingly, the possibility of an overlap between the two fields of application cannot be ruled out.

f 49. However, sub-para (3) could—where appropriate, in conjunction with sub-para (4)—lay down a definitive special rule on plans and projects which excludes the application of art 6(2). This would mean that following authorisation under art 6(3) or (4) plans and projects could no longer be subjected to further requirements by virtue of the adverse effect on protection areas.

g 50. A strong argument against applying art 6(2) of the Habitats Directive to plans and projects would appear to follow from art 6(4). If art 6(2) were applicable to plans and projects which were authorised under this provision in spite of the adverse effect on protection areas, this derogating authorisation would have no practical effect. Member states would normally be required to prevent such plans and projects as they would result in the deterioration of protection areas. It must therefore be concluded that art 6(2) cannot be applied in such cases. If art 6(3) and (4) were construed as a uniform system for h authorising plans and projects, it would be consistent to exclude the application of art 6(2) also in the case of authorisation under art 6(3).

i 51. The initiators of plans and projects and the competent authorities would enjoy considerably enhanced legal certainty if art 6(3) and (4) of the Habitats Directive alone applied to plans and projects. In the case of new plans and projects definitive authorisation would ensure that considerations relating to protection of a site could no longer affect the implementation of the scheme in question. Furthermore, the existence of previous authorisations for plans and projects which were not granted pursuant to art 6(3) would not be called into question on account of adverse effects on protection areas.

14 Cited in footnote 5, above (pp 8, 30, 64).

52. However, such exclusive application of art 6(3) of the Habitats Directive is not imperative under the general scheme of art 6. In any event, the normal authorisation procedure with the appropriate assessment and the derogating authorisation are to be found in different subparagraphs. a

53. Furthermore, there is a fundamental difference between plans and projects authorised under art 6(3) of the Habitats Directive and plans and projects which are to be authorised only by way of exception under art 6(4) thereof. Normal authorisation is based on the assumption that a plan or project will not adversely affect the integrity of protection areas, whereas the derogating authorisation assumes that such adverse effect will occur. b

54. Therefore, even after the conclusion of the normal authorisation procedure under art 6(3) of the Habitats Directive the general obligation laid down in art 6(2) must apply to avoid deterioration and significant disturbance attributable to the implementation of a plan or project. c

55. This is consistent with the particular function of art 6(3) of the Habitats Directive in comparison with art 6(2). Article 6(3) primarily establishes an authorisation procedure which uses the opportunity to assess the impact of a plan or a project in light of the conservation objectives of the protection area concerned before it has any adverse effects on that area. However, a preliminary check is not incompatible with the application of the general rule relating to protection laid down in art 6(2). d

56. Where the provisions are complied with, there is, following the authorisation procedure under art 6(3) of the Habitats Directive, no need for subsequent measures under art 6(2). An ideal appropriate assessment would identify precisely any adverse effect which occurred subsequently. Therefore, authorisation would be granted only where the plan or the project did not adversely affect the integrity of the site concerned. For the purpose of providing a consistent standard of protection this would also exclude the possible occurrence of deterioration or disturbance which could be significant in relation to the objectives of the directive. At the same time the practical effectiveness of authorisation under art 6(3) of the Habitats Directive would be safeguarded since the effects expressly permitted therein could not constitute an infringement of art 6(2). e

57. However, practical consequences relating to authorised projects and plans would arise from art 6(2) of the Habitats Directive if they resulted in deterioration or significant adverse effects in spite of an appropriate assessment. In that case the member state concerned would be obliged to take the necessary preventative measures in spite of the fact that authorisation had been given. f

58. This obligation is appropriate since otherwise habitats areas and species numbers within Natura 2000 network could be lost forever. It is further justified, at least in the case of new plans and projects, by the fact that in such cases the member states have accepted either an inadequate appropriate assessment or scientific uncertainty as to the effects of the measure concerned. However, it is also unacceptable for habitats areas and species numbers to be reduced as a consequence of old plans and projects to which art 6(3) of the Habitats Directive did not apply *ratione temporis*. g

59. The continuing application of art 6(2) of the Habitats Directive to plans and projects would also be consistent with the Court of Justice's judgment in *European Commission v Ireland*<sup>15</sup>. In that case it ruled that Ireland had not h

<sup>15</sup> Case C-117/00 [2002] ECR I-5335 (para 22 et seq). i



- a fulfilled its obligations under art 6(2) of the Habitats Directive in respect of the Owenduff-Nephin Beg Complex. That case concerned overgrazing resulting in erosion and a decline in heath land and also the planting of conifers. In that context the court did not raise the question whether there were plans or projects which required the application of art 6(3) of the Habitats Directive and, possibly, precluded the application of art 6(2).
- b 60. Accordingly, the answer to the second question must be that art 6(3) of the Habitats Directive lays down the procedure for authorising plans and projects which do not affect the integrity of protection sites, whereas art 6(2) thereof lays down permanent obligations, irrespective of the authorisation of plans and projects, to avoid deterioration and disturbance which could be significant in relation to the objectives of the directive.
- c

*C—Question (3): the possibility of significant adverse effect*

61. By its third question the Raad van State seeks to clarify two conditions for carrying out an appropriate assessment under the first sentence of art 6(3) of the Habitats Directive. It asks, one, what requirements must be placed on the likelihood of significant adverse effect and, two, when it must be considered that the possible adverse effect is significant.
- d 62. It should first be pointed out that the possibility of significant adverse effect is primarily a question of nature conservation which must be answered on the basis of the circumstances of the individual case. However, the court
- e may provide guidance.

*1—Possibility of an adverse effect*

(a) Submissions of the parties

- f 63. Waddenvereniging considers that it is always necessary to carry out an appropriate assessment where the absence of significant adverse effects cannot clearly be excluded.
64. Vogelbescherming dismisses the idea of limiting the appropriate assessment to cases in which significant effects will occur with a sufficient degree of probability. On the contrary, it is sufficient that such effects could occur. The likelihood of adverse effects occurring can be assessed only when
- g the actual appropriate assessment is carried out.
65. Vogelbescherming understands the question submitted by the Raad van State as asking whether the possibility of measures to minimise damage could be taken into account as early as this stage of the application of art 6(3) of the Habitats Directive. However, such measures can be taken effectively only on
- h the basis of an appropriate assessment. In the present case the questions posed in connection with an ongoing government study already show that cockle fishing is likely to have significant effect.
66. The Commission considers that in addition to the fundamental ability of a plan or project to adversely affect a site the occurrence of significant adverse effect must also be sufficiently likely. This must be assessed in a preliminary assessment. According to the precautionary principle, doubt as to the absence
- i of such effects is sufficient to give rise to an obligation to carry out an appropriate assessment.
67. The Netherlands government takes the view that an appropriate assessment is necessary only where significant adverse effects are sufficiently likely. This must be determined in a preliminary assessment.

68. PO Kokkelvisserij also considers that an appropriate assessment is necessary only where it can be presumed that the plan or project will have significant adverse effect. a

(b) Opinion

69. As regards the degree of probability of significant adverse effect, the wording of various language versions is not unequivocal. The German version appears to be the broadest since it uses the subjunctive 'könnte' (could). This indicates that the relevant criterion is the mere possibility of an adverse effect. On the other hand, the English version uses what is probably the narrowest term, namely 'likely', which would suggest a strong possibility. The other language versions appear to lie somewhere between these two poles. Therefore, according to the wording it is not necessary that an adverse effect will certainly occur but that the necessary degree of probability remains unclear. b  
c

70. Since the normal authorisation procedure is intended to prevent protection areas being affected by plans or projects, the requirements relating to the probability of an adverse effect cannot be too strict. If the possibility of an appropriate assessment were ruled out in respect of plans and projects which had only a 10% likelihood of having a significant adverse effect, statistically speaking one in ten measures precisely under this limit would have significant effects. However, all such measures could be authorised without further restrictions. Consequently, such a specific probability standard would give rise to fears that Natura 2000 would slowly deteriorate. Furthermore, the appropriate assessment is also precisely intended to help establish the likelihood of adverse effects. If the likelihood of certain adverse effects is unclear, this militates more in favour than against an appropriate assessment. d  
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71. In principle, the possibility of avoiding or minimising adverse effects should be irrelevant as regards determining the need for an appropriate assessment. It appears doubtful that such measures could be carried out with sufficient precision in the absence of the factual basis of a specific assessment. f

72. On the other hand, it would be disproportionate to regard any conceivable adverse effect as grounds for carrying out an appropriate assessment. Adverse effects, which are not obvious in view of the site's conservation objectives, may be disregarded. However, this can be assessed and decided on only on a case-by-case basis. g

73. In that regard the criterion must be whether or not reasonable doubt exists as to the absence of significant adverse effects. In assessing doubt, account will have to be taken, on the one hand, of the likelihood of harm and, on the other, also of the extent and nature of such harm. Therefore, in principle greater weight is to be attached to doubts as to the absence of irreversible effects or effects on particularly rare habitats or species than to doubts as to the absence of reversible or temporary effects or the absence of effects on relatively common species or habitats. h

74. Therefore, an appropriate assessment is always necessary where reasonable doubt exists as to the absence of significant adverse effects. i

2—Significance

(a) Submissions of the parties

75. Waddenvereniging proposes various criteria for assessing significance. The effects of comparable schemes on other sites and population

a development—in this case the decline of eider ducks—could provide guidance. The size of the areas and the project cannot be taken into consideration since otherwise sections of protection areas could in practice lose their protected status.

76. Vogelbescherming proposes the following stages of assessment:

b —Are adverse effects conceivable?  
—Do the areas covered by the plan or project overlap with the areas covered by the natural habitats or species?

—If the answer to both questions is in the affirmative, it is necessary to examine whether or not there is the slightest risk of an adverse effect on the integrity of the site concerned.

c 77. The Commission calls for an objective interpretation which, in terms of its application, must, however, be guided by the particular features of the site concerned. Adverse effects are significant in particular where they:

—render the implementation of the conservation objectives impossible or unlikely, or

d —would irrevocably destroy a vital component of the ecosystem which characterises the site and is essential to its integrity or its importance to the coherence of Natura 2000.

78. The Netherlands government would also like to avoid an arbitrary or casual assessment of significance and expects account to be taken not only of the features of the site concerned but also of the cumulative effects connected with other plans and projects.

e 79. PO Kokkelvisserij refers to the Commission's guidelines<sup>16</sup> and the adverse effects which formed the subject matter of the judgment concerning the Santoña marshes<sup>17</sup>. According to that judgment, the effects must be considerable, relatively serious, irreparable or difficult to repair. In view of the complexity of environmental assessments, it dismisses the idea of an exhaustive list of criteria. However, it does consider that in each case it is necessary to take account of the nature and extent of the site and the actual and foreseeable effects of the plan or project, in particular whether these effects are structural or temporary or can be avoided by natural means. Consideration should also be given to the conservation objectives of the site and other environmental characteristics or consequences.

g (b) Opinion

80. Restricting the appropriate assessment to plans and projects which are likely to have significant effect prevents unnecessary appropriate assessments. A rough assessment must be made of this requirement as part of a preliminary assessment without anticipating the actual appropriate assessment.

h 81. The term 'significant' describes two comparison parameters, in this case the relationship between certain adverse effects on a protection area. The protection area is defined by its conservation objectives. The seriousness of the adverse effects is evident from the extent and nature of the possible harm. Not only the ability to reverse or offset the effects but also the rarity of the habitats or species concerned are relevant in this respect.

i 82. Of the parties, only the Commission seeks to define precisely the threshold beyond which effects become significant. However, the criteria which

16 Cited in footnote 5, above (point 4.4.1 p 36 et seq).

17 *EC Commission v Spain* Case C-355/90 [1993] ECR I-4221 (the *Santoña* case).



it proposes—the defeat of the conservation objectives or destruction of essential components of the site—set this threshold very high. a

83. At the hearing Vogelbescherming and Waddenvereniging correctly pointed out that this standard does not reflect the court's case law, in particular that concerning the Birds Directive. For example, it follows from the judgment concerning the Leybucht that any reduction in a special protection area, for example by the construction of a road<sup>18</sup>, is to be equated at least with a considerable adverse effect<sup>19</sup>. In the judgment concerning the Santoña marshes the court also recognised that a marine-farming scheme<sup>20</sup> and the discharge of waste water<sup>21</sup> constituted significant adverse effects without considering cumulative effects. However, it cannot be assumed that these actions would in themselves have been capable of defeating the conservation objectives of the special protection areas concerned or of destroying essential components thereof. b

84. However, I must concur with the Commission in so far as it refers to the conservation objectives of the site. These objectives demonstrate its importance within Natura 2000. Therefore, each of these objectives is relevant to the network. If adverse effects resulting from plans and projects were accepted on the grounds that they merely rendered the attainment of these objectives difficult but not impossible or unlikely, the species numbers and habitat areas covered by Natura 2000 would be eroded by them. It would not even be possible to foresee the extent of this erosion with any degree of accuracy because no appropriate assessment would be carried out. These losses would not be offset because art 6(4) of the Habitats Directive would not apply. c

85. Thus, in principle any adverse effect on the conservation objectives must be regarded as a significant adverse effect on the integrity of the site concerned. Only effects which have no impact on the conservation objectives are relevant for the purposes of art 6(3) of the Habitats Directive. d

86. The answer to this part of the third question must therefore be that any effect on the conservation objectives has a significant effect on the site concerned. e

#### *D—Question (4): the appropriate assessment and appropriate steps*

87. By its fourth question the Raad van State seeks to obtain the clarifications necessary to determine whether, in the present case, the competent authorities carried out an appropriate assessment and drew the necessary conclusions or took appropriate steps to avoid deterioration and disturbance. f

#### *1—The appropriate assessment*

88. In so far as it concerns the appropriate assessment, the fourth question relates, on the one hand, generally to the requirements concerning an appropriate assessment and, on the other, specifically to whether it is justified to refuse cockle fishing authorisations only where there is 'obvious doubt' as to the absence of significant adverse effects. In this connection the Raad van State raises the question whether the precautionary principle must be observed. g

18 See the *Santoña* judgment (para 36), cited in footnote above.

19 See *EC Commission v Germany* Case C-57/89 [1991] ECR I-883 (para 20 et seq) (the *Leybucht* case).

20 See the *Santoña* judgment (paras 44, 46) cited in footnote 17, above. See also *European Commission v France* Case C-96/98 [1999] ECR I-8531 (para 39).

21 See the *Santoña* judgment (para 52 et seq), cited in footnote 17, above. h

*a* (a) Submissions of the parties

(i) General remarks

89. PO Kokkelvisserij proposes deriving the requirements relating to the appropriate assessment from art 2(2) and (3) of the Habitats Directive under which, on the one hand, natural habitats and species of wild fauna and flora of Community interest are to be maintained or restored at favourable conservation status but, on the other, account is to be taken of economic, social and cultural requirements and regional and local characteristics.

90. The other parties agree that an appropriate assessment must relate to the effects of plans or projects on the conservation objectives of the site concerned. In that regard they propose methods with varying degrees of detail.

*c* (ii) The precautionary principle

91. Waddenvereniging, the Commission, the Netherlands government and PO Kokkelvisserij take the view that the precautionary principle laid down in art 174(2) EC (formerly art 130r of the EC Treaty) must be taken into account in interpreting art 6(2) and (3) of the Habitats Directive. Vogelbescherming *d* considers that art 6(2) and (3) of the Habitats Directive already gives sufficiently concrete expression to the precautionary principle and therefore renders unnecessary the reference to art 174(2) EC.

(iii) Doubt as to the absence of adverse effects

92. The Commission refers to the English and French language versions of the second sentence of art 6(3) of the Habitats Directive, under which the competent authorities must be certain that the integrity of the site concerned will not be adversely affected. In the same way as Vogelbescherming and Waddenvereniging it consequently concludes that there may be no doubt that such adverse effects are unlikely.

93. The Netherlands government takes the view that criterion relating to obvious doubt must apply to art 6(2) and (3) of the Habitats Directive. For the purpose of applying the first sentence of art 6(3), obvious doubts are necessary to give rise to an appropriate assessment. Within the scope of the second sentence of art 6(3) authorisation must be possible where there is no absolute certainty, but only a high degree of certainty that adverse effects can be ruled out. Absolute certainty can rarely be attained. Accordingly, the authorisation of a plan or project can be denied only where obvious doubts remain after an appropriate assessment has been carried out.

94. PO Kokkelvisserij takes the view that the precautionary principle would be stretched too far if authorisation had to be denied where there was any doubt as to the absence of adverse effects. Referring also to the principle of proportionality, it proposes that where there is scientific uncertainty appropriate steps must be taken which cannot normally rule out all risks.

(b) Opinion

(i) Appropriate assessment

95. It should first be noted that the Habitats Directive does not lay down any methods for carrying out an appropriate assessment. In this respect it may be helpful to refer to the relevant documents of the Commission<sup>22</sup>, even though

<sup>22</sup> See, for example, the guidelines cited in footnote 5, above, and the document entitled 'Assessment of plans and projects significantly affecting Natura 2000 sites, Methodological guidance on the provisions of Article 6(3) and (4) of the Habitats Directive 92/43/EEC', November 2001.

they are not legally binding. The court can in no way draw up, in abstract terms, a particular method for carrying out an appropriate assessment. However, it is possible to derive certain framework conditions from the directive. a

96. Most languages versions, and also the tenth recital in the preamble to the German version, expressly require an *appropriate* assessment. As the Commission in particular correctly states, it is also clear from the wording of art 6(3) of the Habitats Directive that an appropriate assessment must precede agreement to a plan or project and that it must take account of cumulative effects which arise from combination with other plans or projects. b

97. This assessment must, of necessity, compare all the adverse effects arising from the plan or project with the site's conservation objectives. To that end, both the adverse effects and the conservation objectives must be identified. The conservation objectives can be deduced from the numbers within the site. However, it will often be difficult to encompass all adverse effects in an exhaustive manner. In many areas there is considerable scientific uncertainty as to cause and effect. If no certainty can be established even having exhausted all scientific means and sources, it will consequently be necessary also to work with probabilities and estimates. They must be identified and reasoned. c  
d

98. Following an appropriate assessment, a reasoned judgment must be made as to whether or not the integrity of the site concerned will be adversely affected. In that respect it is necessary to list the areas in which the occurrence or absence of adverse effects cannot be established with certainty and also the conclusions drawn therefrom. e

(ii) Taking account of the precautionary principle and permissible doubts as regards the authorisation of plans and projects

99. As regards the decision on authorisation, the second sentence of the German version of the second sentence of art 6(3) of the Habitats Directive provides that such decision is to be taken only when, in the light of the conclusions of the assessment of the implications for the site, the competent authorities have ascertained that it will not adversely affect the integrity of the site concerned. As the Commission correctly emphasises, the other language versions go further than a mere 'ascertainment' in that they require that the competent authorities establish certainty in this respect. Therefore, it must be concluded that the ascertainment required for agreement in the German version can be made only when, in the light of the conclusions of the assessment of the implications for the site, the competent authorities are certain that it will not adversely affect the integrity of the site concerned<sup>23</sup>. Therefore, as regards the decision the decisive factor is not whether such adverse effect can be proven but—conversely—that the authorising authorities ascertain that there are no such effects. f  
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100. This rule gives concrete expression to the precautionary principle laid down in art 174(2) EC in relation to a protection area covered by Natura 2000. The precautionary principle is not defined in Community law. It is examined in case law primarily in so far as protective measures may be taken, where there is uncertainty as to the existence or extent of risks, without having to wait until i

<sup>23</sup> See, to this effect, also the opinion of Advocate General Léger in *European Commission v Austria* Case C-209/02 (2003) Transcript (opinion), 6 November (para 40 et seq) (the *Wörschach golf course* case). The German version of the opinion is based, as regards para 30, on the difference set out between the German version of the directive and the other language versions.



a the reality and seriousness of those risks become fully apparent<sup>24</sup>. Therefore, the decisive factor is the element of scientific uncertainty as to the risks involved<sup>25</sup>. However, in each particular case the action associated with the protective measures must be proportionate to the assumed risk. In that regard the Commission stated in its communication on the precautionary principle that judging what is an 'acceptable' level of risk for society is an eminently political responsibility<sup>26</sup>. Such responsibility can be met only where the scientific uncertainty is minimised before a decision is taken by using the best available scientific means.

c 101. Accordingly, the rulings of the court did not concern a 'failure to observe' the precautionary principle in abstract terms, but the application of provisions which give expression to the precautionary principle in relation to certain areas<sup>27</sup>. On the one hand, these provisions normally provide for a comprehensive scientific assessment and, on the other, specify the acceptable level of risk which remains after this assessment in each case or the margin of discretion of the relevant authorities.

d 102. Article 6(3) of the Habitats Directive constitutes such a rule. In order to avoid adverse effects on the integrity of Natura 2000 sites as a result of plans and projects, provision is firstly made for the use of the best available scientific means. This is done by means of a preliminary assessment of whether there are likely to be significant effects and then, where necessary, an appropriate assessment is carried out. The level of risk to the site which is still acceptable after this examination is set out in the second sentence of art 6(3). According to e that provision, the authorising authority can grant authorisation only when it is certain that the integrity of the site concerned will not be adversely affected. Consequently, remaining risks may not undermine this certainty.

f 103. However, it could be contrary to the principle of proportionality, which is cited by PO Kokkelvisserij, to require certainty as to the absence of adverse effects on the integrity of the site concerned before an authority may agree to a plan or project.

g 104. It is settled case law that the principle of proportionality is one of the general principles of Community law. A measure is proportionate only where it is both appropriate and necessary and not disproportionate to the objective pursued<sup>28</sup>. This principle is to be taken into account in interpreting Community law<sup>29</sup>.

24 See *R v Ministry of Agriculture, Fisheries and Food, ex p National Farmers' Union* Case C-157/96 [1998] ECR I-2211 (para 63), *UK v European Commission* Case C-180/96 [1998] ECR I-2265 (para 99) and *Monsanto Agricoltura Italia SpA v Presidenza del Consiglio dei Ministri* Case C-236/01 [2003] ECR I-8105 (para 111).

h 25 For example, the Ministerial Declaration of the Sixth Trilateral Governmental Conference on the Protection of the Wadden Sea, Esbjerg, 13 November 1991, defined the precautionary principle as follows: '... to take action to avoid activities which are assumed to have significant damaging impact on the environment, even where there is no sufficient scientific evidence to prove a causal link between activities and their impact.'

26 Communication from the Commission on the precautionary principle of 2 February 2000 (COM/2000/0001), point 5.2.1.

i 27 See *Association Greenpeace France v Ministère de l'Agriculture et de la Pêche* Case C-6/99 [2001] All ER (EC) 791, [2000] ECR I-1651 (para 44 et seq) and the *Monsanto* case (para 112 et seq), cited in footnote 24, above, both of which relate to genetic engineering rights.

28 See, for example, *Germany v European Parliament* Case C-233/94 [1997] ECR I-2405 (para 54), *Norbrook Laboratories Ltd v Ministry of Agriculture, Fisheries and Food* Case C-127/95 [1998] ECR I-1531 (para 89) and *R v Secretary of State for the Environment, Transport and the Regions, ex p Omega Air Ltd, Aero Engines Ireland Ltd v Irish Aviation Authority* Joined cases C-27/00 and C-122/00 [2002] ECR I-2569 (para 62).

29 See *Orkem v EC Commission* Case 374/87 [1989] ECR 3283 (para 28).

105. The authorisation threshold laid down in the second sentence of art 6(3) of the Habitats Directive is capable of preventing adverse effects on sites. No less stringent means of attaining this objective with comparable certainty is evident. There could be doubts only as regards the relationship between the authorisation threshold and the protection of the site which can be achieved thereby. a

106. However, disproportionate results are to be avoided in connection with the derogating authorisation provided for in art 6(4) of the Habitats Directive. Under this provision, plans or projects may be authorised, by way of derogation, in spite of a negative assessment of the implications for the site where there are imperative reasons of overriding public interest, there are no alternative solutions and all compensatory measures necessary to ensure that the overall coherence of Natura 2000 have been taken. Thus, in art 6(3) and (4) of the Habitats Directive the Community legislature itself set out the relationship between nature conservation and other interests. Consequently, no failure to observe the principle of proportionality can be established. b  
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107. However, the necessary certainty cannot be construed as meaning absolute certainty since that is almost impossible to attain. Instead, it is clear from the second sentence of art 6(3) of the Habitats Directive that the competent authorities must take a decision having assessed all the relevant information which is set out in particular in the appropriate assessment. The conclusion of this assessment is, of necessity, subjective in nature. Therefore, the competent authorities can, from their point of view, be certain that there will be no adverse effects even though, from an objective point of view, there is no absolute certainty. d  
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108. Such a conclusion of the assessment is tenable only where the deciding authorities at least are satisfied that there is no reasonable doubt as to the absence of adverse effects on the integrity of the site concerned. As in the case of a preliminary assessment—provided for in the first sentence of art 6(3) of the Habitats Directive—to establish whether a significant adverse effect on the site concerned is possible, account must also be taken here of the likelihood of harm occurring and the extent and nature of the anticipated harm<sup>30</sup>. Measures to minimise and avoid harm can also be of relevance. Precisely where scientific uncertainty exists, it is possible to gain further knowledge of the adverse effects by means of associated scientific observation and to manage implementation of the plan or project accordingly. f  
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109. In any event, the decisive considerations must be set out in the authorisation. They may be reviewed at least in so far as the authorising authorities' margin of discretion is exceeded. This would appear to be the case in particular where the findings of an appropriate assessment on possible adverse effects are contested without cogent factual arguments<sup>31</sup>. h

110. It is uncertain whether the Netherlands rule on the need for obvious doubt complies with the level of acceptable risk thus defined. It classifies as acceptable a risk of adverse effects which can still give rise to doubts which are reasonable but not obvious. However, such reasonable doubts would preclude the certainty that the integrity of the site concerned will not be adversely i

<sup>30</sup> See para 73, above.

<sup>31</sup> In his opinion on the *Wörschach golf course* case (para 39) (see footnote 23, above) Advocate General Léger considered that the fact that the competent authorities had agreed to the project concerned even though the appropriate assessment had identified a not insignificant risk of serious disturbance constituted an infringement of the second sentence of art 6(3) of the Habitats Directive.

- a affected which is necessary under Community law. The Raad van State's comments on the available scientific knowledge confirms this assessment. It refers to an expert report which concludes that there are gaps in knowledge and that the majority of the available research findings which are cited do not point unequivocally to serious adverse (irreversible) effects on the ecosystem. However, this finding merely means that serious adverse effects cannot be ascertained with certainty, not that they certainly do not exist.

b 111. In summary, the answer to the fourth question—in so far as it relates to art 6(3) of the Habitats Directive—must be that an appropriate assessment must precede agreement to a plan or project, take account of cumulative effects, and document all adverse effects on conservation objectives.

- c The competent authorities may agree to a plan or project only where, having considered all the relevant information, in particular the appropriate assessment, they are certain that the integrity of the site concerned will not be adversely affected. This presupposes that the competent authorities are satisfied that there is no reasonable doubt as to the absence of such adverse effects.

d *2—Article 6(2) of the Habitats Directive*

112. The fourth question concerns not only an interpretation of art 6(3) of the Habitats Directive but also the possible application of art 6(2) which would be possible if the annual authorisation of the cockle fishing were not classified as a plan or project.

e (a) Submissions of the parties

113. As regards 'appropriate steps' within the meaning of art 6(2) of the Habitats Directive, the Netherlands government, PO Kokkelvisserij and Vogelbescherming conclude that account must be taken not only of the needs of the relevant site, but also of economic, social and cultural requirements and regional and local characteristics, pursuant to art 2(3) of the Habitats Directive.

- f 114. The Netherlands government takes the view that obvious doubt as to the absence of adverse effects is required to trigger preventative measures also within the scope of art 6(2) of the Habitats Directive.

115. The Commission emphasises that art 6(2) of the Habitats Directive requires preventative measures to avoid deterioration and significant disturbance.

g (b) Opinion

116. In my view, there is no need to answer the fourth question as regards art 6(2) of the Habitats Directive. When a plan or project has been authorised, this provision has no function of its own in addition to art 6(3) of the Habitats Directive<sup>32</sup>. However, if the court should conclude that the annual authorisation of cockle fishing is not to be regarded as a plan or project, the question would arise as to which requirements on this authorisation follow from art 6(2) of the Habitats Directive.

- h 117. In this respect it should be borne in mind that where a plan or project is authorised the ascertainment—referred to in the second sentence of art 6(3) of the Habitats Directive—that the integrity of the site concerned will not be adversely affected must also exclude deterioration and significant disruption under art 6(2) of the Habitats Directive<sup>33</sup>. It would be equally unacceptable for

<sup>32</sup> See para 56, above.

<sup>33</sup> See para 56, above.



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a measure which adversely affects the integrity of a Natura 2000 site not to be regarded as deterioration or significant disruption. The substantive standard of protection provided for by sub-*paras* (2) and (3) of art 6 of the Habitats Directive is identical. Consequently, the appropriate steps referred to in art 6(2) of the Habitats Directive must ensure that the integrity of a Natura 2000 site will not be adversely affected.

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118. This obligation is permanent, that is to say even where it is necessary to take a decision on authorisation of a scheme which is not to be regarded as a plan or project. However, unlike art 6(3) of the Habitats Directive, art 6(2) contains no specific rules on how protection of the site is to be afforded in the authorisation procedure. Therefore, the competent authorities can also take measures other than those provided for in art 6(3) of the Habitats Directive to safeguard the objective of protection. However, such measures may be no less effective than the procedure under art 6(3) of the Habitats Directive. This standard of protection would not be provided if authorisation were granted even though reasonable doubts existed as to the absence of adverse effects on the integrity of the site concerned.

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119. For the sake of completeness, it should be noted that in some circumstances the criteria set out in art 6(4) of the Habitats Directive would have to apply to authorise, by way of exception, a scheme which would adversely affect the integrity of the site. Thus, pursuant to art 2(3) of the Habitats Directive account could be taken of economic, social and cultural requirements and regional and local characteristics and at the same time the principle of proportionality could be given concrete expression.

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120. The answer to this part of the fourth question must therefore be that where art 6(2) of the Habitats Directive applies to the authorisation of a scheme, such authorisation must, in substantive terms, provide the same standard of protection as authorisation granted pursuant to art 6(3) of the Habitats Directive.

*E—Question (5): direct applicability of art 6(2) and (3) of the Habitats Directive*

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121. Finally, the Raad van State seeks to ascertain whether, in the absence of transposition into Netherlands law, art 6(2) and (3) of the Habitats Directive have direct effect in the sense that individuals may rely on them in national courts and those courts must afford them protection.

*1—Submission of the parties*

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122. Waddenvereniging and Vogelbescherming take the view that art 6(2) and (3) of the Habitats Directive are sufficiently clear and unconditional to be directly applicable.

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123. Vogelbescherming further points out that the Raad van State itself already considers that art 6(2) of the Habitats Directive is directly applicable by referring to the judgments in *World Wildlife Fund (WWF) v Autonome Provinz Bozen*<sup>34</sup> and *Luxembourg v Linster*<sup>35</sup>. At any rate, it is possible to ascertain, in accordance with these judgments, that the discretion available to the member states has been exceeded.

<sup>34</sup> Case C-435/97 [1999] ECR I-5613.

<sup>35</sup> Case C-287/98 [2000] ECR I-6917.

a 124. The Netherlands government also states that the two provisions could establish a sufficiently clear obligation at least in cases in which the limits of discretion granted to member states are reached. However, it leaves the decision to the court.

b 125. The Commission considers that the direct applicability of art 6(2) of the Habitats Directive is unlikely since the decision on which measures are to be taken is left to the member states. On the other hand, art 6(3) of the Habitats Directive is sufficiently clear and also unconditional, at least once a special protection area has been designated.

c 126. PO Kokkelvisserij considers that the two provisions are not directly applicable. This follows from the fact that the Commission has still not drawn up a list of sites of Community importance within the meaning of art 4(2) of the Habitats Directive. Moreover, the two provisions grant the member states a margin of discretion and are not sufficiently clear. Furthermore, the present case relates not to the use of the provisions in question as rights of prohibition but as grounds for entitlements. Finally, at the hearing PO Kokkelvisserij took the view that direct application would inevitably result in horizontal application to the detriment of third parties.

## 2—Opinion

e 127. The question submitted by the Raad van State requires consideration of three partial aspects. It is to be ascertained whether art 6(2) and (3) of the Habitats Directive satisfy the requirements for direct application, to whom and under what conditions they may be invoked in the member states and whether the indirect burden on the shellfish catchers precludes direct applicability.

### (a) Direct applicability

f 128. As the court has consistently held, a provision of a directive is directly applicable on expiry of the period laid down for implementation where, as its subject matter is concerned, it is unconditional and sufficiently precise<sup>36</sup>.

g 129. Under art 23 of the Habitats Directive, member states are required to implement it within two years of its notification. The directive was notified on 5 June 1992 and therefore the period laid down for its implementation expired on 5 June 1994<sup>37</sup>.

h 130. Both provisions are unconditional, at least in respect of the Wadden Sea. Contrary to the opinion of PO Kokkelvisserij, the fact that there is no list of sites of Community importance within the meaning of art 4(2) of the Habitats Directive is irrelevant. Under art 7 of the Habitats Directive, art 6(2) to (4) thereof must be applied to the Wadden Sea as a special protection area, irrespective of whether or not this list has been drawn up<sup>38</sup>.

131. As regards the precision of the provisions, art 6(3) of the Habitats Directive lays down a body of rules made up of several stages which sets out

i 36 See, inter alia, *Marks & Spencer plc v Customs and Excise Comrs* Case C-62/00 [2002] STC 1036, [2002] ECR I-6325 (para 25) and the case law cited therein.

37 See *European Commission v Greece* Case C-329/96 [1997] ECR I-3749 (para 2) and *European Commission v Germany* Case C-83/97 [1997] ECR I-7191 (para 2).

38 The extent to which these provisions are to be applied to sites within the meaning of the Habitats Directive before this list is drawn up will have to be examined in *Società Italiana Dragaggi SpA v Ministero delle Infrastrutture e dei Trasporti and Regione Autonoma del Friuli Venezia Giulia* Case C-117/03 OJ 2003 C146 p 19.

clearly the requirements and legal consequences at each stage. Therefore, in the light of the authorising authorities' discretion set out above, this provision is capable of having direct effect. a

132. Furthermore, art 6(2) of the Habitats Directive also contains clearly defined requirements, namely deterioration or significant disturbance of sites. There is, however, a margin of discretion as regards the appropriate steps to avoid such effects. b

133. This discretion could preclude direct application<sup>39</sup>. In the view of the Commission, a judgment of the court relating to art 4 of Council Directive (EEC) 75/442<sup>40</sup> also militates in favour of this conclusion. This provision is couched in general terms in a similar way to art 6(2) of the Habitats Directive. The court ruled that art 4 of Directive 75/442 indicates a programme to be followed and sets out the objectives which the member states must observe in their performance of other more specific obligations imposed on them by the directive. This provision must be regarded as defining the framework for the action to be taken by the member states regarding the treatment of waste and not as requiring, in itself, the adoption of specific measures or a particular method of waste disposal<sup>41</sup>. c

134. However, on closer examination, art 4 of Directive 75/442 and art 6(2) of the Habitats Directive are hardly comparable. Article 6(2) does not set out the objectives of the Habitats Directive, nor is this provision given concrete expression by other provisions. d

135. The parallels with judgments in which the court acknowledged direct applicability in spite of the member states' discretion are much stronger. For example, in the WWF case the court held that in national proceedings too individuals may plead that the national legislature has, in implementing a directive, exceeded the discretion granted to it by Community law<sup>42</sup>. Otherwise the binding effect of the directive would be undermined. e

136. The implementation of art 6(2) of the Habitats Directive does not necessarily involve legislative measures. However, the courts can establish a fortiori whether or not the discretion has been exceeded in selecting the appropriate measures. It is relatively easy to declare misuse of power in particular where no steps were taken to avoid imminent deterioration or significant disturbance or where no further measures were adopted despite the obvious ineffectiveness of the measures taken previously. f

137. Therefore, art 6(2) of the Habitats Directive is directly applicable in so far as misuse of power is claimed. g

(b) The question whether an individual may rely on art 6(2) and (3) of the Habitats Directive

138. It does not inevitably follow from the direct applicability of a provision of Community law that any individual may bring an action before the courts h

<sup>39</sup> As pointed out by Advocate General Fenelly in his opinion in *Commission v France* Case C-256/98 (para 16), cited in footnote 9, above.

<sup>40</sup> On waste (OJ 1975 L194 p 39), as amended by Council Directive (EEC) 91/156 (OJ 1991 L78 p 32).

<sup>41</sup> See *Comitato di Coordinamento per la Difesa della Cava v Regione Lombardia* Case C-236/92 [1994] ECR I-483 (para 8 et seq).

<sup>42</sup> Cited in footnote 34, above, (para 69 et seq). See also *Linster's case* (para 32), cited in footnote 35, above; the *Kraaijeveld* case (para 56), cited in footnote 6, above, and *Verbond van Nederlandse Ondernemingen v Inspecteur der Invoerrechten en Accijnzen* Case 51/76 [1977] ECR 113 (paras 22–24). See also the opinion of Advocate General Alber in *Rieser Internationale Transporte GmbH v Autobahnen- und Schnellstraßen-Finanzierungs-AG (Asfinag)* Case C-157/02 (2003) Transcript (opinion), 9 September (para 71). i



a where there is failure to comply with it. In the present case the question arises as to whether and under what conditions individuals—or non-governmental organisations—may rely on provisions relating to the conservation of natural habitats and species.

b 139. According to the established case law, wherever the provisions of a directive appear, so far as their subject matter is concerned, to be unconditional and sufficiently precise, they may, in the absence of implementing measures adopted within the prescribed period, be relied on against any national provision which is incompatible with the directive or in so far as they define rights which individuals are able to assert against the state<sup>43</sup>.

c 140. Accordingly, the court draws a distinction between the directly applicable provisions of a directive in terms of rights of prohibition and grounds for entitlements. Whereas rights of prohibition may be invoked against any conflicting national provision, entitlements must be laid down in the relevant provision<sup>44</sup>.

d 141. As regards the aspect of rights of prohibition, the possibility of invoking them stems from the action (contrary to Community law) which is to be prohibited. Where avenues of legal redress against such action exist under national law, all relevant directly applicable provisions of the directive must be complied with within that framework. Therefore, in this regard an individual may rely on art 6(2) and (3) of the Habitats Directive where avenues of legal redress against measures infringing the above-mentioned provisions are available to him<sup>45</sup>.

e 142. In so far as directly applicable provisions of a directive establish entitlements, national law is subject to minimum standards of Community law as regards the availability of legal redress. It follows from the settled case law of the court that although, in the absence of Community rules governing the matter, it is for the domestic legal system of each member state to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive directly from Community law, such rules may not be less favourable than those governing similar domestic actions (the principle of equivalence) and may not render practically impossible or excessively difficult the exercise of rights conferred by Community law (the principle of effectiveness)<sup>46</sup>.

g 143. However, there is no evidence to suggest that rights of an individual are established. The objective of protection laid down by art 6(2) and (3) of the Habitats Directive is to conserve habitats and species within areas which form part of Natura 2000. Unlike in the case of rules on the quality of the atmosphere or water<sup>47</sup>, the protection of common natural heritage is of

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43 See *Becker v Finanzamt Münster-Innenstadt* Case 8/81 [1982] ECR 53 (para 25) and *Rechnungshof v Österreichischer Rundfunk* Joined cases C-465/00, C-138/01 and C-139/01 [2003] ECR I-4989 (para 98), and the references contained therein.

44 See *Riksskatteverket v Gharehveran* Case C-441/99 [2001] ECR I-7687 (para 45).

i 45 See in particular *Associazione Italiana per il World Wildlife Fund v Regione Veneto* Case C-118/94 [1996] ECR I-1223 (para 19), relating to the Birds Directive and also, for example, *Linster's case* (para 31 et seq), cited in footnote 35, above.

46 See *Criminal proceedings against Steffensen* Case C-276/01 [2003] ECR I-3735 (para 60) and the *Peterbroeck case* (para 12), cited in footnote 4, above.

47 See *EC Commission v Germany* Case C-361/88 [1991] ECR I-2567 (para 16), *EC Commission v Germany* Case C-59/89 [1991] ECR I-2607 (para 19), *EC Commission v Germany* Case C-58/89 [1991] ECR I-4983 (para 14) and *European Commission v Germany* Case C-298/95 [1996] ECR I-6747 (para 16).

particular interest<sup>48</sup> but not a right established for the benefit of individuals. The close interests of individuals can be promoted only indirectly, as a reflex so to speak. a

144. The answer to the fifth question must therefore be that individuals may rely on art 6(2) and (3) of the Habitats Directive in so far as avenues of legal redress against measures infringing the above-mentioned provisions are available to them under national law. b

(c) Burden imposed on third parties by the direct application of art 6(2) and (3) of the Habitats Directive

145. In the present case the direct application of arts 6(2) and (3) of the Habitats Directive could be precluded by the disadvantages to cockle fishermen stated by PO Kokkelvisserij. c

146. It is true that, according to case law, a directive which has not been transposed does give rise to obligations on individuals either in regard to other individuals or, a fortiori, in regard to the member state itself<sup>49</sup>. This case law is based on the fact that under art 249 EC (formerly art 189 of the EC Treaty) a directive is binding upon each member state to which it is addressed but not upon the individual. It could be understood as meaning that any burden on citizens as a result of directly applicable directives must be excluded. d

147. In this regard, it should be noted, firstly, that in any event the provisions of the relevant national law must, as far as possible, be interpreted in such a way that the purposes of Community law, and in particular of the relevant provisions of the directive, are achieved<sup>50</sup>. The Raad van State itself states that such an interpretation, in accordance with the directive, of art 12 of the Netherlands Natural Conservation law is possible. Moreover, any discretion which may exist must be exercised to this effect. e

148. Secondly, on closer examination the case law does not necessarily preclude any burden on citizens resulting from directly applicable directives. The judgments rejecting direct applicability concerned, on the one hand, the application of directives in the civil law relationship between citizens<sup>51</sup>, and on the other, citizen's obligations towards the state, in particular in the field of criminal law<sup>52</sup>. Moreover, it can be inferred from *ECSC v Acciaierie e Ferriere Busseini SpA (in liq)*<sup>53</sup>, which concerned the status of a Community claim in bankruptcy proceedings, that directly applicable directives cannot undermine vested rights. f

149. However, where an activity requires authorisation before it can be carried on, direct application of the provisions of a directive does not, as regards the decision on such authorisation, result in a direct obligation on individuals, nor would it encroach on vested rights. On the contrary, it merely g

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48 See *EC Commission v Netherlands* Case 236/85 [1987] ECR 3989 (para 5), *EC Commission v Belgium* Case 247/85 [1987] ECR 3029 (para 9) and *EC Commission v France* Case 252/85 [1988] ECR 2243 (para 5).

49 See *Pretore di Salò v Persons Unknown* Case 14/86 [1987] ECR 2545 (para 19). See also *Faccini Dori v Recreb Srl* Case C-91/92 [1995] All ER (EC) 1, [1994] ECR I-3325 (para 20 et seq).

50 See *Marleasing SA v La Comercial Internacional de Alimentación SA* Case C-106/89 [1990] ECR I-4135 (para 8), *Wagner Miret v Fondo de Garantía Salarial* Case C-334/92 [1993] ECR I-6911 (para 20) and the *Faccini Dori* case (para 26), cited in footnote 49, above. i

51 See the *Faccini Dori* case (para 48), cited in footnote 49, above, and *Marshall v Southampton and South West Hampshire Area Health Authority (Teaching)* Case 152/84 [1986] 2 All ER 584, [1986] ECR 723.

52 See *Criminal proceedings against Kolpinghuis Nijmegen BV* Case 80/86 [1987] ECR 3969 (para 6 et seq) and the *Pretore di Salò* case, cited in footnote 49, above.

53 Case C-221/88 [1990] ECR I-495 (para 23 et seq).

- a* precludes granting an advantage to an individual which would involve a state decision in his favour. This decision would be based on provisions of national law contrary to the requirements of the directive. Therefore, by adopting such a decision the member state would be failing to fulfil its obligations under the directive. However, member states may not adopt such a decision which grants an advantage to an individual but infringes Community law. Either the relevant provisions of national law underlying the grant of such advantage must be interpreted and applied in conformity with the directive, or—where interpretation in conformity with the directive is not possible—they must not be applied. At least as long as legal positions protected by Community law are not affected, such an indirect burden on citizens does not preclude state authorities from being bound by directly applicable directives.

*c* 150. This view can be based on other cases in which the court permitted an indirect burden on individuals by the direct application of directives<sup>54</sup>. The court recently confirmed this view when it ruled that mere adverse repercussions on the rights of third parties, even if the repercussions are certain, do not justify preventing an individual from invoking the provisions of a directive against the member state concerned<sup>55</sup>.

- d* 151. In summary, the answer to the fifth question must therefore be that individuals may rely on art 6(3) of Directive 92/43 in so far as avenues of legal redress against measures infringing the above-mentioned provisions are available to them under national law. They may, under the same conditions, rely on art 6(2) of Directive 92/43 in so far as error of assessment is claimed.
- e* An indirect burden on citizens which does not encroach on legal positions protected by Community law does not preclude the recognised (vertical) binding of state authorities to directly applicable directives.

#### V—CONCLUSION

- f* 152. I propose that the Court of Justice answer the questions referred for a preliminary ruling by the Raad van State as follows:

*g* (1) The words ‘plan and project’ in art 6(3) of Council Directive (EEC) 92/43 (on the conservation of natural habitats and of wild fauna and flora) also cover an activity which has already been carried on for many years but for which an authorisation is in principle granted each year for a limited period.

*h* (2) Article 6(3) of Directive 92/43 lays down the procedure for authorising plans and projects which do not affect the integrity of protection sites, whereas art 6(2) thereof lays down permanent obligations irrespective of the authorisation of plans and projects, namely to avoid deterioration and disturbance which could be significant in relation to the objectives of the directive.

(3) An appropriate assessment is always necessary where reasonable doubt exists as to the absence of significant adverse effects. Any effect on the conservation objectives has a significant effect on the site concerned.

*i* 54 See *Tögel v Niederösterreichische Gebietskrankenkasse* Case C-76/97 [1998] ECR I-5357 (para 52), *Fratelli Costanzo SpA v Comune di Milano* Case 103/88 [1989] ECR 1839 (para 28), both concerning public procurement; and *R v Medicines Control Agency, ex p Smith & Nephew Pharmaceuticals Ltd* Case C-201/94 (1996) 34 BMLR 141, [1996] ECR I-5819 (para 35 et seq), concerning the licensing of medicinal products. See also the opinion of Advocate General Léger in *R (on the application of Wells) v Secretary of State for Transport, Local Government and the Regions* Case C-201/02 [2005] All ER (EC) 323 (para 65 et seq), concerning the directive on environmental impact assessment.

55 See the judgment in *Wells’ case* (para 57), cited in footnote above.



(4) An appropriate assessment must precede agreement to a plan or project, take account of cumulative effects, and document all adverse effects on conservation objectives. a

The competent authorities may agree to a plan or project only where, having considered all the relevant information, in particular the appropriate assessment, they are certain that the integrity of the site concerned will not be adversely affected. This presupposes that the competent authorities are satisfied that there is no reasonable doubt as to the absence of such adverse effects. b

Where art 6(2) of Directive 92/43 applies to the authorisation of a scheme such authorisation must, in substantive terms, provide the same standard of protection as authorisation granted pursuant to art 6(3) of the Habitats Directive. c

(5) Individuals may rely on art 6(3) of Directive 92/43 in so far as avenues of legal redress against measures infringing the above-mentioned provisions are available to them under national law. They may, under the same conditions, rely on art 6(2) of Directive 92/43 in so far as error of assessment is claimed. An indirect burden on citizens which does not encroach on legal positions protected by Community law does not preclude the recognised (vertical) binding of state authorities to directly applicable directives. d

7 September 2004. **The COURT OF JUSTICE (Grand Chamber)** delivered the following judgment. e

1. The reference for a preliminary ruling concerns the interpretation of art 6 of Council Directive (EEC) 92/43 (on the conservation of natural habitats and of wild fauna and flora) (OJ 1992 L206 p 7) (the Habitats Directive). f

2. The reference was made in proceedings between the Landelijke Vereniging tot Behoud van de Waddenzee (National association for conservation of the Waddenzee, the Waddenvereniging) and the Nederlandse Vereniging tot Bescherming van Vogels (Netherlands association for the protection of birds, the Vogelbeschermingsvereniging) on the one hand and the Staatssecretaris van Landbouw, Natuurbeheer en Visserij (Secretary of State for agriculture, nature conservation and fisheries, the Secretary of State) on the other in respect of licences which the latter issued to the Coöperatieve Producentenorganisatie van de Nederlandse Kokkelvisserij UA (Cooperative producers' association of Netherlands cockle fisheries, the PO Kokkelvisserij) for the mechanical fishing of cockles in the special protection area (SPA) of the Waddenzee, classified within the meaning of art 4 of Council Directive (EEC) 79/409 (on the conservation of wild birds) (OJ 1979 L103 p 1) (the Birds Directive). g  
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#### LEGAL FRAMEWORK

##### *The Birds Directive*

3. Article 4(1) and (2) of the Birds Directive requires member states to classify as SPAs the territories satisfying the ornithological criteria established by those provisions. i

4. Article 4(4) of the Birds Directive provides:

'In respect of the protection areas referred to in paragraphs 1 and 2 above, Member States shall take appropriate steps to avoid pollution or deterioration of habitats or any disturbances affecting the birds, in so far as

- a these would be significant having regard to the objectives of this article. Outside these protection areas, Member States shall also strive to avoid pollution or deterioration of habitats.'

*The Habitats Directive*

5. Article 6 of the Habitats Directive states:

- b '1. For special areas of conservation, Member States shall establish the necessary conservation measures involving, if need be, appropriate management plans specifically designed for the sites or integrated into other development plans, and appropriate statutory, administrative or contractual measures which correspond to the ecological requirements of the natural habitat types in Annex I and the species in Annex II present on the sites.

- c 2. Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.

- d 3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

- e 4. If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.

- g Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest.'

- h 6. Article 7 of the Habitats Directive states that—

- i 'obligations arising under Article 6(2), (3) and (4) of this Directive shall replace any obligations arising under the first sentence of Article 4(4) of [the Birds Directive] in respect of areas classified pursuant to Article 4(1) or similarly recognised under Article 4(2) thereof, as from the date of implementation of this Directive or the date of classification or recognition by a Member State under [the Birds Directive], where the latter date is later.'

NATIONAL LEGISLATION

7. Under art 12(1) of the Natuurbeschermingswet (Nature Conservation Law), it is prohibited to carry out, to have carried out or to allow actions which

are harmful to the natural integrity or the scientific importance of a protected natural site or disfigure it, without authorisation by the Minister van Landbouw, Natuurbeheer en Visserij (Minister for Agriculture, nature conservation and fisheries, the Minister) or in breach of the conditions accompanying that authorisation. Under art 12(2), activities harmful to the essential characteristics of a protected natural site, as set out in the designation decision, are always to be considered harmful to the natural integrity of such a site or its interest in natural science terms. a

8. It is clear from the order of 17 November 1993 designating the Waddenzee as a national natural site and from the explanatory memorandum for that order, which is an integral part of it, that the policy of authorisations and revocations under the Natuurbeschermingswet is linked to that followed under the Planologische Kernbeslissing Waddenzee (Key planning decision for the Waddenzee, hereinafter the PKB Waddenzee). According to that explanatory memorandum, applying the procedures of the Natuurbeschermingswet creates an adequate framework for controlling activities which might harm the main objective of the PKB Waddenzee, namely, sustainable protection and development of that sea as a natural site and, in particular, of feeding, nesting and resting areas for birds frequenting that site. Human activities for economic purposes are allowed subject to an adequate assessment in the light of the main objective. Activities envisaged in the Waddenzee must therefore be examined in the light of the above-mentioned objective and policy guidelines and assessed in terms thereof. b

9. The section in the PKB Waddenzee devoted to coastal fisheries management is implemented in the government decision of 21 January 1993, namely, the Structuurnota Zee- en kustvisserij 'Vissen naar evenwicht' (Structure Document on Marine and Inshore Fisheries 'Fishing for equilibrium'). This establishes the policy for shellfish fishing, inter alia in the Waddenzee, for the years 1993–2003 and includes a number of restrictions as regards cockle fishing. Certain areas in the national natural site are permanently closed to cockle fishing and in years in which food is scarce, 60% of the average food requirement of birds in the form of cockles and mussels is reserved for them. While 100% of their average food requirement is not thus reserved, that is because they can also turn to alternative food sources (Baltic clams, surf clams and shore crabs). c

10. Under the PKB Waddenzee, it follows from the precautionary principle that where the most reliable information available leaves obvious doubt as to the absence of possible significant adverse effects on the ecosystem, the benefit of the doubt will favour conservation of the Waddenzee. The order for reference makes clear that most of the available scientific studies consulted do not unequivocally indicate the existence of significant adverse effects on the ecosystem of the Waddenzee linked to mechanical cockle fishing. d

#### THE MAIN ACTION AND THE QUESTIONS REFERRED

11. By decisions of 1 July 1999 and 7 July 2000 (the decisions at issue in the main action), the Secretary of State issued licences to PO Kokkelvisserij, subject to certain conditions, to engage in mechanical cockle fishing in the Waddenzee SPA during the periods from 16 August to 25 November 1999 and 14 August to 30 November 2000 respectively. e

12. The Waddenvereniging and the Vogelbeschermingsvereniging challenged those decisions before the Secretary of State, who, by decisions of f



a 23 December 1999 and 19 February 2001, held that the complaints made against the decisions at issue in the main action were not founded and rejected the applications against them.

b 13. Those nature protection associations brought an action against those rejections before the Raad van State (Council of State). They claimed in essence that cockle fishing, as authorised by the decisions at issue in the main action, causes permanent damage to the geomorphology, flora and fauna of the Waddenzee's seabed. They also submitted that such fishing reduces the food stocks of birds which feed on shellfish, causing a decline in their populations, in particular for oyster-catchers and eider ducks. The Waddenvereniging and the Vogelbeschermingsvereniging also claimed that those decisions were contrary to the Habitats and Birds Directives.

c 14. As regards the correct transposition of art 6(2) to (4) of the Habitats Directive into Netherlands law, the Raad van State states that art 12 of the Natuurbeschermingswet, although not expressly intended to implement the obligations laid down in art 6(2) of the Habitats Directive, may be interpreted in a manner consistent with that provision. Similarly, the d Natuurbeschermingswet does not contain rules which implement art 6(3) and (4) of that directive. Nor are there generally binding rules intended to implement the provisions of those two paragraphs which are otherwise applicable to the Waddenzee.

e 15. The national court also states that according to the Waddenvereniging and the Vogelbeschermingsvereniging, in view of the expansion of cockle fishing in the Waddenzee SPA, there is a 'plan or project' which should be subject to 'appropriate assessment' in accordance with art 6(3) of the Habitats Directive whereas the Secretary of State contends that the activity in question, inasmuch as it has been carried on for many years without any intensification, falls within art 6(2) of that directive.

f 16. As regards the relationship between art 6(2) and (3) of the Habitats Directive, the Waddenvereniging and the Vogelbeschermingsvereniging submit that although the activity for which licences were granted must be described as a 'plan' or 'project' within the meaning of art 6(3), it must nevertheless be examined in the light of art 6(2). It is therefore appropriate to consider whether art 6(3) must be regarded as a specific application of the rules in art 6(2), so that g those two paragraphs must be applied cumulatively, or as a provision with a separate, independent purpose, so that art 6(2) relates to existing use while art 6(3) applies to new plans or projects.

h 17. The Raad van State asks under what conditions an 'appropriate assessment' of the effect of the plan or project on the site concerned must be carried out. In addition, it asks what the criteria are on the basis of which it must be determined whether 'appropriate steps' or an 'appropriate assessment' are concerned, also in the light of the requirement laid down in art 6(3) of the Habitats Directive for the competent authorities to agree to a plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned.

i 18. Finally, the national court considers it relevant to know whether art 6(2) and (3) of the Habitats Directive has direct effect.

19. In those circumstances, the Raad van State decided to stay the proceedings and to refer the following questions to the Court of Justice of the European Communities for a preliminary ruling:

(1)(a) Are the words “plan or project” in Article 6(3) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora to be interpreted as also covering an activity which has already been carried on for many years but for which an authorisation is in principle granted each year for a limited period, with a fresh assessment being carried out on each occasion as to whether, and if so in which sections of the area, the activity may be carried on? a

(b) If the answer to Question (1)(a) is in the negative, must the relevant activity be regarded as a “plan or project” if the intensity of this activity has increased over the years or an increase in it is made possible by the authorisations? b

(2)(a) If it follows from the answer to Question (1) that there is a “plan or project” within the meaning of Article 6(3) of the Habitats Directive, is Article 6(3) of the Habitats Directive to be regarded as a special application of the rules in Article 6(2) or as a provision with a separate, independent purpose in the sense that, for example: (i) Article 6(2) relates to existing use and Article 6(3) to new plans or projects, or (ii) Article 6(2) relates to management measures and Article 6(3) to other decisions, or (iii) Article 6(3) relates to plans or projects and Article 6(2) to other activities? c

(b) If Article 6(3) of the Habitats Directive is to be regarded as a special application of the rules in Article 6(2), can the two subparagraphs be applicable cumulatively? d

(3)(a) Is Article 6(3) of the Habitats Directive to be interpreted as meaning that there is a “plan or project” once a particular activity is likely to have an effect on the site concerned (and an “appropriate assessment” must then be carried out to ascertain whether or not the effect is “significant”) or does this provision mean that an “appropriate assessment” has to be carried out only where there is a (sufficient) likelihood that a “plan or project” will have a significant effect? e

(b) On the basis of which criteria must it be determined whether or not a plan or project within the meaning of Article 6(3) of the Habitats Directive not directly connected with or necessary to the management of the site is likely to have a significant effect thereon, either individually or in combination with other plans or projects? f

(4)(a) When Article 6(3) of the Habitats Directive is applied, on the basis of which criteria must it be determined whether or not there are “appropriate steps” within the meaning of Article 6(2) or an “appropriate assessment”, within the meaning of Article 6(3), in connection with the certainty required before agreeing to a plan or project? g

(b) Do the terms “appropriate steps” or “appropriate assessment” have independent meaning or, in assessing these terms, is account also to be taken of Article 174(2) EC and in particular the precautionary principle referred to therein? h

(c) If account must be taken of the precautionary principle referred to in Article 174(2) EC, does that mean that a particular activity, such as the cockle fishing in question, can be authorised where there is no obvious doubt as to the absence of a possible significant effect or is that permissible only where there is no doubt as to the absence of such an effect or where the absence can be ascertained? i

(5) Do Article 6(2) or Article 6(3) of the Habitats Directive have direct effect in the sense that individuals may rely on them in national courts and

a those courts must provide the protection afforded to individuals by the direct effect of Community law, as was held inter alia in [*SCS Peterbroeck Van Campenhout & Cie v Belgium* Case C-312/93 [1996] All ER (EC) 242, [1995] ECR I-4599]?’

b 20. By order of 28 April 2004, the application by PO Kokkelvisserij to be allowed to submit written observations in response to Advocate General Kokott’s opinion or otherwise to be given an opportunity to respond to that opinion was rejected.

#### THE QUESTIONS REFERRED

##### *First question*

c *Question (1)(a)*

21. By question (1)(a), the national court in essence asks whether mechanical cockle fishing which has been carried on for many years but for which a licence is granted annually for a limited period, with each licence entailing a new assessment both of the possibility of carrying on that activity and of the site  
d where it may take place, falls within the concept of ‘plan’ or ‘project’ within the meaning of art 6(3) of the Habitats Directive.

22. The tenth recital in the preamble to the Habitats Directive states that ‘an appropriate assessment must be made of any plan or programme likely to have a significant effect on the conservation objectives of a site which has been designated or is designated in future’. That recital finds expression in art 6(3) of  
e the directive, which provides inter alia that a plan or project likely to have a significant effect on the site concerned cannot be authorised without a prior assessment of its effects.

23. The Habitats Directive does not define the terms ‘plan’ and ‘project’.

24. By contrast, Council Directive (EEC) 85/337 (on the assessment of the effects of certain public and private projects on the environment) (OJ 1985 L175 p 40), the sixth recital in the preamble to which states that development consent for projects which are likely to have significant effects on the environment should be granted only after prior assessment of the likely significant environmental effects of these projects has been carried out, defines  
f ‘project’ as follows in art 1(2):

g ‘—the execution of construction works or of other installations or schemes,  
—other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources.’

25. An activity such as mechanical cockle fishing is within the concept of  
h ‘project’ as defined in the second indent of art 1(2) of Directive 85/337.

26. Such a definition of ‘project’ is relevant to defining the concept of plan or project as provided for in the Habitats Directive, which, as is clear from the foregoing, seeks, as does Directive 85/337, to prevent activities which are likely to damage the environment from being authorised without prior assessment of their impact on the environment.

i 27. Therefore, an activity such as mechanical cockle fishing is covered by the concept of plan or project set out in art 6(3) of the Habitats Directive.

28. The fact that the activity has been carried on periodically for several years on the site concerned and that a licence has to be obtained for it every year, each new issuance of which requires an assessment both of the possibility of carrying on that activity and of the site where it may be carried on, does not in



itself constitute an obstacle to considering it, at the time of each application, as a distinct plan or project within the meaning of the Habitats Directive. a

29. The answer to question (1)(a) must therefore be that mechanical cockle fishing which has been carried on for many years but for which a licence is granted annually for a limited period, with each licence entailing a new assessment both of the possibility of carrying on that activity and of the site where it may be carried on, falls within the concept of 'plan' or 'project' within the meaning of art 6(3) of the Habitats Directive. b

*Question (1)(b)*

30. In the light of the reply to question (1)(a), there is no need to reply to question (1)(b). c

*Second question*

31. By its second question, the national court in essence asks what the relationship is between art 6(2) and (3) of the Habitats Directive.

32. It should be recalled that art 6(2) of the Habitats Directive, in conjunction with art 7 thereof, requires member states to take appropriate steps to avoid, in SPAs, the deterioration of habitats and significant disturbance of the species for which the areas have been designated. d

33. Article 6(3) of the Habitats Directive provides that the competent national authorities are to authorise a plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon only after having ascertained, by means of an appropriate assessment of the implications of that plan or project for the site, that it will not adversely affect the integrity of the site. e

34. That provision thus establishes a procedure intended to ensure, by means of a preliminary examination, that a plan or project which is not directly connected with or necessary to the management of the site concerned but likely to have a significant effect on it is authorised only to the extent that it will not adversely affect the integrity of that site. f

35. The fact that a plan or project has been authorised according to the procedure laid down in art 6(3) of the Habitats Directive renders superfluous, as regards the action to be taken on the protected site under the plan or project, a concomitant application of the rule of general protection laid down in art 6(2). g

36. Authorisation of a plan or project granted in accordance with art 6(3) of the Habitats Directive necessarily assumes that it is considered not likely adversely to affect the integrity of the site concerned and, consequently, not likely to give rise to deterioration or significant disturbances within the meaning of art 6(2). h

37. Nevertheless, it cannot be precluded that such a plan or project subsequently proves likely to give rise to such deterioration or disturbance, even where the competent national authorities cannot be held responsible for any error. Under those conditions, application of art 6(2) of the Habitats Directive makes it possible to satisfy the essential objective of the preservation and protection of the quality of the environment, including the conservation of natural habitats and of wild fauna and flora, as stated in the first recital in the preamble to that directive. i

38. The answer to the second question must therefore be that art 6(3) of the Habitats Directive establishes a procedure intended to ensure, by means of a preliminary examination, that a plan or project which is not directly connected

- a with or necessary to the management of the site concerned but likely to have a significant effect on it is authorised only to the extent that it will not adversely affect the integrity of that site, while art 6(2) of the Habitats Directive establishes an obligation of general protection consisting in avoiding deterioration and disturbances which could have significant effects in the light of the directive's objectives, and cannot be applicable concomitantly with
- b art 6(3).

### Third question

#### Question (3)(a)

- c 39. According to the first sentence of art 6(3) of the Habitats Directive, any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, is to be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives.
- d 40. The requirement for an appropriate assessment of the implications of a plan or project is thus conditional on its being likely to have a significant effect on the site.
- e 41. Therefore, the triggering of the environmental protection mechanism provided for in art 6(3) of the Habitats Directive does not presume—as is, moreover, clear from the guidelines for interpreting that article drawn up by the Commission of the European Communities, entitled 'Managing Natura 2000 Sites: The provisions of art 6 of the "Habitats" Directive (92/43/EEC)'—that the plan or project considered definitely has significant effects on the site concerned but follows from the mere probability that such an effect attaches to that plan or project.
- f 42. As regards art 2(1) of Directive 85/337, the text of which, essentially similar to art 6(3) of the Habitats Directive, provides that 'Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment ... are made subject to an assessment with regard to their effects', the Court of Justice has held that these are projects which are likely to have significant effects on the environment (see to that effect *European Commission v Portugal* Case C-117/02 (2004) Transcript (judgment), 29 April (para 85)).
- g 43. It follows that the first sentence of art 6(3) of the Habitats Directive subordinates the requirement for an appropriate assessment of the implications of a plan or project to the condition that there be a probability or a risk that the latter will have significant effects on the site concerned.
- h 44. In the light, in particular, of the precautionary principle, which is one of the foundations of the high level of protection pursued by Community policy on the environment, in accordance with the first subparagraph of art 174(2) EC (formerly art 130r of the EC Treaty), and by reference to which the Habitats Directive must be interpreted, such a risk exists if it cannot be excluded on the basis of objective information that the plan or project will have significant effects on the site concerned (see, by analogy, *inter alia UK v European Commission* Case C-180/96 [1998] ECR I-2265 (paras 50, 105, 107)).
- i Such an interpretation of the condition to which the assessment of the implications of a plan or project for a specific site is subject, which implies that in case of doubt as to the absence of significant effects such an assessment must be carried out, makes it possible to ensure effectively that plans or

projects which adversely affect the integrity of the site concerned are not authorised, and thereby contributes to achieving, in accordance with the third recital in the preamble to the Habitats Directive and art 2(1) thereof, its main aim, namely, ensuring biodiversity through the conservation of natural habitats and of wild fauna and flora. a

45. In the light of the foregoing, the answer to question (3)(a) must be that the first sentence of art 6(3) of the Habitats Directive must be interpreted as meaning that any plan or project not directly connected with or necessary to the management of the site is to be subject to an appropriate assessment of its implications for the site in view of the site's conservation objectives if it cannot be excluded, on the basis of objective information, that it will have a significant effect on that site, either individually or in combination with other plans or projects. b  
c

*Question (3)(b)*

46. As is clear from the first sentence of art 6(3) of the Habitats Directive in conjunction with the tenth recital in its preamble, the significant nature of the effect on a site of a plan or project not directly connected with or necessary to the management of the site is linked to the site's conservation objectives. d

47. So, where such a plan or project has an effect on that site but is not likely to undermine its conservation objectives, it cannot be considered likely to have a significant effect on the site concerned.

48. Conversely, where such a plan or project is likely to undermine the conservation objectives of the site concerned, it must necessarily be considered likely to have a significant effect on the site. As the Commission in essence maintains, in assessing the potential effects of a plan or project, their significance must be established in the light, inter alia, of the characteristics and specific environmental conditions of the site concerned by that plan or project. e

49. The answer to question (3)(b) must therefore be that, pursuant to the first sentence of art 6(3) of the Habitats Directive, where a plan or project not directly connected with or necessary to the management of a site is likely to undermine the site's conservation objectives, it must be considered likely to have a significant effect on that site. The assessment of that risk must be made in the light inter alia of the characteristics and specific environmental conditions of the site concerned by such a plan or project. f  
g

*Fourth question*

50. By questions (4)(a) to (c), the national court in essence asks the court to clarify the concepts of 'appropriate steps' within the meaning of art 6(2) of the Habitats Directive and 'appropriate assessment' within the meaning of art 6(3) thereof and the conditions under which an activity such as mechanical cockle fishing may be authorised. h

51. In the light of the context of the main action, as well as the foregoing observations, and in particular the answers to the first two questions, there is no need, as stated in para 116 of Advocate General Kokott's opinion, to answer the fourth question as regards art 6(2) of the Habitats Directive.

52. As regards the concept of 'appropriate assessment' within the meaning of art 6(3) of the Habitats Directive, it must be pointed out that the provision does not define any particular method for carrying out such an assessment. i

53. None the less, according to the wording of that provision, an appropriate assessment of the implications for the site concerned of the plan or project must precede its approval and take into account the cumulative effects which



a result from the combination of that plan or project with other plans or projects in view of the site's conservation objectives.

54. Such an assessment therefore implies that all the aspects of the plan or project which can, either individually or in combination with other plans or projects, affect those objectives must be identified in the light of the best scientific knowledge in the field. Those objectives may, as is clear from arts 3 and 4 of the Habitats Directive, in particular art 4(4), be established on the basis, *inter alia*, of the importance of the sites for the maintenance or restoration at a favourable conservation status of a natural habitat type in Annex I to that directive or a species in Annex II thereto and for the coherence of Natura 2000, and of the threats of degradation or destruction to which they are exposed.

55. As regards the conditions under which an activity such as mechanical cockle fishing may be authorised, given art 6(3) of the Habitats Directive and the answer to the first question, it lies with the competent national authorities, in the light of the conclusions of the assessment of the implications of a plan or project for the site concerned, to approve the plan or project only after having made sure that it will not adversely affect the integrity of that site.

56. It is therefore apparent that the plan or project in question may be granted authorisation only on the condition that the competent national authorities are convinced that it will not adversely affect the integrity of the site concerned.

57. So, where doubt remains as to the absence of adverse effects on the integrity of the site linked to the plan or project being considered, the competent authority will have to refuse authorisation.

58. In this respect, it is clear that the authorisation criterion laid down in the second sentence of art 6(3) of the Habitats Directive integrates the precautionary principle (see *R v Ministry of Agriculture, Fisheries and Food, ex p National Farmers' Union* Case C-157/96 [1998] ECR I-2211 (para 63)) and makes it possible effectively to prevent adverse effects on the integrity of protected sites as the result of the plans or projects being considered. A less stringent authorisation criterion than that in question could not as effectively ensure the fulfilment of the objective of site protection intended under that provision.

59. Therefore, pursuant to art 6(3) of the Habitats Directive, the competent national authorities, taking account of the conclusions of the appropriate assessment of the implications of mechanical cockle fishing for the site concerned, in the light of the site's conservation objectives, are to authorise such activity only if they have made certain that it will not adversely affect the integrity of that site. That is the case where no reasonable scientific doubt remains as to the absence of such effects (see, by analogy, *Monsanto Agricoltura Italia SpA v Presidenza del Consiglio dei Ministri* Case C-236/01 [2003] ECR I-8105 (paras 106, 113)).

60. Otherwise, mechanical cockle fishing could, where appropriate, be authorised under art 6(4) of the Habitats Directive, provided that the conditions set out therein are satisfied.

61. In view of the foregoing, the answer to the fourth question must be that, under art 6(3) of the Habitats Directive, an appropriate assessment of the implications for the site concerned of the plan or project implies that, prior to its approval, all the aspects of the plan or project which can, by themselves or in combination with other plans or projects, affect the site's conservation objectives must be identified in the light of the best scientific knowledge in the

field. The competent national authorities, taking account of the appropriate assessment of the implications of mechanical cockle fishing for the site concerned in the light of the site's conservation objectives, are to authorise such an activity only if they have made certain that it will not adversely affect the integrity of that site. That is the case where no reasonable scientific doubt remains as to the absence of such effects.

#### *Fifth question*

62. In the light of the finding in para 51, above, it is not necessary to consider the fifth question in so far as it relates to art 6(2) of the Habitats Directive.

63. It is therefore appropriate to consider that question only in so far as it concerns art 6(3) of the Habitats Directive.

64. By its fifth question, the national court asks in essence whether, when a national court is called on to ascertain the lawfulness of an authorisation for a plan or project within the meaning of art 6(3) of the Habitats Directive, it may examine whether the limits of discretion of the competent national authorities laid down by that provision have been complied with even though it has not been transposed into the legal order of the member state concerned despite the expiry of the time limit laid down for that purpose.

65. It should be recalled that the obligation of a member state to take all the measures necessary to achieve the result prescribed by a directive is a binding obligation imposed by the third paragraph of art 249 EC (formerly art 189 of the EC Treaty) and by the directive itself. That duty to take all appropriate measures, whether general or particular, is binding on all the authorities of member states including, for matters within their jurisdiction, the courts (see *Aannemersbedrijf PK Kraaijeveld BV v Gedeputeerde Staten van Zuid-Holland* Case C-72/95 [1997] All ER (EC) 134, [1996] ECR I-5403 (para 55)).

66. As regards the right of an individual to rely on a directive and of the national court to take it into consideration, it would be incompatible with the binding effect attributed to a directive by art 249 EC to exclude, in principle, the possibility that the obligation which it imposes may be relied on by those concerned. In particular, where the Community authorities have, by directive, imposed on member states the obligation to pursue a particular course of conduct, the effectiveness of such an act would be weakened if individuals were prevented from relying on it before their national courts, and if the latter were prevented from taking it into consideration as an element of Community law in order to rule whether the national legislature, in exercising the choice open to it as to the form and methods for implementation, has kept within the limits of its discretion set by the directive (see the *Kraaijeveld* case (para 56)). That also applies to ascertaining whether, failing transposition into national law of the relevant provision of the directive concerned, the national authority which has adopted the contested measure has kept within the limits of its discretion set by that provision.

67. More particularly, as regards the limits of discretion set by art 6(3) of the Habitats Directive, it follows from that provision that in a case such as that in the main action, the competent national authorities, taking account of the conclusions of the appropriate assessment of the implications of mechanical cockle fishing for the site concerned in the light of the site's conservation objectives, are to authorise such an activity only if they have made certain that it will not adversely affect the integrity of that site, that being the case if there remains no reasonable scientific doubt as to the absence of such effects (see para 59, above).

a 68. Such a condition would therefore not be observed were the national authorities to authorise that activity in the face of uncertainty as to the absence of adverse effects for the site concerned.

b 69. It follows that art 6(3) of the Habitats Directive may be taken into account by the national court in determining whether a national authority which has granted an authorisation relating to a plan or project has kept within the limits of the discretion set by the provision in question.

c 70. Consequently, the answer to the fifth question must be that where a national court is called on to ascertain the lawfulness of an authorisation for a plan or project within the meaning of art 6(3) of the Habitats Directive, it can determine whether the limits on the discretion of the competent national authorities set by that provision have been complied with, even though it has not been transposed into the legal order of the member state concerned despite the expiry of the time limit laid down for that purpose.

#### COSTS

d 71. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the court, other than the costs of those parties, are not recoverable.

On those grounds, the Court of Justice (Grand Chamber) rules as follows:

e (1) Mechanical cockle fishing which has been carried on for many years but for which a licence is granted annually for a limited period, with each licence entailing a new assessment both of the possibility of carrying on that activity and of the site where it may be carried on, falls within the concept of 'plan' or 'project' within the meaning of art 6(3) of Council Directive (EEC) 92/43 (on the conservation of natural habitats and of wild fauna and flora).

f (2) Article 6(3) of Directive 92/43 establishes a procedure intended to ensure, by means of a preliminary examination, that a plan or project which is not directly connected with or necessary to the management of the site concerned but likely to have a significant effect on it is authorised only to the extent that it will not adversely affect the integrity of that site, while art 6(2) of that directive establishes an obligation of general protection consisting in avoiding deterioration and disturbances which could have significant effects in the light of the directive's objectives, and cannot be applicable concomitantly with art 6(3).

g (3)(a) The first sentence of art 6(3) of Directive 92/43 must be interpreted as meaning that any plan or project not directly connected with or necessary to the management of the site is to be subject to an appropriate assessment of its implications for the site in view of the site's conservation objectives if it cannot be excluded, on the basis of objective information, that it will have a significant effect on that site, either individually or in combination with other plans or projects.

h (b) Pursuant to the first sentence of art 6(3) of Directive 92/43, where a plan or project not directly connected with or necessary to the management of a site is likely to undermine the site's conservation objectives, it must be considered likely to have a significant effect on that site. The assessment of that risk must be made in the light inter alia of the characteristics and specific environmental conditions of the site concerned by such a plan or project.

i (4) Under art 6(3) of Directive 92/43, an appropriate assessment of the implications for the site concerned of the plan or project implies that, prior to



its approval, all the aspects of the plan or project which can, by themselves or in combination with other plans or projects, affect the site's conservation objectives must be identified in the light of the best scientific knowledge in the field. The competent national authorities, taking account of the appropriate assessment of the implications of mechanical cockle fishing for the site concerned in the light of the site's conservation objectives, are to authorise such an activity only if they have made certain that it will not adversely affect the integrity of that site. That is the case where no reasonable scientific doubt remains as to the absence of such effects. a  
b

(5) Where a national court is called on to ascertain the lawfulness of an authorisation for a plan or project within the meaning of art 6(3) of Directive 92/43, it can determine whether the limits on the discretion of the competent national authorities set by that provision have been complied with, even though it has not been transposed into the legal order of the member state concerned despite the expiry of the time limit laid down for that purpose. c

*a* **European Commission v European Council (supported by Portugal)**  
(Case C-110/02)

*b*

COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

JUDGES SKOURIS (PRESIDENT), JANN, TIMMERMANS, ROSAS, GULMANN, PUISOCHET, CUNHA RODRIGUES (PRESIDENTS OF CHAMBERS), LA PERGOLA, SCHINTGEN, MACKEN, COLNERIC, VON BAHR AND LENAERTS (RAPPORTEUR)

*c* ADVOCATE GENERAL JACOBS

11 DECEMBER 2003, 29 JUNE 2004

*d* *European Community – Rules on state aids – Power of Council unanimously to authorise state aid – Commission declaring state aid contrary to common market and ordering repayment – Member state requesting that Council authorise subsequent aid intended to compensate for repayment obligation – Whether Council competent to declare compatible with common market aid allocating to beneficiaries of unlawful aid an amount designed to compensate for requisite repayments – Article 88(2) EC (formerly EC Treaty, art 93(2)).*

*e* Acting under art 88(2)<sup>a</sup> EC (formerly art 93(2) of the EC Treaty), the Commission of the European Communities had declared aid measures granted by the Portuguese government to operators in the pig-farming sector to be contrary to the common market. However, thereafter, at the request of the Portuguese government, the Council of the European Union, acting unanimously, had adopted Council Decision (EC) 2002/114 (authorising the government of Portugal to grant aid to Portuguese pig farmers who were the beneficiaries of the measures granted in 1994 and 1998), by which it had authorised further aid measures granted by the Portuguese government to compensate the pig farmers who were obliged to repay the aid that had been declared incompatible with the common market by the Commission. The Council's reasoning in adopting that decision had been that the repayment obligation threatened the economic viabilities of more than a few of the beneficiaries with damaging social effects in certain regions, such that exceptional circumstances existed for the purposes of art 88(2) EC, rendering, by way of derogation and to the extent necessary to remedy the imbalance that had arisen, the aid measure compatible with the common market. The Commission applied to the Court of Justice of the European Communities for annulment of that decision.

*i* **Held** – Where the Commission had declared an aid measure to be incompatible with the common market and ordered repayment, on the proper construction of art 88(2) EC, the Council was not competent validly to declare compatible with the common market an aid measure allocating to the beneficiaries of the unlawful aid measure an amount designed to compensate them for the repayments that they were required to make. It was clear that the Treaty had reserved a central role for the Commission in determining whether

<sup>a</sup> Article 88, so far as material, is set out at judgment para 3, below

aid was incompatible with the common market, and the Council was not to  
 a  
 paralyse the effectiveness of a Commission decision declaring aid to be  
 incompatible with the common market by itself declaring the same aid to  
 be compatible with the common market on the basis of the third subparagraph  
 of art 88(2) EC. Nor, therefore, might the Council thwart the effectiveness of  
 b  
 such a decision by declaring compatible with the common market an aid  
 designed measure to compensate the beneficiaries of the unlawful aid for the  
 repayments they are required to make pursuant to that decision. The aim of  
 obliging the state concerned to abolish the unlawful aid was to restore  
 situation existing before that aid had been granted, and that objective was  
 attained once the unlawful aid had been repaid. In any event, the aid granted in  
 the second instance was so indissolubly linked to that aid previously found  
 c  
 by the Commission to be unlawful that it appeared largely artificial to make a  
 distinction between them for the purposes of applying art 88(2) EC. It followed  
 that the Council had lacked the competence to have adopted the decision,  
 which would be annulled (see judgment paras 29, 31, 33, 35, 42, 44–47, 51,  
 below).

### Notes

For competition and state intervention in regard to state aids, see 47 *Halsbury's Laws* (4th edn) (2001 reissue) para 439.

For the EC Treaty, art 88 EC (formerly art 93), see 50 *Halsbury's Statutes* (4th edn) Current Statutes Service (issue 88) 381.

### Cases cited

*Belgium v EC Commission* Case C-142/87 [1990] ECR I-959, ECJ.

*EC Commission v Belgium* Case 156/77 [1978] ECR 1881, ECJ.

*EC Commission v Belgium* Case 52/84 [1986] ECR 89, ECJ.

*EC Commission v Germany* Case 70/72 [1973] ECR 813, ECJ.

*EC Commission v Germany* Case C-5/89 [1990] ECR I-3437, ECJ.

*European Commission v EU Council* Case C-122/94 [1996] ECR I-881, ECJ.

*European Commission v EU Council* Case C-309/95 [1998] ECR I-655, ECJ.

*European Commission v Italy* Case C-350/93 [1995] ECR I-699, ECJ.

*Fédération Nationale du Commerce Extérieur des Produits Alimentaires v France* Case  
 C-354/90 [1991] ECR I-5505, ECJ.

*Italy v EC Commission* Case C-261/89 [1991] ECR I-4437, ECJ.

*Italy v European Commission* Case C-310/99 [2002] ECR I-2289, ECJ.

*Kühne & Heitz NV v Produktschap voor Pluimvee en Eieren* Case C-453/00 (2003)

Transcript (opinion), 17 June, (2004) Transcript (judgment), 13 January, ECJ.

*Sicilcassa SpA v IRA Costruzioni SpA* Case C-297/01 [2003] ECR I-7849, ECJ.

*Textilwerke Deggendorf GmbH (TWD) v European Commission* Case C-355/95 P  
 [1997] ECR I-2549, ECJ; *affg* Joined cases T-244/93 and T-486/93 [1995] ECR  
 II-2265, CFI.

*Wirtschaftsvereinigung Stahl v European Commission* Case C-441/97 P [2000] ECR  
 I-10293, ECJ.

### Application

By an application lodged on 25 March 2002 at the Registry of the Court of  
 Justice of the European Communities, the Commission of the European  
 Communities sought an annulment, pursuant to art 230 EC (formerly art 173  
 of the EC Treaty), of Council Decision (EC) 2002/114 (authorising the



- a government of Portugal to grant aid to Portuguese pig farmers who were beneficiaries of the measures granted in 1994 and 1998). By orders of the President of the Court of Justice of 16 and 19 September 2002, Portugal and France were each granted leave to intervene in support of the Council, the latter, however, being authorised to submit observations only in the event of oral proceedings taking place. The Commission was represented by F Santaolalla Gadea, D Triantafyllou and V Di Bucci, acting as agents, with an address for service in Luxembourg. The Council of the European Union was represented by J Carbery and F Florindo Gijón, acting as agents. Portugal was represented by L Fernandes and I Palma, acting as agents, with an address for service in Luxembourg. The language of the case was French. The facts are set out in the opinion of the Advocate General.
- b
- c

11 December 2003. **The Advocate General (FG Jacobs)** delivered the following opinion<sup>1</sup>.

1. In these proceedings, brought under art 230 EC (formerly art 173 of the EC Treaty), the Commission of the European Communities seeks
- d the annulment of Council Decision (EC) 2002/114<sup>2</sup>.

2. That decision (hereinafter the contested measure) was taken pursuant to the third subparagraph of art 88(2) EC (formerly art 93(2) of the EC Treaty), which empowers the Council of the European Union, where justified by exceptional circumstances, to declare compatible with the common market an aid which a member state is granting or intends to grant. It authorises Portugal
- e to make payments to a group of Portuguese pig farmers equivalent in amount to aid which those farmers have already received but have been required to repay following Commission decisions<sup>3</sup> declaring it incompatible with the Common Market.

3. The contested measure is apparently not the only recent decision of the
- f Council relying on the procedure laid down in the third subparagraph of art 88(2) EC to authorise an aid which serves to reimburse its recipients for having to repay another aid previously subject to a negative Commission decision<sup>4</sup>. The present proceedings therefore offer the Court of Justice of the European Communities the opportunity to determine whether such a use of the Council's power is consistent with the system laid down by the Treaty
- g for the control of state aid.

#### LEGAL FRAMEWORK

4. Article 87(1) EC (formerly art 92(1) of the EC Treaty) states that—

- h 'Save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the

1 Original language: English.

2 Authorising the government of Portugal to grant aid to Portuguese pig farmers who were beneficiaries of the measures granted in 1994 and 1998 (OJ 2002 L43 p 18).

i 3 Commission Decision (EC) 2000/200 (concerning an aid scheme implemented by Portugal with a view to reducing the debt burden of intensive stock farms and assisting recovery in the pig-farming sector) (OJ 2000 L66 p 20); Commission Decision (EC) 2001/86 (on the aid scheme implemented by Portugal in favour of the pig-farming sector) (OJ 2001 L29 p 49).

4 See Council Decision (EC) 2000/257 (concerning aid granted in Italy by RIBS SpA in accordance with the provisions of national law no 700 of 19 December 1983 on the restructuring of the sugar beet sector) (OJ 2000 L79 p 38).

production of certain goods shall, insofar as it affects trade between Member States, be incompatible with the common market.’ a

Article 87(2) specifies categories of aid which are compatible with the common market. Article 87(3) lays down categories of aid which may be considered to be so compatible.

5. The Treaty confers a central role on the Commission in supervising and controlling the granting of aid by the member states. Under art 88(1) EC, it is for the Commission, in co-operation with the member states, to ‘keep under constant review all systems of aid existing in those States’. The first subparagraph of art 88(2) EC empowers and requires the Commission to assess the compatibility of an aid with art 87 EC, and, if such aid is incompatible, to ‘decide that the state concerned shall abolish or alter it’ within a specified time period. Article 88(3) EC requires member states to notify the Commission of any plans to grant or alter aid, and prohibits them from implementing such plans until the Commission has reached a decision pursuant to the first paragraph of art 88(2) EC. Should the state in question not comply with such a decision, the second subparagraph of art 88(2) EC permits the Commission or any other interested state to refer the matter directly to the Court of Justice. b  
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d

6. The third and fourth subparagraphs of art 88(2) EC provide as follows:

‘On application by a Member State, the Council may, acting unanimously, decide that aid which that State is granting or intends to grant shall be considered to be compatible with the common market, in derogation from the provisions of Article 87 or from the regulations provided for in Article 89, if such a decision is justified by exceptional circumstances. If, as regards the aid in question, the Commission has already initiated the procedure provided for in the first subparagraph of this paragraph, the fact that the State concerned has made its application to the Council shall have the effect of suspending that procedure until the Council has made its attitude known.’ e  
f

If, however the Council has not made its attitude known within three months of the said application being made, the Commission shall give its decision on the case.’

7. Article 89 EC (formerly art 94 of the EC Treaty) empowers the Council to make regulations for the application of arts 87 and 88 EC. Pursuant to that power, the Council has adopted Council Regulation (EC) 659/1999, which lays down detailed rules regarding the procedures to be followed in the application of art 88 EC<sup>5</sup>. g

8. Under art 36 EC, the competition rules contained in the Treaty, including those relating to state aid, apply to production of and trade in agricultural products only to the extent determined by the Council in legislation working out and implementing the common agricultural policy pursuant to art 37 EC (formerly art 43 of the EC Treaty). h

9. Article 21 of Council Regulation (EEC) 2759/75 (on the common organisation of the market in pigmeat)<sup>6</sup> states that, except as otherwise specified in that regulation, the state aid provisions of the Treaty are to apply to the production of and trade in pigs and pigmeat products. i

<sup>5</sup> Laying down detailed rules for the application of art 88 of the EC Treaty (OJ 1999 L83 p 1).

<sup>6</sup> OJ 1975 L282 p 1.

a THE FACTUAL BACKGROUND AND THE CONTESTED MEASURE

10. In 1994 and 1999, Portugal granted aid to its pig-farming sector (hereinafter the original aid). The 1994 aid was not notified to the Commission, and the 1999 aid was notified but implemented before the Commission decided as to its compatibility with the common market.

b 11. By Commission Decisions (EC) 2000/200 and (EC) 2001/86 (hereinafter the Commission decisions)<sup>7</sup> the Commission declared most of the original aid to be incompatible with the common market and ordered it to be repaid.

12. On 21 January 2002, following an application from the Portuguese government, the Council adopted the contested measure, which declared compatible with the common market a grant of aid by Portugal to the pig farmers who had benefited from the original aid 'equivalent to the amounts

c which those beneficiaries must reimburse' under the Commission decisions.

13. Recitals (13) and (14) in the preamble to the contested measure contain the following justification for that measure:

'(13) ... refunding the [original aid] threatens the economic viability of not a few beneficiaries and would have extremely damaging social effects in certain regions because 50% of the pig herd is concentrated in less than 5% of the territory.

(14) Exceptional circumstances therefore exist, making it possible to consider such aid, by way of derogation and to the extent strictly necessary to remedy the imbalance which has arisen, to be compatible with the common market on the terms specified in this Decision.'

PROCEDURE AND CLAIMS OF THE PARTIES

14. In its application pursuant to art 230 EC, the Commission asks the court to annul the contested measure and to order the Council to pay the costs. It submits, in essence, that the Council was not entitled to adopt the measure given the Commission decisions on the original aid. By so doing, the Council is alleged to have exceeded its competence, misused its powers, and infringed the Treaty as well as general principles of Community law. Alternatively, the Commission submits that the Council committed a manifest error of appreciation in concluding that there were the exceptional circumstances required under the third subparagraph of art 88(2) EC. Further in the alternative, the Commission asserts that the contested measure is not adequately and correctly reasoned.

15. The Council asks the court to dismiss the application as unfounded and order the Commission to bear the costs. The Portuguese government has intervened in its support. The French government also applied for leave to intervene, but did so only after the expiry of the time limit specified in art 93(1) of the court's Rules of Procedure. It was therefore given leave, pursuant to art 93(7), to submit its observations during the oral procedure, if that procedure were to take place. In the event, a hearing was not requested, and none was held.

16. The Council and the Portuguese government argue principally that the contested measure relates to a new aid, and that from a legal viewpoint, it therefore leaves intact, and is unaffected by, the previous Commission decisions.

7 Cited in footnote 3, above.



## IDENTIFICATION OF THE ISSUES

17. In the light of the arguments of the parties, the following issues fall to be considered.

—Is the Council entitled under the third subparagraph of art 88(2) EC to adopt a decision in respect of aid which has previously been the subject of a negative Commission decision?

—May the Council in any event authorise aid which has as its object and effect to assist its recipients to repay aid previously the subject of a negative Commission decision?

—Was the Council manifestly in error in concluding that exceptional circumstances justified the adoption of the contested measure?

—Is the contested measure adequately and correctly reasoned?

## IS THE COUNCIL ENTITLED TO ADOPT A DECISION IN RESPECT OF AID WHICH HAS PREVIOUSLY BEEN THE SUBJECT OF A NEGATIVE COMMISSION DECISION?

18. The Commission develops a number of overlapping arguments to show that once it has decided against a given aid, the Council may not adopt a contrary decision. The following four of its submissions appear to me the most important. First, it has the primary competence to determine the compatibility of aid with the common market, and that the Council's power to do likewise is exceptional and should be narrowly interpreted. Secondly, the procedure specified in respect of that power only makes sense on the assumption that the Commission has yet to reach a decision. Otherwise, there would be no point in the requirement that the Commission suspend its investigation for a three-month period following a member state's application to the Council. Thirdly, if the Council were able to override the Commission, there would be the risk of a conflict between the supervision of the Commission by the Community judicature and that exercised by the Council. Fourthly, a loss of legal certainty would also result.

19. I find the Commission's submissions on the first issue compelling.

20. It seems to me clear that, as the Commission contends, the relationship between the competences conferred upon the Council and the Commission under art 88(2) EC must be regulated on the basis of a principle of pre-emption, so that once either institution has decided upon the compatibility of a given aid, the other is thereby pre-empted from reaching a decision with regard to that aid.

21. In my view, that principle follows clearly from the text of the Treaty. Without it, there would be no purpose to the requirement in the third and fourth subparagraphs of art 88(2) EC that the Commission suspend its investigation for three months whilst the Council considers an application from a member state<sup>8</sup>. The three-month period would serve neither to protect the Council's freedom to decide upon an aid nor to impose a time limit within which the Council must act, given that the Council would retain its power to act, apparently indefinitely, even after the Commission had reached a decision.

22. The principle also accords with the general objective of the relevant Treaty provisions of securing the effective and impartial control of state aid. The Commission is better suited to the task of overseeing the activities of the member states than the Council, which comprises their representatives. It is

<sup>8</sup> Advocate General Mayras reached the same conclusion in his opinion in *EC Commission v Germany* Case 70/72 [1973] ECR 813 at 835, second column. See, however, the opinion of Advocate General Cosmas in *European Commission v EU Council* Case C-309/95 [1998] ECR I-655 (para 45).

a therefore given primary responsibility for assessing the compatibility of an aid with the common market<sup>9</sup>. The Council's power is by contrast subject to the procedural limitation discussed in the previous paragraph and is expressly confined to exceptional circumstances. A power in the Council to overturn at any time a negative Commission decision would clearly set at nought the allocation of responsibility thus envisaged by the Treaty.

b 23. Without such a principle, there would, to my mind, be a real possibility for conflict between a Council decision under the third subparagraph of art 88(2) EC and a judgment of the Community judicature in relation to a prior Commission decision. If the Council retained its power to act for an indefinite period after the Commission had decided upon the compatibility of an aid, it might intervene only after proceedings relating to the Commission's prior decision had been commenced, or even concluded, before the Community courts<sup>10</sup>. In the words of Advocate General Mayras, it is surely—

d 'inconceivable that the authors of the Treaty could have allowed for a possible conflict between a decision of the Council based on a determination of circumstances which are exceptional, and which derogate from Article [87], and a judgment of the Court which can only be based on a definitive interpretation of this provision of the Treaty.'<sup>11</sup>

e 24. Further, a principle of pre-emption appears to me to be necessary in order to secure legal certainty. Without it, the Council could reverse a decision of the Commission apparently at any stage and, as the present proceedings illustrate, potentially long after it had been taken<sup>12</sup>. Such a possibility would inject a significant element of uncertainty into the relations between the Commission, the member states and the recipients of state aid. The incentive would be very great for beneficiaries to withhold repayment of illegal aid and to concentrate their efforts instead upon lobbying the state concerned to make application to the Council. Such aid as was recouped by action of the member state or by order of the national courts might later have to be restored to the beneficiaries. Awards of damages in favour of competitors might also have been made in the interim.

g 25. The time limits specified in the Treaty—in the fifth paragraph of art 230 EC for direct actions, for example, and, in the present context, in the fourth subparagraph of art 88(2) EC—aim precisely to minimise the period during which parties are uncertain as to their legal position. The drafters of the Treaty cannot in my view have intended to confer upon the Council a power, unlimited in time, to reverse a negative decision of the Commission in the field of state aid.

h 26. The main response offered by the Council and the Portuguese government is to argue that the contested measure did not purport to authorise the original aid, but related rather to a new and distinct aid. I shall

i 9 The Commission's primary role in that regard has been recognised by the court in its case law which denies to the national courts any power to assess the compatibility of an aid with the common market. See *Fédération Nationale du Commerce Extérieur des Produits Alimentaires v France* Case C-354/90 [1991] ECR I-5505 (para 14 of the judgment).

10 Those proceedings might take the form of a challenge under art 230 EC, or they might arise out of an application by the Commission or another interested state under the second subparagraph of art 88(2) EC.

11 *Commission v Germany* Case 70/72 (at 835, second column), cited in footnote 8, above.

12 The contested measure was adopted on 21 January 2002, over two years after the first of the Commission decisions.

consider that argument when I turn to the second issue. However, both of those parties also advance arguments contesting the Commission's position in relation to the first issue. a

27. The Council submits that its power under art 88(2) EC is limited only by the requirement of exceptional circumstances. On that view, the three-month period specified in the fourth subparagraph serves to suspend the Commission investigation, but has no consequences for the Council. b

28. The Council also argues that the principle of pre-emption, advocated by the Commission, would run counter to the second paragraph of art 7(1) EC (formerly art 4(1) of the EC Treaty), which provides that each institution is to act within the limits of the powers conferred on it by the Treaty, in that it would render the competence of an institution conditional upon the willingness and speed of another institution to act first. c

29. Finally, the Council notes that ordinarily, in the case of incompatible legal acts which are not subject to any formal hierarchy, it is the subsequent act that overrules the former in time and not the reverse.

30. I am not convinced by the Council's submissions.

31. As I have already explained<sup>13</sup>, I cannot see what purpose the three-month time limit specified in the fourth subparagraph of art 88(2) EC would serve if the Commission's decision, once reached, did not pre-empt the Council from deciding upon the same subject matter. I therefore cannot accept that the only limitation on the Council's power under the third subparagraph is the existence of exceptional circumstances. d

32. Nor do I consider that the principle of pre-emption would in any way infringe the principle of attribution of competences, enshrined in art 7(1) EC. In my view, the Council's competence under the third subparagraph of art 88(2) EC only accrues on the assumption that there has yet to be a Commission decision relating to the same aid. There is no reason why the competence of one institution should not depend upon whether or not there has been some prior act by another. Such is an essential feature of the legislative procedures specified in the Treaty. e

33. Lastly, it is not clear to me that the principle *lex posterior derogat priori* is of any application in the present context, which concerns two decisions relating to the same circumstances rather than two conflicting pieces of legislation. In any event, for the reasons set out above, I consider that there are good reasons for applying instead a principle of pre-emption<sup>14</sup>. f

34. The Portuguese government advances a further argument. It submits that the inclusion in the third subparagraph of art 88(2) EC of a reference to aid which a state 'is granting' demonstrates that that provision encompasses aid upon which the Commission has already taken a position, given that under art 88(3) EC, the state could not have proceeded to grant that aid until the Commission had reached its final decision upon it. *Ex hypothesi*, the Commission's decision would be negative, for otherwise there would be no need for the state to apply to the Council. g

35. I am unconvinced by that argument. h

36. As the Commission submits, the reference in the third subparagraph of art 88(2) EC to aid which a state is granting can be explained as relating either to illegal aid (granted without notification or after notification but prior to any positive decision by the Commission) or existing aid (which does not need to i

<sup>13</sup> At para 21, above.

<sup>14</sup> At paras 20–25, above.



a be notified or authorised prior to its implementation). Such an interpretation does not imply any need for a prior Commission decision on the aid. For the reasons already explained, any other reading would seem to me incompatible with both the letter and the spirit of art 88(2) EC.

b

MAY THE COUNCIL AUTHORISE AID WHICH HAS AS ITS OBJECT AND EFFECT TO ASSIST ITS RECIPIENTS TO REPAY AID PREVIOUSLY THE SUBJECT OF A NEGATIVE COMMISSION DECISION?

c 37. The Council and the Portuguese government submit that the contested measure deals not with the original aid which formed the subject of the Commission decisions, but with a new aid, involving separate legislation, a distinct transfer of resources, and its own criteria of eligibility and payment. The aid at issue therefore required a fresh assessment under art 87(2) EC, which it received, in the event, from the Council by the adoption of the contested measure.

d 38. Because the contested measure relates to a new aid, it does not in the Council's submission affect the legal status of the Commission decisions, which remain valid and operational. In consequence, the supposed principle of pre-emption is of no application to the contested measure.

e 39. The Council considers irrelevant to its legal analysis the fact that the aid authorised by the contested measure had some of the same beneficiaries as the original aid, that its effect was to counterbalance some of the economic consequences flowing from the repayments ordered by the Commission decisions, or that its object was more or less similar to that of the original aid.

f 40. The Council submits that the possibility of divergent decisions relating to successive aid schemes in favour of the same recipients is explicitly recognised by the third subparagraph of art 11(2) of Regulation 659/1999<sup>15</sup>, according to which 'the Commission may authorise [a] Member State to couple the refunding of [an] aid [which is subject to an injunction providing for its provisional recovery] with the payment of rescue aid to the firm concerned'. It also follows from the court's judgment in *Textilwerke Deggendorf GmbH (TWD) v European Commission*<sup>16</sup>, upholding the validity of a Commission decision which declared new aid to be compatible with the common market provided that aid previously prohibited by another decision was duly recovered.

g 41. Such a possibility is, in the Council's view, only logical given that a negative decision relating to a particular aid can hardly serve to prohibit any subsequent aid to the same beneficiary in the more or less distant future. The court indeed acknowledged the need to examine each aid individually when it set aside the 'once and once only' principle in the context of restructuring aid on the basis that such a principle 'would not allow the Commission to examine, in each particular case, whether a project for restructuring aid was necessary in order to attain Treaty objectives'<sup>17</sup>.

h 42. I am not convinced by the Council's arguments.

i

<sup>15</sup> Cited in footnote 5, above.

<sup>16</sup> Case C-355/95 P [1997] ECR I-2549.

<sup>17</sup> *Wirtschaftsvereinigung Stahl v European Commission* Case C-441/97 P [2000] ECR I-10293 (para 55 of the judgment).

43. It is self-evident that a negative Commission decision does not serve to prevent any subsequent aid to the same beneficiaries from being found compatible with the common market<sup>18</sup>.

44. However, the contested measure purports to authorise an aid which is in my view clearly and simply intended to compensate the beneficiaries of the original aid for having to repay that aid. The aid permitted under art 1 of the measure is stated to be 'equivalent to the amounts which [the] beneficiaries [of the original aid] must reimburse under th[e Commission] decisions'. As recital (13) in the preamble to the contested measure makes clear, the specific difficulties which the contested measure aims to address arise out of the requirement that the beneficiaries of the new aid refund the original aid. The effect of the contested measure is therefore to counteract, in so far as is possible, the economic consequences of the Commission decisions.

45. As the Commission rightly submits, if the Council were able to adopt a decision authorising the grant of an aid which has its object and effect to compensate the recipients for having to repay a previous aid, it could easily circumvent the principle of pre-emption which, for the reasons which I have outlined above, must in my view govern the relationship between the competences conferred by art 88(2) EC.

46. Thus, I consider that the Council may not adopt under the third subparagraph of art 88(2) EC a decision to authorise a new aid the object and effect of which are to relieve the beneficiaries of the costs entailed in reimbursing another aid which must be repaid pursuant to a previous Commission decision.

47. Given my conclusions on the first two issues, I am of the opinion that the contested measure should be annulled on the grounds that the Council lacked competence to act as it did, and therefore also infringed the third subparagraph of art 88(2) EC. It is unnecessary to consider the other cumulative pleas in law relating to misuse of powers or to the infringement of other provisions or principles of Community law, given that they overlap with and would if successful result in the same outcome as the grounds which I have already addressed.

48. The approach which I have here proposed does not appear to me in any way to undermine either the liberty of a member state to make an application or the power of the Council to reach a decision under the third subparagraph of art 88(2) EC. In the course of its investigation of a given aid under art 88(2) EC, the Commission must inform the member state concerned of its doubts. That state will therefore have sufficient notice to bring the matter before the Council, should it wish to do so, before the Commission reaches its final decision<sup>19</sup>. Moreover, if a member state is dissatisfied with the Commission's decision, once taken, the appropriate route for it to follow, in my view, is to bring judicial proceedings under art 230 EC within the specified time limit.

49. Notwithstanding my above conclusions, I propose also to consider the alternative pleas advanced by the Commission: namely, that the Council

<sup>18</sup> See, in that regard, the opinion of Advocate General Mayras in *EC Commission v Belgium* Case 156/77 [1978] ECR 1881 at 1911, first column.

<sup>19</sup> In the present proceedings, as regards the Commission decisions, cited in footnote 3, above, see the Commission's decisions initiating the procedure laid down in art 88(2) EC (OJ 1998 C83 p 5; and OJ 1999 C220 p 19). For the current position, see arts 4(4) and 6(1) of Regulation 659/1999, cited in footnote 5, above.

*a* committed a manifest error of appreciation in concluding that there existed exceptional circumstances sufficient to justify recourse to the procedure specified in the third subparagraph of art 88(2) EC; and that it failed to offer adequate reasoning in support of the contested measure.

*b* WAS THE COUNCIL MANIFESTLY IN ERROR IN CONCLUDING THAT EXCEPTIONAL CIRCUMSTANCES JUSTIFIED THE ADOPTION OF THE CONTESTED MEASURE?

50. The Commission submits in the alternative that the Council committed a manifest error of appreciation in concluding that the hardship to the beneficiaries of the original aid arising out of the obligation to repay that aid

*c* constituted in itself an exceptional circumstance within the meaning of the third subparagraph of art 88(2) EC.

51. In reaching the conclusion, in recital (14) of the preamble to the contested measure, that exceptional circumstances existed, the Council had regard, in recital (13), to the fact that a refund of the original aid would threaten the economic viability of not a few beneficiaries and would have extremely damaging social effects in certain regions because 50% of Portugal's pig herd is concentrated in less than 5% of its territory.

*d* 52. I have no doubt that the Council enjoys a substantial margin of discretion in determining whether and when the exceptional circumstances exist which would justify it in authorising a given aid<sup>20</sup>. The Council is called upon in that context to carry out an assessment of a complex economic situation. The complexity of its task may be all the more pronounced in the agricultural field. That said, there must in my view be certain limits to the Council's discretion.

*e* 53. The Commission is correct in contending that the reimbursement of an aid illegally paid prior to a negative Commission decision is an entirely normal and logical consequence of a finding that it is incompatible with the common market. The court has repeatedly held that the Commission may order the repayment of an aid when reaching a negative decision<sup>21</sup>. Under art 14 of Regulation 659/1999<sup>22</sup>, the Commission is now required to order recovery of an aid following a negative decision, unless to do so would be contrary to a general principle of Community law. The recovery of aid serves to restore the previously existing situation, thereby removing the distortion to competition resulting from the aid in question. It is therefore a necessary and fundamental feature of the Community system for the control of state aid.

*f* 54. Nor, in my view, can the difficulties encountered by undertakings in reimbursing aid be qualified as in any way exceptional. As the court has held, when ordered by the Commission, recovery must be pursued by the state in question even if it leads to the failure of the undertaking to which the aid was granted<sup>23</sup>. The only defence available to the member state is that it is absolutely impossible for it to recover the aid.

*g* 55. Accordingly, the Council appears to me, in adopting the contested measure, to have committed a manifest error of appreciation when it

*i* 20 See *European Commission v EU Council* Case C-122/94 [1996] ECR I-881 (paras 18, 19, 24, 25 of the judgment).

21 See, for example, *Commission v Germany* Case 70/72 (para 13 of the judgment), cited in footnote 8, above.

22 Cited in footnote 5, above.

23 See *EC Commission v Belgium* Case 52/84 [1986] ECR 89 (para 16 of the judgment).



concluded that exceptional circumstances existed by reason of the economic difficulties encountered by the beneficiaries of the original aid in having to repay that aid. a

56. Whilst the Council may, of course, justify its intervention on the basis of economic and social circumstances, those circumstances must, in my view, be independent of the reimbursement required by a previous Commission decision. b

57. I therefore consider that the Commission succeeds also in its first alternative plea and that the contested measure must in any event be set aside on the basis that the Council committed a manifest error of appreciation in concluding that there were the exceptional circumstances necessary for its adoption. c

#### IS THE CONTESTED MEASURE ADEQUATELY AND CORRECTLY REASONED?

58. Finally, and also in the alternative, the Commission asserts that, even assuming that exceptional circumstances may exist in the present case, the Council has not sufficiently demonstrated their existence in the contested measure. Most of the preamble to that measure is devoted to setting out the history of the Commission decisions and the situation of the Portuguese pig-farming sector in 1998. In the Commission's submission, such reasons as are offered for the contested measure all relate to the original aid, without explaining why the current situation is to be regarded as exceptional or why it justifies the grant of a new aid. d

59. It appears to me that a distinction must be drawn between the substantive and the formal inadequacies which might be attributed to the reasoning of the contested measure. e

60. As regards the former, I have already concluded that the Council was incorrect to identify as an exceptional circumstance the difficulty experienced by recipients of the original aid as a result of their obligation to repay that aid. f

61. As regards the latter, the contested measure clearly and unequivocally states the Council's justification for authorising the aid, namely the need to compensate Portuguese pork producers in difficulty as a consequence of their obligation to reimburse the original aid. Although such reasoning is in my view not valid, it is quite adequate to inform those affected by the contested measure of the Council's motivation in adopting it, and to permit the court to exercise its supervisory jurisdiction. g

#### CONCLUSION

62. In the light of the foregoing observations, I am therefore of the opinion that the Court of Justice should: h

(1) annul Council Decision (EC) 2002/114 (authorising the government of Portugal to grant aid to Portuguese pig farmers who were beneficiaries of the measures granted in 1994 and 1998);

(2) order the Council to pay the costs;

(3) order Portugal and France, as interveners, to bear their own costs. i

29 June 2004. **The COURT OF JUSTICE** delivered the following judgment.

1. By an application lodged at the Registry of the Court of Justice on 25 March 2002, the Commission of the European Communities sought the annulment, pursuant to art 230 EC (formerly art 173 of the EC Treaty), of Council Decision (EC) 2002/114 (authorising the government of Portugal to

*a* grant aid to Portuguese pig farmers who were beneficiaries of the measures granted in 1994 and 1998) (OJ 2002 L43 p 18).

2. By orders of the President of the Court of Justice of 16 and 19 September 2002, the Portuguese Republic and the French Republic were each granted leave to intervene in support of the Council of the European Union, the latter, however, being authorised to submit observations only in the event of oral proceedings taking place.

#### LEGAL BACKGROUND

3. Article 88(2) and (3) EC (formerly art 93 of the EC Treaty) provide:

*c* '(2) If, after giving notice to the parties concerned to submit their comments, the Commission finds that aid granted by a State or through State resources is not compatible with the common market having regard to Article 87, or that such aid is being misused, it shall decide that the State concerned shall abolish or alter such aid within a period of time to be determined by the Commission.

*d* If the State concerned does not comply with this decision within the prescribed time, the Commission or any other interested State may, in derogation from the provisions of Articles 226 and 227, refer the matter to the Court of Justice direct.

*e* On application by a Member State, the Council may, acting unanimously, decide that aid which that State is granting or intends to grant shall be considered to be compatible with the common market, in derogation from the provisions of Article 87 or from the regulations provided for in Article 89, if such a decision is justified by exceptional circumstances. If, as regards the aid in question, the Commission has already initiated the procedure provided for in the first subparagraph of this paragraph, the fact that the State concerned has made its application to the Council shall have the effect of suspending that procedure until the Council has made its attitude known.

*f* If, however, the Council has not made its attitude known within three months of the said application being made, the Commission shall give its decision on the case.

*g* (3) The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the common market having regard to Article 87, it shall without delay initiate the procedure provided for in paragraph 2. The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.'

*h* THE CONTESTED DECISION AND ITS CONTEXT

*i* 4. By Decree-Law No 146/94 of 24 May 1994 (Diário da República I, series A, No 120, of 24 May 1994; the Decree-Law of 1994), the Portuguese Republic established an aid scheme setting up lines of credit for reducing the debt burden on intensive stock farms and assisting the recovery of pig farming. That aid system was not notified to the Commission.

5. Acting under the first paragraph of art 88(2) EC, the Commission adopted Commission Decision (EC) 2000/200 (concerning an aid scheme implemented by Portugal with a view to reducing the debt burden of intensive stock farms and assisting recovery in the pig-farming sector) (OJ 2000 L66 p 20). Under art 1(1) of that decision, it declared the credit line for reducing the debt burden

on intensive stock farms incompatible with the common market in cases where, together with the investment aid received, the grant equivalent exceeded 35% in farming areas other than less-favoured farming areas. Article 1(2) declared the credit line for assisting recovery in the pig-farming sector incompatible with the common market. Repayment of the aid already unlawfully paid to the beneficiaries, with interest, was ordered under art 3 of that decision. a

6. By Decree-Law No 4/99 of 4 January 1999 (Diário da República I, Series A, No 2, of 4 January 1999; the Decree-Law of 1999), the Portuguese Republic further introduced a moratorium extending by one year the period for repayment of certain loans contracted by pig farms which produced, fattened and slaughtered pigs in a closed cycle, and also introduced short-term financing for such farms by means of loans at favourable rates. Although those measures were notified to the Commission, they were put into effect before the Commission stated its position in respect of them. b

7. Those aid measures were declared incompatible with the common market, and their repayment was ordered by Commission Decision (EC) 2001/86 (on the aid scheme implemented by Portugal in favour of the pig-farming sector) (OJ 2001 L29 p 49). c

8. On 23 November 2001, the Portuguese Republic requested the Council of the European Union to adopt, on the basis of the third subparagraph of art 88(2) EC, a 'decision authorising it to grant aid to Portuguese pig farmers obliged to repay the aid granted in 1994 and 1998 and [declaring] that aid compatible with the common market'. d

9. Acceding to that request, the Council adopted the contested decision, art 1 of which is worded as follows: e

'Exceptional aid by the Portuguese Government to the Portuguese pig sector involving the grant of aid to beneficiaries covered by the Commission Decisions of 25 November 1999 and 4 October 2000, totalling not more than EUR 16,3 million, equivalent to the amounts which those beneficiaries must reimburse under those Decisions, shall be considered compatible with the common market.' f

10. After setting out the particular circumstances and features of the Portuguese pig-farming industry which had led the Portuguese Republic to adopt the Decree-Laws of 1994 and 1999, the grounds for the contested decision state, in para (9), that— g

'as the pattern of trade shows, [the aid instituted under those Decree-Laws] did not have any particular effect on intra-Community trade and consequently did not cause any distortion of competition.' h

11. According to paras (12)–(14) of the grounds for the contested decision:

'(12) In its decisions of 25 November 1999 and 4 October 2000, the Commission held that the measures in question were not compatible with the common market. Pursuant to those decisions, the Portuguese authorities initiated a procedure to recover the aid granted. i

(13) However, refunding the aid granted threatens the economic viability of not a few beneficiaries and would have extremely damaging social effects in certain regions because 50% of the pig herd is concentrated in less than 5% of the territory.



- a* (14) Exceptional circumstances therefore exist, making it possible to consider such aid, by way of derogation and to the extent strictly necessary to remedy the imbalance which has arisen, to be compatible with the common market on the terms specified in this Decision.'

*b* THE ACTION

12. The Commission makes five pleas in law in support in its action, claiming that the Council did not have the power to adopt the contested decision, misuse of powers and procedure, infringement of the EC Treaty and various general principles, manifest error of assessment, and failure to state sufficient reasons for the contested decision.

*c*

*The first plea*

*Arguments of the parties*

13. The Commission argues in its first plea that the Council did not have the power to adopt the contested decision, and its reasoning in that respect is in two stages.

*d*

14. First, the Commission argues that the contested decision has effects identical to a revocation or annulment of Decisions 2000/200 and 2001/86, whereby the Commission declared the aid paid under the Decree-Laws of 1994 and 1999 incompatible with the common market and ordered it to be repaid.

*e*

15. By authorising the payment to the Portuguese pig farmers concerned of aid equivalent in amount to that which they had to repay in accordance with those Commission decisions, the contested decision nullified the effects of the latter. It prevented the effective withdrawal of aid which the Commission had declared incompatible with the common market and the return to the status quo required by the first subparagraph of art 88(2) EC in order to preserve the market from distortions of competition.

*f*

16. According to the Commission, the contested decision effectively amounted to an authorisation of the initial aid, which the Commission had previously declared incompatible.

*g*

17. Secondly, the Commission argues that it is clear from the wording of art 88 EC that the Treaty intended to confer upon it, as a monopoly, the tasks of controlling and managing state aids. That, it maintains, is explained by the fact that only a body totally independent of member states is capable of examining aid measures adopted by the latter with the required objectivity and impartiality, and of ensuring that competition is not distorted to an extent contrary to the common interest.

*h*

18. As for the power conferred on the Council under art 88(2) EC, the Commission argues that that is exceptional in character. That is clear from the wording both of the third subparagraph of that provision, which refers to 'exceptional circumstances', and of the fourth subparagraph, which lays down a period during which the member state's application is to suspend the procedure before the Commission, at the expiry of which period the Commission recovers its power to 'give a decision', that is to say decide definitively on the aids concerned. The granting to the Council of such a power of decision, taking precedence over that of the Commission for a limited period, would, moreover, be devoid of meaning if the Council's decision could prevail over that of the Commission in all circumstances.

*i*

19. It follows, in the Commission's view, that the Council does not have the power to adopt a decision on the basis of the third subparagraph of art 88(2)

EC where an aid has been declared incompatible with the common market by a Commission decision. Nor, to that extent, did the Council have the power to override the effects of such a decision, by authorising the grant of aids designed to compensate the beneficiaries of the aid declared incompatible for the repayment which that decision obliged them to make. a

20. The Council argues, first, that the Commission's reasoning is based entirely on the premiss that the contested decision annulled or revoked Decisions 2000/200 and 2001/86. In reality, the Council argues, the contested decision did not call into question the repayment obligations under those decisions, since it was, on the contrary, in the context of the full implementation of those obligations, and taking account of the social and economic consequences which such implementation would have, that the Council decided to authorise the new aid which the Portuguese government was proposing to grant. b  
c

21. What counts as new aid, the Council argues, depends on formal and objective considerations. In this case the aid authorised by the contested decision consisted of an entirely new payment, arising from a national provision other than the Decree-Laws of 1994 and 1999, corresponding to different eligibility and payment conditions from those which applied to the aids granted under those Decree-Laws. d

22. According to the Council, the fact that the aid authorised by the contested decision constitutes new aid is also demonstrated by the definition of 'new aid' in art 1 of Council Regulation (EC) 659/1999 (laying down detailed rules for the application of art 93 of the EC Treaty) (OJ 1999 L83 p 1) as 'aid schemes and individual aid, which is not existing aid, including alterations to existing aid'. The term 'existing' implies that the aid in question has already been authorised, which is precisely not the case with the aid to which the contested decision relates. e

23. Moreover, the third subparagraph of art 11(2) of Regulation 659/1999, which allows the possibility of authorising the member state to accompany repayment of the illegal aid with an aid to rescue the undertaking concerned, also confirms that it is possible to adopt divergent decisions concerning state aids granted successively to the same operators. The same applies to Community case law, which, the Council argues, has implicitly acknowledged that the Commission may make the payment of new aid declared compatible with the common market subject to the recovery of earlier aid declared incompatible (see *Textilwerke Deggendorf GmbH (TWD) v European Commission* Joined cases T-244/93 and T-486/93 [1995] ECR II-2265; affirmed Case C-355/95 P [1997] ECR I-2549). f  
g

24. Finally, the Council argues that neither decisions of the Commission declaring an aid incompatible with the common market nor any other text constitute a prohibition against the beneficiaries of such aid receiving other aid sooner or later. The principle that each successive aid is to be examined individually should be complied with in all circumstances (see *Wirtschaftsvereinigung Stahl v European Commission* Case C-441/97 P [2000] ECR I-10293 (para 55)). If the contested decision had not been taken, the aid which it authorised, which had, moreover, been notified to the Commission by the Portuguese Republic, would have had to have been examined by the Commission and to have given rise to a decision by the latter. h  
i

25. Concerning, secondly, the scope of art 88(2) EC, the Council argues that the three-month period referred to in the fourth subparagraph of that provision is laid down for purely suspensive purposes. It follows, in the

a Council's submission, that it remained at liberty to authorise the aid concerned notwithstanding the expiry of that period.

26. As for the conflict capable of arising in that respect between a previous decision of the Commission, finding aid incompatible with the common market, and a subsequent decision of the Council, authorising that aid, the Council argues that the principle to be applied when dealing with incompatible rules, in the absence of a hierarchy between them, is that the later rule derogates from the previous one.

27. The Portuguese Republic essentially shares the analysis of the Council. The aid authorised by the contested decision was a new aid, distinct from those established by the Decree-Laws of 1994 and 1999, having been notified as new aid to the Commission. Portugal adds that the fact that the third subparagraph of art 88(2) EC empowers the Council to rule not only on aid which a member state 'intends to grant' but also on aid which it 'is granting' confirms that the Council is empowered to authorise aid even where the Commission has already expressed its view on it. Article 88(3) shows that any granting of aid requires prior examination by the Commission, with the result that the aid cannot be granted unless there has been a favourable decision by the Commission in that regard.

#### *Findings of the court*

28. In order to rule on the Commission's first plea in support of its action, it first needs to be determined whether, as the Commission has argued, art 88(2) EC must be interpreted in such a way that, where the Commission has adopted a decision finding aid incompatible with the common market, the Council no longer has the power to decide, on the basis of the third subparagraph of that provision, that that aid must be regarded as compatible with the common market.

29. In that respect, it should be noted that the intention of the Treaty, in providing through art 88 EC for aid to be kept under constant review and supervised by the Commission, is that the finding that aid may be incompatible with the common market is to be arrived at, subject to review by the Community judicature, by means of an appropriate procedure which it is the Commission's responsibility to set in motion. Articles 87 EC (formerly art 92 of the EC Treaty) and 88 EC thus reserve a central role for the Commission in determining whether aid is incompatible (see *Fédération Nationale du Commerce Extérieur des Produits Alimentaires v France* Case C-354/90 [1991] ECR I-5505 (paras 9, 14)).

30. As is clear from its very wording, the third subparagraph of art 88(2) EC covers an exceptional case (see *EC Commission v Belgium* Case 156/77 [1978] ECR 1881 (para 16)). According to that provision, the Council acting unanimously, 'on application by a Member State', may decide that aid which that state is granting or intends to grant must be regarded as compatible with the common market 'in derogation from the provisions of Article 87 or from the regulations provided for in Article 89', if such a decision is justified by 'exceptional circumstances'.

31. It follows that, as the Commission has rightly pointed out, the power conferred upon the Council by the third subparagraph of art 88(2) EC is clearly exceptional in character.

32. In such a context, the further provisions in the third and fourth subparagraphs of art 88(2), whereby, on the one hand, application to the



Council by a member state suspends examination in progress at the Commission for a period of three months, and, on the other, in the absence of a decision by the Council within that period, the Commission is to give a ruling, undeniably indicate that, where that period has expired, the Council is no longer competent to adopt a decision under that third subparagraph in relation to the aid concerned. The taking of decisions the operative parts of which might contradict is thereby avoided. a

33. The enactment of a temporal limitation of that kind on the Council's competence where the Commission has already opened the procedure under the first subparagraph of art 88(2) EC, without, however, yet having adopted a decision declaring the aid incompatible with the common market, and the fact that, at the end of the three-month period laid down by the fourth subparagraph of that provision, the Commission alone retains the competence to rule on the aid concerned, also demonstrate that, if the member state concerned has made no application to the Council under the third subparagraph of art 88(2) EC before the Commission declares the aid in question incompatible with the common market and thereby closes the procedure referred to in the first subparagraph of art 88(2), the Council is no longer authorised to exercise the exceptional power conferred upon it by the third subparagraph in order to declare such aid compatible with the common market. b

34. It may be observed on that latter point that, in *European Commission v EU Council* Case C-122/94 [1996] ECR I-881, the contested decision of the Council did not follow a Commission decision declaring aid incompatible with the common market, the Commission in that case having merely taken the view on the basis of art 88(3) EC that the aid project in question was not compatible with the common market and opened the procedure laid down by the first subparagraph of art 88(2). c

35. As the Commission has rightly pointed out, the interpretation adopted in paras 32 and 33 of this judgment, which makes it possible to avoid the same state aid being the subject of contrary decisions taken successively by the Commission and the Council, contributes to legal certainty. It should be noted in particular that the definitive nature of an administrative decision which is acquired on the expiry of reasonable time limits for bringing an action or by the exhaustion of remedies contributes to such certainty (see *Kühne & Heitz NV v Produktschap voor Pluimvee en Eieren* Case C-453/00 (2003) Transcript (opinion), 17 June, (2004) Transcript (judgment) (para 24)). d

36. As for the argument of the Portuguese government that the third subparagraph of art 88(2) EC also authorises the Council to rule on aid which a member state is 'granting', whereas in accordance with art 88(3) any 'grant' of aid requires precisely that the Commission should have expressed a view on it first, so that the Council has the power to rule on aid which has already been the subject of a previous decision by the Commission, the court finds that this argument arises from a contradiction in terms. It cannot concomitantly be argued that an aid which a member state is 'granting' within the meaning of the third subparagraph of art 88(2) EC is an aid which must necessarily have been previously declared compatible with the common market by the Commission, pursuant to the provisions of art 87 EC, and that the Council has the power subsequently to declare such an aid compatible with the common market in derogation from those provisions. e

37. Secondly, the court has to determine whether the fact that the Council does not have the power to rule on the compatibility with the common market f

a of an aid in relation to which the Commission has already definitively ruled implies, as the latter argues, that the Council also lacks the power to rule on an aid measure whose aim is to allocate to beneficiaries of the illegal aid previously declared incompatible by a Commission decision an amount designed to compensate for the repayments which they are obliged to make pursuant to that decision.

b 38. It should be noted first in that respect, contrary to what the Council maintains, that it cannot be inferred from the case law of the Court of Justice that, in relation to such aid, the Community institutions retain full liberty to make such a ruling without being required to pay due regard to the previous decision of the Commission finding the aid originally granted to the persons concerned incompatible with the common market.

c 39. The court has, on the contrary, held that when the Commission considers the compatibility of a measure of state aid with the common market, it must take all the relevant factors into account, including, where relevant, the circumstances already considered in a prior decision and the obligations which that previous decision may have imposed on a member state (see, in particular, d *Italy v EC Commission* Case C-261/89 [1991] ECR I-4437 (para 20), the TWD case (para 26)). The court deduced in particular that, where the Commission has not been informed of any new fact allowing it to assess whether the aid in question might have the benefit of a derogation under the Treaty, it is justified in basing its decision on the assessments it has already made in its previous decision and the failure to comply with the condition it has imposed thereby e (see *Italy v Commission* Case C-261/89 (para 23)).

40. Similarly, the court has held that a transitional system maintaining the effects of a state aid scheme not notified to the Commission and declared incompatible with Community law by a Commission decision—without, however, the Commission demanding repayment of the aid concerned—had to be interpreted as far as possible in such a way as to ensure its compatibility f with that decision, namely in such a way that it does not authorise the granting of new state aid after the abrogation of the aid scheme censured by that Commission decision (order of 24 July 2003 in *Sicilcassa SpA v IRA Costruzioni SpA* Case C-297/01 [2003] ECR I-7849 (para 44)).

41. It has, moreover, consistently been held that the abolition, by means of recovery, of state aid which has been unlawfully granted is the logical consequence its being found unlawful (see *Belgium v EC Commission* Case C-142/87 [1990] ECR I-959 (para 66), *Italy v European Commission* Case C-310/99 [2002] ECR I-2289 (para 98)).

42. The aim of obliging the state concerned to abolish aid found by the Commission to be incompatible with the common market is to restore the previous situation, and that objective is attained once the aid in question, h increased where appropriate by default interest, has been repaid by the recipient. By repaying the aid, the recipient forfeits the advantage which it had enjoyed over its competitors on the market, and the situation prior to payment of the aid is restored (see, in particular, *European Commission v Italy* Case C-350/93 [1995] ECR I-699 (paras 21, 22) and *Italy v Commission* Case C-310/99 i (paras 98, 99)).

43. In those circumstances, to hold that a member state is able to grant to beneficiaries of unlawful aid, which has previously been declared incompatible with the common market by a Commission decision, new aid in an amount equivalent to that of the unlawful aid, intended to neutralise the impact of the repayments which the beneficiaries are obliged to make pursuant to that

decision, would clearly amount to thwarting the effectiveness of decisions taken by the Commission under arts 87 and 88 EC (see, by analogy, *EC Commission v Germany* Case C-5/89 [1990] ECR I-3437 (para 17), *Italy v Commission* Case C-310/99 (para 104)).

44. Finally, it should be noted that, as is clear from paras 33 and 35 of this judgment, where a decision finding an aid incompatible with the common market has been adopted by the Commission, the Council cannot paralyse the effectiveness of that decision by itself declaring the aid compatible with the common market on the basis of the third subparagraph of art 88(2) EC.

45. Nor, therefore, can the Council thwart the effectiveness of such a decision by declaring compatible with the common market, in accordance with that provision, an aid designed to compensate the beneficiaries of the unlawful aid declared incompatible with the common market for the repayments they are required to make pursuant to that decision.

46. In such circumstances, moreover, the aid granted in the second instance is so indissolubly linked to that previously found by the Commission to be incompatible with the common market that it appears largely artificial to claim to make a distinction between those aids for the purposes of applying art 88(2) EC.

47. It follows from the whole of the above considerations that, on a proper interpretation of the third subparagraph of art 88(2) EC, the Council cannot, on the basis of that provision, validly declare compatible with the common market an aid which allocates to the beneficiaries of an unlawful aid, which a Commission decision has previously declared incompatible with the common market, an amount designed to compensate for the repayments which they are required to make pursuant to that decision.

48. In this case, it is undisputed that the Portuguese Republic has not applied to the Council under the third subparagraph of art 88(2) EC for a declaration that the aids granted by the Decree-Laws of 1994 and 1999 are compatible with the common market. It is also undisputed that those aids have been declared incompatible with the common market and that their recovery has been ordered by Decisions 2000/200 and 2001/86.

49. As for the contested decision, it is obvious from the very wording of its title, and from the wording of art 1 thereof, that the aid which it sought to declare compatible with the common market was specifically designed to grant to the beneficiaries of the aids previously declared incompatible with that market, by Decisions 2000/200 and 2001/86, an amount intended to allow them to meet the repayments which they are required to make pursuant to those two decisions.

50. As is clear from para 47 of this judgment, the Council could not validly adopt such a decision.

51. It follows that the Commission's first plea in support of its action, arguing that the Council lacked the competence to adopt the contested decision, is well founded, and that the latter must therefore be annulled.

*The second, third, fourth and fifth pleas*

52. Since the Commission's first plea has been accepted, and the contested decision must be annulled on that account, it is not necessary to examine the Commission's other pleas in support of its action.



**a** COSTS

53. Under art 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Council has been unsuccessful, the Council must be ordered to pay the costs. Pursuant to the first paragraph of art 69(4), the Portuguese Republic and the French Republic

**b** must bear their own costs.

On those grounds, the Court of Justice, hereby:

(1) Annuls Council Decision (EC) 2002/114 (authorising the government of Portugal to grant aid to Portuguese pig farmers) who were beneficiaries of the measures granted in 1994 and 1998;

**c** (2) Orders the Council of the European Union to pay the costs;  
(3) Orders the Portuguese Republic and the French Republic to bear their own costs.

# Van den Bergh Foods Ltd v European Commission

(Case T-65/98)

COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES (FIFTH CHAMBER)

JUDGES GARCÍA-VALDECASAS (PRESIDENT), LINDH AND COOKE

3 OCTOBER 2002, 23 OCTOBER 2003

*European Community – Rules on competition – Abuse of dominant position – Undertaking marketing ice cream products in Ireland – Undertaking supplying freezer cabinets to retailers at no or nominal charge for use exclusively for sale of undertaking's products – Whether agreements preventing, restricting or distorting competition – Whether undertaking entitled to exemption from competition rules – Whether undertaking abusing dominant position – Whether application of competition rules infringing undertaking's right to property – EC Treaty, arts 85(1), (3), 86, 222 (now arts 81(1), (3), 82, 295 EC).*

The applicant was a wholly-owned subsidiary of a multinational group and was the principle manufacturer of single-wrapped ice creams for immediate consumption in Ireland. It had concluded distribution agreements with ice cream retailers, under which freezer cabinets that were to be maintained by the applicant at no cost were supplied free of charge or at nominal rent, subject to an exclusivity clause that the freezer cabinets were to be used only for the sale of the applicant's products. Those agreements were terminable at any time on two months' notice by either side. Certain complaints were lodged by the applicant's competitors with the Commission of the European Communities, which adopted Commission Decision (EC) 98/531 (relating to a proceeding under arts 85 and 86 of the EC Treaty (now arts 81 and 82 EC) (Case Nos IV/34.073, IV/34.395 and IV/35.436—Van den Bergh Foods Ltd)). That decision: (i) declared the exclusivity clause, in so far as it applied to retailers not having a freezer cabinet either procured by themselves or provided by an ice cream manufacturer other than the applicant, contrary to art 85(1) of the EC Treaty; (ii) rejected a request by the applicant for an exemption for the exclusivity clause pursuant to art 85(3) of the Treaty; and (iii) declared the applicant's inducements to enter into freezer cabinet agreements subject to the exclusivity clause contrary to art 86 of the Treaty. In particular, the Commission stated that the applicant's position on the market was dominant and that the exclusivity clause restricted the ability of retailers to stock and offer for sale products from competing suppliers, since it was not economically viable for retailers to allocate space to the installation of an additional cabinet, having regard to the space constraints inevitably experienced by retail outlets. Further, only a small proportion of retail outlets in Ireland had freezer cabinets which were not subject to an exclusivity clause and other suppliers did not have access to retailers who had concluded such agreements with the result that the outlet was foreclosed rendering very difficult entry by competing suppliers. In due course, the applicant brought an action under art 173 of the Treaty (now art 230 EC) before the Court of First Instance of the European Communities for annulment of the decision, contending: (i) that the Commission had committed a number of manifest errors of assessment in analysing the

- a* existence and extent of foreclosure of the relevant market resulting from the distribution agreements in question, by having materially overestimated the degree of market foreclosure; (ii) that the exclusivity clause fell within the scope of art 85(3) of the Treaty and might thus be the subject of an exemption; (iii) that the Commission had erred in finding that there had been an abuse of the dominant position, and in finding that the applicant had induced retailers to grant it exclusivity by supplying freezer cabinets to them and by maintaining them at no direct charge to the retailer; and (iv) that the application of the competition rules constituted an unjustified and disproportionate infringement of its rights to property, as recognised by art 222 of the Treaty (now art 295 EC).
- b*
- c* **Held** – (1) It was clear from an examination of the entirety of the similar distribution agreements concluded on the relevant market, and other evidence of the economic and legal context of which those agreements formed part, that the distribution agreements concluded by the applicant were liable to have an appreciable effect on competition for the purposes of art 85(1) of the Treaty.
- d* Contractual restrictions on retailers had to be examined not just in a purely formal manner from the legal point of view, but also taking into account the specific economic context in which the agreements in question operated, including the particular features of the relevant market, which might, in practice, reinforce those restrictions and thus distort competition. In the instant case, rather than having penalised the applicant for its legitimate business
- e* success, the Commission had merely identified the features that formed part of the economic context of the case, namely, the effective dependence of retailers, the dominant position of the applicant on the market, the popularity of its product range, the constraints associated with the lack of space characterising typical sales outlets, and the disadvantages and risks associated with stocking a second range of ice cream. Further, there was objective and
- f* specific evidence demonstrating the existence of demand in Ireland for the ice creams of other manufacturers where they were available. Therefore, despite the fact that it was theoretically possible for retailers who had only a freezer cabinet provided by the applicant to sell the ice creams of other manufacturers, the effect of the exclusivity clause in practice was to restrict the commercial
- g* freedom of retailers to choose the products they wished to sell in their sales outlets. Accordingly, the effect of compliance with the exclusivity clause was to cause retailers to act differently in relation to the applicant's products than they did in relation to ice creams of other brands and in a way that was likely to distort competition in the relevant market. The fact the distribution agreements were terminable at any time in no way precluded the effective
- h* enforcement of the agreements during the period in which that option was not used, since that option was not exercised in practice. Moreover, the provision by the applicant of the maintenance costs of the freezers represented a financial barrier to the entry of new suppliers on the market and to the expansion of existing suppliers, since retailers were not inclined to accept freezer cabinets from suppliers who did not offer terms that were at least as
- i* advantageous as those offered by the suppliers of the cabinets already in place (see judgment paras 84, 89–92, 97, 98, 105, 113, 118, below).

(2) The exclusivity clause failed to satisfy the first of the conditions laid down by art 85(3) of the Treaty. Where an undertaking sought an exemption under art 85(3) of the Treaty, it was to produce evidence to establish that the agreement fulfilled the conditions laid down by that provision. If any one of



the four preconditions laid down by the provision was not satisfied, the exemption had to be refused. In the instant case, although the wide availability in outlets of freezer cabinets intended for the sale of ice creams covering the entire geographic market and consisting mainly of the applicant's products might be considered an objective advantage in the distribution of those products in the public interest, it was nevertheless unlikely that the applicant would definitively cease to supply freezer cabinets to retailers if its power to impose an obligation of exclusivity in respect of those freezers were to be restricted (see judgment paras 136, 137, 143, below). a  
b

(3) The Commission had properly concluded that the applicant had abused a dominant position on the relevant market by having induced retailers to obtain its supplies exclusively. The applicant was an unavoidable trading partner for many retailers on the relevant market and thus occupied a dominant position. Where an undertaking was found to occupy such a position, it had a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market. In the instant case, the provision of freezer cabinets subject to a condition of exclusivity was a standard practice on the relevant market that was not prohibited in a competitive market as a matter of principle. However, the nature of the exclusivity clause was such that it prevented retailers from selling other brands of ice cream (or of reducing the opportunity for them to do so), even though there was a demand for such brands, and of preventing competing manufacturers from gaining access to the relevant market (see judgment paras 158–160, 162, below). c  
d

(4) The decision did not contain any undue limitation on the exercise of the applicant's right to property in its freezer cabinets. Although the right to property formed part of the general principles of Community law, the exercise of that right was not absolute and it had to be viewed in relation to its social function, such that it might be restricted. Any such restriction had to correspond in fact to the objectives of general interest pursued by the Community which were not to constitute a disproportionate and intolerable interference, and the application of arts 85 and 86 of the Treaty constituted one of those aspects of public interest in the Community. In the instant case, the decision in no way affected the applicant's ownership of its assets, but it merely regulated, in the public interest, one particular manner of exploiting them. Further, it provided merely that if the applicant decided to exploit its property by making it available without charge to retailers, it was not to do so on the basis of an exclusivity clause so long as it held a dominant position on the relevant market. It followed that the application would be dismissed (see judgment paras 170, 171, 210, below). e  
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## Notes h

For the general nature of abuse of a dominant position and distribution agreements in general, see 47 *Halsbury's Laws* (4th edn) (2001 reissue) paras 355, 420.

For the EC Treaty, arts 81(1), (3), 82, 295 EC (formerly arts 85(1), (3), 86, 222), see 50 *Halsbury's Statutes* (4th edn) Current Statutes Service (issue 88) 378–379, 449. i

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- Volvo (AB) v Erik Veng (UK) Ltd* Case 238/87 [1988] ECR 6211, ECJ. f

### Application

By application lodged on 21 April 1998 at the Registry of the Court of First Instance, Van den Bergh Foods Ltd, formerly HB Ice Cream Ltd (HB), established in Dublin, Ireland, brought an action under the fourth paragraph of art 173 of the EC Treaty (now, after amendment, the fourth paragraph of art 230 EC) for the annulment of Commission Decision (EC) 98/531 relating to a proceeding under arts 85 and 86 of the EC Treaty (now arts 81 and 82 EC) (Case Nos IV/34.073, IV/34.395 and IV/35.436—Van den Bergh Foods Ltd) (the contested decision). By order of the President of the Fifth Chamber of the Court of First Instance of 2 March 1999, Mars and Treats Frozen Confectionery Ltd, now Richmond Frozen Confectionery Ltd, were given leave to intervene in the present case in support of the form of order sought by the Commission of the European Communities. By an order of 16 June 1998, received at the Court of Justice of the European Communities, the Supreme Court of Ireland referred for a preliminary ruling under art 177 of the EC Treaty (now art 234 EC) three questions on the interpretation of arts 85, 86 and 222 of the EC Treaty (now art 295 EC). That case was registered as Case C-344/98. By an order of 28 April 1999, the President of the Fifth Chamber of the court stayed the proceedings in the present case pursuant to art 47(3) of the Statute of the Court of Justice pending delivery of judgment in Case C-344/98. On 14 December 2000 the Court of Justice gave judgment g  
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- a* in *Masterfoods Ltd v HB Ice Cream Ltd*, *HB Ice Cream Ltd v Masterfoods Ltd* (t/a Mars Ireland) Case C-344/98 [2001] All ER (EC) 130. By letters of 1 February 2001 the Registrar of the Court of First Instance invited the parties to lodge observations on the implications, if any, to be drawn in the present proceedings from that judgment. Van den Bergh Foods Ltd was represented by M Nicholson and M Rowe, Solicitors, with an address for service in Luxembourg; the Commission of the European Communities, represented by W Wils and A Whelan, acting as agents, with an address for service in Luxembourg, supported by Masterfoods Ltd, established in Dublin, represented by PGH Collins, Solicitor, with an address for service in Luxembourg; and by Richmond Frozen Confectionery Ltd, established in Northallerton, United Kingdom, represented by IS Forrester QC, with an address for service in Luxembourg. The language of the case was English. The facts are set out in the judgment of the court.

23 October 2003. **THE COURT OF FIRST INSTANCE (Fifth Chamber)** delivered the following judgment.

*d* **FACTS**

1. This action is for the annulment of Commission Decision (EC) 98/531 (relating to a proceeding under arts 85 and 86 of the EC Treaty (Case Nos IV/34.073, IV/34.395 and IV/35.436—Van den Bergh Foods Ltd)) (OJ 1998 L246 p 1) (hereinafter the contested decision).
- e* 2. Van den Bergh Foods Ltd (hereinafter HB), a wholly-owned subsidiary of Unilever plc, is the principal manufacturer of ice cream products in Ireland, particularly single-wrapped ice creams for immediate consumption (hereinafter impulse ice creams). For a number of years HB has supplied ice cream retailers with freezer cabinets, in which it retains ownership, and which are supplied free of charge or at a nominal rent, provided that they are used exclusively for HB ice creams (hereinafter the exclusivity clause). Pursuant to the standard terms of the freezer agreements, they can be terminated at any time on two months' notice on either side. HB maintains the cabinets at no cost to the retailer, save in cases of negligence.
- f* 3. Masterfoods Ltd (hereinafter Mars), a subsidiary of the United States corporation Mars Inc, entered the Irish ice cream market in 1989.
- g* 4. In the summer of 1989 many retailers with freezer cabinets supplied by HB began to stock and display Mars products. This led to a demand by HB that they comply with the exclusivity clause.
- h* 5. In March 1990, Mars brought an action in the Irish High Court seeking, inter alia, a declaration that the exclusivity clause was void under domestic law and under arts 85 and 86 of the EC Treaty (now arts 81 and 82 EC). In a separate cross-action HB claimed injunctions restraining Mars from inducing or procuring breaches of the exclusivity clause.
6. In April 1990, the High Court granted an interlocutory injunction in favour of HB.
- i* 7. On 28 May 1992, the High Court gave judgment in the actions brought by Mars and HB (see [1992] 3 CMLR 830). It dismissed the action brought by Mars, and granted HB a permanent injunction restraining Mars from inducing retailers to stock Mars ice cream in freezer cabinets belonging to HB.
8. Mars appealed against that judgment to the Irish Supreme Court on 4 September 1992. The Supreme Court decided to stay proceedings and to refer to the Court of Justice of the European Communities three questions for a

preliminary ruling (see para 30, below). That reference was the subject of the judgment of the Court of Justice in *Masterfoods Ltd v HB Ice Cream Ltd*, *HB Ice Cream Ltd v Masterfoods Ltd* (t/a Mars Ireland) Case C-344/98 [2001] All ER (EC) 130, [2000] ECR I-11369. At the date of the present judgment, the proceedings before the Supreme Court are still pending. a

9. In parallel to those proceedings before the Irish courts, on 18 September 1991 Mars lodged a complaint with the Commission of the European Communities under art 3 of Council Regulation 17/62 (first regulation implementing arts 85 and 86 of the Treaty) (OJ English Sp Edn 1959-1962 p 87). The complaint related to the provision by HB, to large numbers of retailers, of freezer cabinets to be used exclusively for HB products. b

10. On 22 July 1992, Valley Ice Cream (Ireland) Ltd also lodged a complaint against HB with the Commission. c

11. On 29 July 1993, the Commission issued a statement of objections to HB in which it concluded that HB's distribution arrangements infringed arts 85 and 86 of the Treaty (hereinafter the 1993 statement of objections).

12. Following negotiations with the Commission, HB, while contesting the Commission's view, proposed changes to its distribution arrangements, with a view to qualifying for an exemption under art 85(3) of the Treaty. Those changes were notified to the Commission on 8 March 1995 and in a press release of 10 March 1995 the Commission stated that, at first sight, the new distribution arrangements might enable HB to obtain an exemption. On 15 August 1995 a notice pursuant to art 19(3) of Regulation 17/62 was published in the Official Journal of the European Communities (OJ 1995 C211 p 4). d

13. On 22 January 1997 the Commission sent HB a new statement of objections in which it expressed the view that the changes had not achieved the expected results of free access to sales outlets (hereinafter the 1997 statement of objections). HB replied to those objections. e

14. On 11 March 1998 the Commission adopted the contested decision. f

#### THE CONTESTED DECISION

15. In the contested decision the Commission states that HB's distribution agreements containing the exclusivity clause are incompatible with arts 85 and 86 of the Treaty. It defines the relevant product market as the market for single-wrapped items of impulse ice cream and the relevant geographic market as Ireland (recitals (138) and (140)). It states that HB's position on the relevant market is particularly strong, as is shown by its market share over many years (see para 21, below). That strength is further illustrated by the degree of both numeric (79%) and weighted distribution (94%) of the relevant HB products during August and September 1995 and by the strength of the brand and the breadth and popularity of its range of products. HB's position on that market is further reinforced by the strength of Unilever's position, not only on the other ice cream markets in Ireland (take-home and catering), but also in the international ice cream markets and the markets for frozen foods and consumer products generally (recital (141)). g

16. The Commission observes that the network of HB's distribution agreements relating to freezer cabinets installed in outlets has the effect of restricting the ability of retailers who are parties to those agreements to stock and offer for sale in their outlets impulse products from competing suppliers, in circumstances where the only freezer cabinet or cabinets for the storage of impulse ice cream in place in their outlets have been provided by HB, where h

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- a* the HB freezer cabinet or cabinets is or are unlikely to be replaced by a cabinet owned by the retailer and/or supplied by a competitor, and where it is not economically viable to allocate space to the installation of an additional cabinet. It considers that the effect of this restriction is that the competing suppliers are precluded from selling their products to those outlets, thereby restricting competition between suppliers in the relevant market (recital (143)).
- b* The Commission did not take into consideration the restrictive effect of each individual agreement, but rather the effect produced by the category of agreements fulfilling the above-mentioned conditions and constituting an identifiable part of the network of HB's freezer cabinet agreements as a whole. According to the Commission, the assessment of the restrictive effect of that part of HB's network then applies equally to each of the agreements comprising that part. The assessment of this restrictive effect was made against the background of the effect of all similar networks of freezer cabinet agreements operated by other ice cream suppliers in the relevant market, as well as in the light of any further relevant market conditions (recitals (144) and (145)).
- c*

- d* 17. The Commission then quantified the restrictive effect of HB's distribution agreements in order to show their significance. It observes that the restrictive effect of the networks of agreements for the supply of freezer cabinets reserved exclusively for the supplier's products are the result of the space constraints inevitably experienced by retail outlets. The average number of cabinets in place in outlets is 1.5, according to the survey carried out by
- e* Lansdowne Market Research Ltd in 1996 (hereinafter the Lansdowne survey), while the retailers consider that the optimal number of freezer cabinets to have in place in an outlet at the height of the season would be 1.57 (recital (147)).

18. The Commission states that only a small proportion of retail outlets in Ireland, 17% according to the Lansdowne survey, have freezer cabinets which are not subject to an exclusivity clause. It maintains that those outlets may be referred to as 'open' outlets, in the sense that retailers are free to stock in them the impulse ice cream of any supplier (recital (148)). As regards the other outlets, 83% according to the Lansdowne survey, in which the suppliers have installed freezer cabinets, the Commission considers that other suppliers cannot have direct access to them for sale of their products without first overcoming substantial barriers. It submits that newcomers to the outlet are foreclosed from them and that—
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'Although this foreclosure is not absolute, in the sense that the retailer is not contractually precluded from selling other suppliers' products, the outlet can be said to be foreclosed in so far as entry thereto by competing suppliers is rendered very difficult.' (Recital (149).)

*h*

19. The Commission finds that in some 40% of all outlets in Ireland the only freezer cabinet/s for the storage of impulse ice cream in place in the outlet has or have been provided by HB (recital (156)). It observes that—

- i* 'A supplier who wishes to gain access for the sale of his impulse ice-cream products to a retail outlet (that is, a new entrant to the outlet) in which at least one supplier-exclusive freezer cabinet is in place can only do so if that outlet has a non-exclusive cabinet ... or if he can persuade the retailer either to replace an *in situ* supplier-exclusive freezer cabinet or to install an additional freezer cabinet alongside the *in situ* supplier-exclusive cabinet/s.' (Recital (157).)



It considers (recitals (158) to (183)), on the basis of the Lansdowne survey, that it is unlikely that retailers will adopt one or other of those measures if they have one (or more) freezers supplied by HB and concludes that 40% of the outlets in question are de facto tied to HB (recital (184)). Other suppliers are therefore foreclosed from access to those outlets, contrary to art 85(1) of the Treaty. a

20. The contested decision also finds that the agreements containing the exclusivity clause cannot be exempted under art 85(3) of the Treaty, as they do not contribute to an improvement in the distribution of the products (recitals (222) to (238)), do not allow consumers a fair share of the resulting benefit (recitals (239) and (240)), are not indispensable to the attainment of those benefits (recital (241)) and afford HB the possibility of eliminating a substantial part of competition on the relevant market (recitals (242) to (246)). b  
c

21. As regards the application of art 86 of the Treaty, the Commission takes the view that HB has a dominant position on the relevant market, in particular because it has for a long time had a share in volume and value of over 75% of that market (recitals (259) and (261)).

22. The Commission states that— d

‘HB abuses its dominant position in the relevant market ... in that it induces retailers ... who do not have a freezer cabinet for the storage of impulse ice cream either procured by themselves or provided by another ice-cream supplier than HB to enter into freezer-cabinet agreements subject to a condition of exclusivity’— e

and that ‘The inducement takes the form of an offer to supply the freezer cabinets to retailers, and to maintain them, at no direct charge to the retailer’ (recital (263)).

23. By the contested decision the Commission: f

—declares that the exclusivity clause in the freezer cabinet agreements concluded between HB and retailers in Ireland, for the placement of cabinets in retail outlets which have only one or more freezer cabinets supplied by HB for the stocking of single-wrapped items of impulse ice cream, and not having a freezer cabinet either procured by themselves or provided by an ice cream manufacturer other than HB, constitutes an infringement of art 85(1) of the EC Treaty (art 1 of the operative part); g

—rejects the request by HB for an exemption of the exclusivity clause described in art 1 pursuant to art 85(3) of the Treaty (art 2 of the operative part);

—declares that HB’s inducement to retailers in Ireland not having a freezer cabinet either procured by themselves or provided by an ice cream manufacturer other than HB, to enter into freezer cabinet agreements subject to a condition of exclusivity by offering to supply to them one or more freezer cabinets for the stocking of single-wrapped items of impulse ice cream, and to maintain the cabinets, free of any direct charge, constitutes an infringement of art 86 of the Treaty (art 3 of the operative part); h

—requires HB immediately to cease the infringements set out in arts 1 and 3, and to refrain from taking any measure having the same object or effect (art 4 of the operative part); i

—requires HB, within three months of notification of the contested decision, to inform retailers with whom it currently has freezer cabinet agreements constituting infringements of art 85(1) of the Treaty, as described

- a in art 1, of the full wording of arts 1 and 3, and to notify them that the exclusivity provisions in question are void (art 5 of the operative part).

#### PROCEDURE AND FORMS OF ORDER SOUGHT

- b 24. By application lodged at the Registry of the Court on 21 April 1998, HB brought an action under the fourth paragraph of art 173 of the EC Treaty (now, after amendment, the fourth paragraph of art 230 EC) for the annulment of the contested decision.

25. By separate document received by the Registry on the same day, HB also applied, under art 185 of the EC Treaty (now art 242 EC), for suspension of the operation of that decision until the court had ruled on the merits.

- c 26. By applications lodged on 29 April and 8 May 1998 respectively, Mars and Treats Frozen Confectionery Ltd, which changed its name in the course of the proceedings to Richmond Frozen Confectionery Ltd (hereinafter Richmond), sought leave to intervene in the present proceedings in support of the form of order sought by the Commission.

- d 27. The applications to intervene were served on the parties in accordance with art 116(1) of the Rules of Procedure of the Court of First Instance.

- e 28. By fax dated 13 May 1998, HB stated that it had no objection to the application by Mars for leave to intervene, but objected to the application by Richmond on the ground that it did not have a sufficient interest in the outcome of the case. HB requested that only a non-confidential version of its application and of the contested decision should be furnished to the applicants for leave to intervene. For that purpose, it listed the information which it considered to be secret or confidential.

- f 29. By separate document lodged at the Registry on 14 May 1998, the Commission stated that it had no objection to the two applications for leave to intervene. With regard to HB's request for confidential treatment, it expressed certain reservations on 18 May 1998.

30. By order of 16 June 1998, received at the Court of Justice on 21 September 1998, the Supreme Court referred for a preliminary ruling under art 177 of the EC Treaty (now art 234 EC) three questions on the interpretation of arts 85, 86 and 222 of the EC Treaty (now art 295 EC). That case was registered as Case C-344/98.

- g 31. By order of 7 July 1998 in *Van den Bergh Foods Ltd v European Commission* Case T-65/98 R [1998] ECR II-2641, the President of the Court of First Instance suspended the application of the contested decision until delivery of final judgment of the court in the present case and reserved the costs.

- h 32. By order of the President of the Fifth Chamber of the court of 2 March 1999, Mars and Richmond were given leave to intervene in the present case in support of the form of order sought by the Commission. In that same order, he granted, in part, the request for confidential treatment submitted by HB. A non-confidential version of the pleadings was served on the interveners.

33. By order of 28 April 1999, the President of the Fifth Chamber of the court stayed the proceedings in the present case pursuant to art 47(3) of the Statute of the Court of Justice pending delivery of judgment in Case C-344/98.

- i 34. On 14 December 2000 the Court of Justice gave judgment in *Masterfoods and HB*. By letters of 1 February 2001 the Registrar of the Court of First Instance invited the parties to lodge observations on the implications, if any, to be drawn in the present proceedings from that judgment. The Commission and HB lodged their observations at the Registry on 15 and 27 February 2001 respectively. On 13 March 2001 Mars lodged at the Registry its statement in

intervention in the present case and also its observations on the implications to be drawn from the judgment of the Court of Justice. Richmond did not lodge a statement in intervention. a

35. On hearing the report of the Judge-Rapporteur, the Court of First Instance (Fifth Chamber) decided to open the oral procedure.

36. The parties presented oral argument and answered questions put by the court at the hearing on 3 October 2002. b

37. HB claims that the court should: annul the contested decision in its entirety; in the alternative, annul those parts of the contested decision that the court finds erroneous or unsafe; order the Commission to pay the costs.

38. The Commission contends that the court should: dismiss the application as unfounded; order HB to pay the costs. c

39. Mars claims that the court should: dismiss the application as unfounded; order HB to pay Mars' costs.

40. At the hearing Richmond claimed that the court should: dismiss the application; order HB to pay the costs.

#### LAW d

41. In support of its action for annulment HB raises seven pleas in law: first, manifest errors of assessment of the facts, resulting in errors of law; second, infringement of art 85(1) of the Treaty; third, infringement of art 85(3) of the Treaty; fourth, infringement of art 86 of the Treaty; fifth, infringement of the right to property, by failing to observe general principles of law and art 222 of the EC Treaty; sixth, infringement of art 190 of the EC Treaty (now art 253 EC); and, seventh, failure to observe fundamental principles of Community law and infringement of essential procedural requirements. The court will examine the first and second pleas together. e

#### THE FIRST AND SECOND PLEAS: MANIFEST ERRORS OF ASSESSMENT OF THE FACTS AND INFRINGEMENT OF ART 85(1) OF THE TREATY f

##### *Arguments of the parties*

42. HB maintains that the contested decision is vitiated by manifest errors of assessment of the facts, resulting in errors of law. It considers that the parties disagree not as to the facts themselves but rather as to the conclusions to be drawn from them.

43. HB submits that freezer cabinet exclusivity cannot be regarded as outlet exclusivity (recital (184) of the contested decision) because the retailers are entitled to terminate the contract with HB or to install new freezers not belonging to HB alongside HB's freezer if new and attractive products are offered or if they are no longer satisfied with HB's range of products or level of service. It is clear from the judgment in *Langnese-Iglo GmbH v European Commission (supported by Mars GmbH)* Case T-7/93 [1995] All ER (EC) 908, [1995] ECR II-1533 that the duration of a contractual tie is significant when assessing the degree of foreclosure of the market. According to HB, its freezer agreements are not of indefinite duration, as the retailers are able to terminate them at any time. The fact that its freezer cabinets are rarely replaced merely proves that retailers with those freezers are satisfied with the arrangement and does not imply that the outlets in question are tied. g

44. According to HB, all the evidence suggests that the overwhelming majority of retailers alleged by the Commission to be foreclosed as a consequence of HB freezer cabinet exclusivity have in fact positively chosen such exclusivity in preference to any of the alternative configurations available h

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- a* to them for the storage and sale of impulse ice cream. It follows that the Commission should not have concluded that the freezer exclusivity clause leads to a foreclosure of the relevant market contrary to arts 85 and 86 of the Treaty. The Commission has failed to make out any causal connection between HB freezer cabinet exclusivity and HB's continuing popularity as reflected in the relatively limited market penetration by rival brands on the relevant market.
- b* The retailers are thus willing to stock new products where there is consumer demand for them. However, the facts show that the limited penetration of HB's competitors is not due to any foreclosure of the market resulting from the exclusivity clause but rather to the fact that their products have not proved sufficiently attractive to consumers.
- c* 45. HB claims that the Commission has incorrectly analysed the question of market foreclosure. It ought to have distinguished between sales outlets which are deprived of any freedom of choice because of the provisions of a distribution agreement and sales outlets which enjoy commercial freedom of choice and have exercised it only after assessing the merits of the offers made by the competitors on the market. Only the first group may be regarded as
- d* foreclosed. In fact the Commission assumed that sales outlets which have only HB freezer cabinets, regardless of their number, are foreclosed. HB explains that it is not seeking to justify absolute territorial protection or any other alleged restriction of competition at issue in the present case, but that it is submitting that all the evidence shows that the limited market penetration by its competitors is due to the fact that HB satisfies the needs of retailers and of
- e* consumers. The Commission has not sought to find any other explanation for the failure of HB's competitors.
46. HB considers that another factor shows that the Commission's reasoning in regard to foreclosure of the relevant market is flawed. If a tie resulting from the freezer agreements between HB and the retailers were to be established, HB submits that it would then be necessary to take account of the fact that the
- f* degree of foreclosure of the market is not 40%, as submitted in the Lansdowne survey, but at most 6%. In any event, when the degree of foreclosure of the relevant market is calculated, HB submits, pointing to various data and to the Lansdowne survey, that it is necessary to exclude from the calculation the following three categories of sales outlets:
- g* —outlets where there are two or more HB freezer cabinets in place: these are outlets where by definition there is the necessary space and it is profitable to have a second freezer (namely 6% of sales outlets);
- outlets where there is no interest on the part of the retailer in stocking another brand of ice cream: in such a situation there is an insufficient causal connection between the practice of the provision of HB's freezer cabinets and
- h* the failure of the competing supplier to gain access to the market (27% of sales outlets);
- outlets where the retailer is interested in stocking another ice cream brand and would be prepared to install another cabinet, to replace an HB cabinet with two smaller cabinets or to replace an HB cabinet by his own cabinet for the purpose (2–5% of sales outlets).
- i* 47. HB thus submits that, when the degree of market foreclosure is calculated, account should be taken only of outlets in which the retailer wishes to change brand but is unable to do so. The approach adopted in the contested decision concerning the application of art 85(1) of the Treaty is therefore

over-simplistic and at variance with the law as it has developed over recent years. HB also submits that the Commission overestimates the space restrictions encountered by retailers. a

48. HB also observes that its calculation of the true measure of market foreclosure is supported by other evidence of the dynamics of the relevant market. It submits, in particular, that the relevant market is contested by at least five manufacturers and that other manufacturers, including new entrants, have been able to achieve substantial levels of distribution, both numeric and weighted. b

49. HB disputes the finding in the contested decision that the provision of freezers subject to an exclusivity clause is a cost barrier to entry or expansion of suppliers and raises competitors' cost of entry to the relevant market, inasmuch as new entrants too need to provide and maintain freezers. HB submits that this practice is necessary in order to prevent its competitors from using its freezers to store their products without having invested in their own freezers. c

50. According to HB, to supply freezers to the impulse ice cream trade in Ireland subject to a separate rental would involve demands on its logistical and other resources that cannot be quantified in purely monetary terms. In addition, HB would be at a competitive disadvantage since it would be required to carry on its balance sheet a fleet of freezer cabinets for use not only in its business but also in the business of its retail customers and competitors. d

51. HB contests the Commission's assertion in recital (198) of the contested decision that price competition may suffer because competition in the impulse ice cream products sector takes place to a large extent between outlets and that inter-brand competition is therefore reduced in outlets stocking only a single brand. It observes that in any event around 44% of outlets stock two brands of ice cream. e

52. HB submits that the correct application of art 85(1) of the Treaty, in the light of the case law of the Court of Justice, calls for application of the rule of reason. It is necessary to make a distinction between restrictions of conduct and restrictions of competition. Any agreement inevitably involves some form of restriction of conduct, but does not necessarily give rise to a restriction of competition. It is therefore clear that application of art 85(1) inevitably involves a qualitative assessment of any given restriction of conduct. f

53. HB also submits that in the light of an analysis based on the rule of reason, art 85 of the Treaty does not apply to freezer cabinet agreements, as it is clear that the exclusivity clause is necessary to achieve the full benefits of the system. Furthermore, the exclusivity clause is not unreasonably restrictive of competition. The exclusivity relates only to the freezer and the agreement is effectively terminable at will (see para 43, above). It observes that in *Pronuptia de Paris GmbH v Pronuptia de Paris Irmgard Schillgalis* Case 161/84 [1986] ECR 353 the court stated that it is possible to deal with particular formats for distribution (a system of distribution through franchises in that case) at the stage of deciding whether art 85(1) is applicable. Community law has long recognised that in considering the applicability of art 85(1) in a given case, it is necessary to take account of the nature of the products governed by the agreement (see *Société Minière v Maschinenbau Ulm GmbH* Case 56/65 [1966] ECR 235 at 250). g  
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54. The contested decision accepts that the free on-loan freezer system provides benefits to both the supplier and the retailer (recital (224)) and that it is widely employed in Europe (recital (21)). HB also submits that the exclusivity

a clause does not confer geographical exclusivity on the retailer and has not prevented entry by Mars or other competitors to the relevant market. That clause does not therefore fall within the scope of art 85(1) of the Treaty, as it is an ancillary restraint. HB observes that this analysis corresponds to that adopted by the Irish High Court in *Masterfoods Ltd (t/a Mars Ireland) v HB Ice Cream* [1992] 3 CMLR 830 (paras 141–146, 221–229, and more particularly para 222). Similarly, HB relies on the report of the United Kingdom Monopolies and Mergers Commission of March 1994 on the supply in the United Kingdom of ice cream for immediate consumption and various judgments of United States courts and submits that there the approach to provision of point-of-sale equipment differs from the approach adopted by the Commission in the contested decision.

c 55. Even if a rule of reason were not applied, HB submits that the exclusivity clause would still fall outside the scope of art 85(1) of the Treaty on a ‘quantitative’ basis, notwithstanding the attempt in the contested decision to create an artificially broad category of foreclosed outlets. It submits that the judgment of the Court of Justice in *Delimitis v Henninger Bräu AG* Case C-234/89 [1991] ECR I-935 and the judgment in the *Langnese-Iglo* case require a detailed examination of the contestability of a market in deciding whether or not a particular agreement or set of agreements produces such a degree of foreclosure as to fall foul of the art 85(1) prohibition. According to HB, the *Delimitis* and *Langnese-Iglo* cases require two conditions to be satisfied for a market to be deemed open, namely, first, that there is access to the minimum number of outlets necessary for the profitable operation of the distribution system and, second, that competitors have some possibility for expansion of their activities, that is to say, to increase their market share. According to HB—

e ‘if the market is contestable so that new entrants are not “denied access” in the sense that there are “real and specific possibilities” for market entry, there is no foreclosure such as to bring art 85(1) into play.’

f Moreover, the importance of the network of similar agreements in the industry should not be exaggerated as it constitutes only ‘one factor amongst others’.

g 56. HB submits that the court must examine the question of foreclosure of the market, and whether such foreclosure is acceptable or not, on the assumption that Mars or any other competitor is willing to make an investment in freezers comparable to that of the other market participants. That is apparent from para 21 of the judgment in *Delimitis*’ case, according to which it is necessary to take account of other strategies for penetrating the market before concluding that a competitor has been unreasonably denied access to the market.

h 57. According to HB, the relevant market is not foreclosed if the quantitative criterion is applied. First, as regards the duration of the restriction, it was established in the *Langnese-Iglo* case that the agreements in question had been concluded for five years and had an average duration of two-and-a-half-years; i however, the freezer cabinet agreements are terminable at will (see para 43, above).

58. Second, HB claims that, in the *Langnese-Iglo* case, the court’s assessment of the foreclosure effect of the agreements at issue was based on the fact that the agreements excluded competing suppliers entirely from the relevant



outlets. By contrast, the freezer exclusivity clause has no such effect. A competitor may convince the retailer of the merits of its products and so obtain access to his sales outlet. a

59. Third, HB submits that in para 105 of the *Langnese-Iglo* judgment the court applied a two-tier test based on a 'tying-in' threshold of 30% in order to determine whether certain agreements had the effect of foreclosing the market. It is therefore necessary to convert the quantitative criteria developed in the *Langnese-Iglo* case in relation to outlet exclusivity, so as to apply it to freezer exclusivity. According to HB, the most appropriate method to convert those criteria is to focus on that part of the retail sector where the retailer has only an HB freezer and either no room for another freezer or considers that investment in a freezer is not economically viable. In the light of the Lansdowne survey, it is viable for a retailer to invest in his own freezer in 47% of sales outlets, accounting for over 80% of total ice cream turnover. b

60. HB therefore submits that the Commission has not established a causal connection between the freezer exclusivity clause and the difficulties experienced by suppliers or new entrants in penetrating the market. It concludes from this that, as the market is not foreclosed on the criteria laid down in the *Langnese-Iglo* case, there is no need to go to the second limb of the test, which is to look at the effect of the agreements in question in contributing to the overall degree of foreclosure of the relevant market. The judgment in the *Langnese-Iglo* case suggests that the Commission ought to have pointed to other features of the economic and legal context which it claims lead to significant foreclosure in the relevant market. c

61. The Commission, supported by the interveners, submits that the exclusivity clause is contrary to art 85 of the Treaty in that it restricts the freedom of retailers and prevents access to the market. It states that the clause operates as a *de facto* tie for two categories of retailers, namely 'those who might add an additional freezer or those who might replace an existing freezer'. The contested decision demonstrates that retailers are reluctant to install an additional freezer because this requires giving up space which could be used for other products. The contested decision also shows that retailers who have no space but could replace an existing freezer, either by a freezer supplied by another manufacturer or by their own freezer, are reluctant to do so because replacing a freezer involves additional responsibilities like maintenance (for retailers buying their own freezers) or the loss of HB products (for retailers taking a freezer from another ice cream manufacturer). d

62. According to the Commission, the real question to be addressed by the court is whether the contested decision has provided sufficient proof of its conclusion at para 143 that 'this restriction has the consequence that those competing suppliers are precluded from selling their products to those outlets, thereby restricting competition between suppliers in the relevant market'. The Commission contends that the contested decision clearly sets out the difficulties faced by retailers who wish to sell other brands of ice cream. e

63. The Commission observes that the contested decision is simply intended to restore the commercial freedom of retailers and so allow rival producers to compete on the merits of their products. The real question is whether retailers, who are ultimately paying for the freezers in their shops, should be free to stock the ice cream brand of their choice in those freezers. The contested decision has demonstrated the dilemma faced by retailers wishing to stock other brands of ice cream. If, in order to sell non-HB ice cream, the retailer must either install an additional freezer or cease to sell HB products, he will be f

- a reluctant to sell other brands. As a result, that outlet is closed off to any rival brand, regardless of the merits of the product. The Commission considers that this dilemma is exactly the same as that which it had identified in the judgment in the *Langnese-Iglo* case [1995] All ER (EC) 908 (para 108), and in *Schöller Lebensmittel GmbH & Co KG v European Commission* Case T-9/93 [1995] ECR II-1611 (para 84)). In those judgments the court found that the Commission was right to regard freezer exclusivity agreements as 'contributing to making access to the market more difficult'.

- b 64. According to the Commission, HB exploits this dilemma for its own purposes by using the exclusivity clause as a barrier to the entry of new competitors. HB's expenditure on freezers enables it to keep other suppliers out of the market. It also contests HB's arguments that retailers are satisfied with their agreement with HB and have no interest in selling other brands of ice cream. The Commission accepts that the exclusivity clause presents advantages for the parties but observes that this fact does not mean that it does not contain any anti-competitive element.

- c 65. With regard to the opportunity for retailers to terminate their agreement with HB, the Commission submits that a key element to be taken into consideration is the economic effect of the agreement. The Lansdowne survey shows that retailers who have an HB freezer rarely exercise their right to replace it with a freezer of another brand or to purchase their own freezer.

- d 66. The Commission also submits that it is possible to separate the supply of ice cream from the supply of the freezer. It is not necessary for ice cream manufacturers to own freezers. HB accepts that distinction, because in 1995 and 1996 it made two separate proposals to the Commission, which separated the ownership of freezers from the supply of ice cream, and were intended to allow it to obtain exemption under art 85(3) of the Treaty.

- e 67. Mars submits that by making success in the marketplace depend on success in gaining access to retail outlets, freezer exclusivity distorts the competitive process by conferring on the existing supplier an unfair advantage over smaller suppliers or newcomers in that market who are unlikely to have a full range of established products.

- f 68. The Commission disputes HB's claim that 6% of the relevant market is foreclosed rather than the 40% referred to in the contested decision.

- g 69. The contested decision shows how difficult it is for a new entrant to gain access to the relevant market owing to the existence of the exclusivity clause (recitals (185) to (200)). In any event, there is a causal connection between the practice of HB freezer cabinet provision and the low market shares achieved by its competitors (recitals (185) to (194)).

- h 70. The Commission disputes HB's argument to the effect that the agreements concluded with retailers fall outside the scope of art 85 of the Treaty because of the application of the rule of reason and the judgment in the *Pronuptia* case. The provisions of the agreement examined by the Court of Justice in the judgment in the *Pronuptia* case were different.

- i 71. Similarly, the Commission disputes HB's interpretation of the judgment in *Delimitis*' case (see para 55, above). It observes that in that judgment the Court of Justice examined whether it was possible for a new competitor to penetrate the bundle of contracts existing on the relevant market. Contrary to HB's assertion, the minimum number of sales outlets necessary for the profitable operation of a distribution system is not a test used by the court as a factor in assessing whether there are concrete possibilities of market penetration.

72. In *Delimitis*' case the Court of Justice stated that it was first necessary to establish whether there is clearly 'a bundle of similar contracts' in the relevant market. In Ireland the majority of freezers installed in outlets are supplied by HB (recital (152) of the contested decision). It is then necessary to examine whether there are opportunities for penetration of the relevant market. The Commission disputes that there are such possibilities in the present case. Thirdly, the Court of Justice suggested in its judgment in *Delimitis*' case that it is necessary to take into account the conditions under which competitive forces operate on the relevant market. The contested decision identifies the difficulties caused for new entrants by the fact of the exclusive use of HB freezers, which discourages retailers from stocking other products and creates logistical and cost barriers to market entry. The Commission submits that HB's argument that a new entrant must be assumed to compete 'in the manner which is characteristic of the industry' is not to be found in any of the cases cited by HB and would be unacceptable if the industry as a whole engaged in practices contrary to arts 85 or 86 of the Treaty.

73. The Commission submits that the degree of dependence referred to in the judgment in *Delimitis*' case is merely one factor amongst others in the economic and legal context in which a network of contracts must be assessed and that this is also apparent from the judgments in the *Langnese-Iglo* case and the *Schöller* case.

74. The analysis by the Court of First Instance in the last mentioned cases must, according to the Commission, be applied in the present case. The court's conclusion that exclusivity clauses relating to freezers make access to the market more difficult is applicable to the exclusivity clause at issue, because the court there confirmed that the need for a new entrant to create a network of retailers for itself did constitute a barrier to market entry.

#### *Findings of the court*

75. In its first two pleas, HB complains that the Commission committed a number of manifest errors in analysing the existence and extent of foreclosure of the relevant market resulting from the distribution agreements in question. It submits in particular that the Commission, by materially overestimating the degree of market foreclosure, infringed art 85(1) of the Treaty.

76. HB challenges, more specifically, the Commission's principal finding in the contested decision that 40% of sales outlets in Ireland are de facto tied to HB by the exclusivity clause and that access to those outlets is therefore foreclosed to other suppliers (see in particular recitals (143), (156) and (184)). It submits that this conclusion is fundamentally wrong in law and in fact, as the Commission has not correctly applied the legal test for establishing whether the relevant market is foreclosed. HB complains that the Commission made no distinction between, on the one hand, retailers who are contractually precluded from stocking other suppliers' ice creams and, on the other hand, those who are free to act in that way and have available space for that purpose, but who decide, using their own business judgment, not to do so. HB considers that retailers freely choose to stock its ice creams in particular because of the quality of its products. It submits that the fact that other manufacturers find it difficult to establish themselves on the relevant market is not due to the exclusivity clause but to the fact that their ice creams are less attractive to retailers and consumers.

77. It is apparent from the contested decision that the Commission examined not only the provisions of HB's distribution agreements, which do not formally



a preclude retailers from stocking other suppliers' ice creams in their sales outlets, but also the application of those agreements in the relevant market and the commercial options actually open to retailers pursuant to those agreements. After analysing the possibilities of persuading a retailer to stock the ice creams of a new entrant on the relevant market, the Commission considered that in respect of 40% of sales outlets—namely those having only freezer cabinets supplied by HB in which to stock ice creams and which do not therefore have either their own freezer or freezers provided by other ice cream manufacturers—it was 'unlikely' that retailers would take the necessary steps to replace HB freezers by their own freezer or by a freezer supplied by a competing manufacturer or that they would provide space in which to install an additional freezer. It concluded from this that the exclusivity clause in the HB distribution agreements in fact operated as an outlet exclusivity in those 40% of sales outlets in the relevant market and that HB had contributed materially to a foreclosure of that market contrary to art 85(1) of the Treaty.

78. The views of the parties differ as to the correctness of the Commission's factual analysis of the particular features of the relevant market in the contested decision and of its finding, based on that analysis, that the exclusivity clause infringes art 85(1) of the Treaty.

79. It must also be pointed out that despite the highly detailed arguments submitted in their written pleadings and at the hearing with regard to the facts of the present case and the conclusions to be drawn from them, the parties do not really disagree on various features of the relevant market (see para 42, above), and particularly the following:

e —impulse ice creams must be stored at a low temperature and therefore in a freezer cabinet in the retailer's premises;

f —in Ireland and throughout Europe, manufacturers and distributors of ice creams generally adopt the practice of supplying freezers to retailers on the basis of an exclusivity clause. Owing to the exclusivity clause, a retailer who has one or more HB freezers only and who wishes to sell another brand of ice cream must either replace the HB freezer or freezers or install an additional freezer;

g —unlike the clauses in the supply agreements at issue in the judgments in the *Langnese-Iglo* case and the *Schöller* case, which required retailers in Germany to sell in their outlets only products purchased directly from Langnese-Iglo and Schöller companies, the exclusivity clause in the present case does not preclude retailers from selling brands of ice creams other than HB, provided that the freezers made available by HB are used exclusively for its own products;

h —HB has long held the position of market leader in Ireland for impulse ice creams. Its product range in Ireland is very popular and commercially very successful. It has acquired that position following considerable investment in the development and promotion of a full range of ice creams, which enjoy a high degree of brand recognition in Ireland;

i —in accordance with the provisions of the HB distribution agreements, retailers who have entered into a freezer supply agreement may terminate that agreement at any time on giving two months' notice. It is common ground that in practice HB does not enforce that period of notice on retailers who wish to terminate the agreement more quickly or with immediate effect;

—for the majority of retailers in Ireland, impulse ice creams are a marginal product (in that they represent merely a small percentage of their turnover and

profit) which is sold seasonally. Impulse ice creams compete in the outlets for selling space, with a number of other products (whether or not impulse products); a

—HB is part of the Unilever group. The companies in that group are the principal suppliers of ice creams in most of the member states. In the impulse ice cream sector, they are the market leader in several member states.

80. The court observes, as a preliminary point, that the exclusivity clause does not require retailers to sell only HB products in their sales outlets. Consequently, that clause is not, in formal terms, an exclusive purchasing obligation whose object is to restrict competition on the relevant market. The court must therefore first examine whether the Commission has adequately proved, in the specific circumstances of the relevant market, that the exclusivity clause relating to freezer cabinets in reality imposes exclusivity on some sales outlets and whether the Commission correctly quantified the degree of that foreclosure. The court must then ascertain, as appropriate, whether the degree of foreclosure is sufficiently high to constitute an infringement of art 85(1) of the Treaty. Judicial review of Commission measures involving an appraisal of complex economic matters must be limited to verifying whether the relevant rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of assessment or a misuse of powers (see, to that effect, *British American Tobacco Co Ltd v EC Commission* Joined cases 142/84 and 156/84 [1987] ECR 4487 (para 62), *Matra Hachette SA v EC Commission* Case T-17/93 [1994] ECR II-595 (paras 23, 25), *Asia Motor France SA v EC Commission* Case T-7/92 [1993] ECR II-669 (para 33)). b  
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81. The assessment in the contested decision of the degree of foreclosure of the relevant market is principally based on information and statistical data contained in the Lansdowne survey. Moreover, the decision often refers to a survey of the relevant market commissioned by HB and completed in 1996 by Behaviour & Attitudes Ltd, a market research firm (hereinafter the B&A survey), and a survey carried out in 1996 by Rosslyn Research Ltd for Mars (hereinafter the Rosslyn survey). Those surveys contain two types of information: first, purely factual information relating to the number of sales outlets in Ireland, the number of freezer cabinets per sales outlet and the calculation of the number of cabinets belonging to retailers or supplied by ice cream manufacturers and, second, evaluations of statistical data supplied in a survey of a representative sample of retailers in Ireland. The Commission's finding in recital (156) of the contested decision is based on an analysis of the information and relevant data from those surveys, its conclusion being that in 40% of sales outlets in the relevant market the only freezer cabinet/s for the storage of impulse ice cream in place in the outlet had been provided by HB (see recitals (87) to (125) and (146) to (156) of the contested decision). The parties do not contest the overall correctness of that figure and, in its observations on the 1997 statement of objections, HB confirmed that it accepted that figure. f  
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82. When examining the correctness of the Commission's assessment of the existence and degree of market foreclosure, the court cannot confine itself to looking at the effects of the exclusivity clause, considered in isolation, referring only to the contractual restrictions imposed by HB's distribution agreements on individual retailers. i

83. In order to determine whether HB's exclusive distribution agreements fall within the prohibition contained in art 85(1) of the Treaty, it is appropriate, in

a accordance with the case law, to consider whether all the similar agreements entered into in the relevant market and the other features of the economic and legal context of the agreements at issue, show that those agreements cumulatively have the effect of denying access to that market to new competitors. If, on examination, that is found not to be the case, the individual agreements making up the bundle of agreements cannot impair competition

b within the meaning of art 85(1) of the Treaty. If, on the other hand, such examination reveals that it is difficult to gain access to the market, it is then necessary to assess the extent to which the agreements at issue contribute to the cumulative effect produced, on the basis that only those agreements which make a significant contribution to any partitioning of the market are prohibited (see *Delimitis*' case (paras 23, 24), and the *Langnese-Iglo* case (para 99)).

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84. It follows that, contrary to HB's submission, the contractual restrictions on retailers must be examined not just in a purely formal manner from the legal point of view, but also by taking into account the specific economic context in which the agreements in question operate, including the particular

d features of the relevant market, which may, in practice, reinforce those restrictions and thus distort competition on that market contrary to art 85(1) of the Treaty.

85. In that regard, it must be remembered that the exclusivity clause in HB's distribution agreements was part of a set of similar agreements concluded by manufacturers on the relevant market and was an established practice not only

e in Ireland but also in other countries (see para 79, above).

86. Thus, HB does not dispute that in 1996 around 83% of retail shops in Ireland had freezers supplied by a manufacturer and were subject to conditions similar to those of the exclusivity clause. The practical consequence of that network of agreements is that ice cream manufacturers which do not have a freezer cabinet installed in one or other of those 83% of outlets are unable to

f gain direct access to them in order to sell their products unless the retailer either replaces an existing cabinet with his own cabinet or a cabinet supplied by the new supplier, or installs another cabinet of his own or one belonging to the new supplier. Without infringing the terms on which the freezer cabinet in question is supplied, a retailer cannot use it to stock ice cream from another manufacturer alongside those of the supplier of the cabinet, even if there is a

g demand for those other brands. It follows that only 17% of outlets had freezer cabinets belonging to the retailer and, consequently, had capacity to stock ice cream from any supplier. Furthermore, according to the Lansdowne survey, 61% of freezer cabinets supplied by an ice cream manufacturer on the relevant market come from HB, 11% from Mars, 9% from Valley and 8% from Nestlé

h (see recital (88) of the contested decision). According to the Rosslyn survey, 64% of freezer cabinets supplied by an ice cream manufacturer on the relevant market come from HB, 14% from Mars and 4% from Valley (see recital (107) of the contested decision).

87. It is apparent from the file that the outlets which are the most important for the sale of impulse ice cream are generally small in area and have limited

i space (see recital (43) of the contested decision). The court finds that HB's argument referred to in para 47, above, namely that the Commission overestimated the space constraints faced by retailers, cannot be accepted. Even if, as HB submits in its written pleadings, the number of freezers in Ireland increased by around 16% between 1991 and 1996 that does not mean that when the contested decision was adopted there were no such constraints. The



legality of the contested decision must be assessed by reference to the facts existing when it was adopted. The court observes that HB does not dispute the Commission's finding that in 1996 (see recital (147)), that is to say just after the increase in the number of freezers in Ireland on which HB relies and two years before the contested decision was adopted, the optimal number of freezers necessary in an outlet at the height of the season had almost been achieved. Furthermore, according to the Lansdowne survey, 87% of retailers consider that it is not economically viable to allocate space to the installation of an additional freezer (see recital (97) of the contested decision). a  
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88. Furthermore, it cannot be denied that the relevant product market is characterised by the need for each retailer to have at least one freezer—either owned by him or supplied by an ice cream manufacturer—in order to stock and display ice creams (see para 79, above). Consequently, the decision that a retailer who sells products for immediate consumption, such as confectionery, crisps and carbonated drinks, has to take is different where, on the one hand, an ice cream manufacturer offers to sell him its products, as a replacement or supplement to an existing range, and, on the other hand, where a similar offer is made by a manufacturer of other products, such as cigarettes or chocolates, which do not require a freezer cabinet but normal shelf space. A retailer cannot simply stock a new range of ice creams alongside other existing products for a trial period in order to establish whether there is sufficient demand for that range. He must first of all take a business decision as to whether the investment, risks and other disadvantages associated with the installation of a freezer or an additional freezer, including the displacement and decrease in the sales of other brands of ice cream and other products, will be outweighed by additional profit. It follows that a rational retailer will allocate space to a freezer in order to stock ice cream of a particular brand only if the sale of that brand is more profitable than the sale of impulse ice creams of other brands and of other products for immediate consumption. c  
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89. The court finds that, in the circumstances set out in particular in paras 85–88, above, the provision of a freezer 'without charge', the evident popularity of HB's ice cream, the breadth of its range of products and the benefits associated with the sale of them are very important considerations in the eyes of retailers when they consider whether to install an additional freezer cabinet in order to sell a second, possibly reduced, range of ice cream or, a fortiori, to terminate their distribution agreement with HB in order to replace HB's freezer cabinet either by their own cabinet or by one belonging to another supplier, which would, in all probability, be subject to a condition of exclusivity. f  
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90. Moreover, HB has held a dominant position on the relevant market for several years. When the contested decision was adopted it had an 89% share of the relevant market, both in volume and in value, the remainder being shared between several small suppliers (see the court's findings in paras 155, 156, below). That dominant position is also illustrated by the high degree of recognition of the HB brand and the size and popularity of its product range in Ireland. The court considers that the Commission, when assessing the effects of the exclusivity clause on the relevant market, could legitimately take into account the fact that HB held a dominant position on it in order to assess the conditions prevailing on that market and that the assessment was not, contrary to HB's submission, 'distorted'. It is settled law that the finding that an undertaking has a dominant position is not in itself a ground of criticism of the undertaking concerned (see *Nederlandsche Banden-Industrie Michelin (NV) v* h  
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- a *EC Commission Case 322/81* [1983] ECR 3461 (para 57) and *Cie Maritime Belge Transports SA v European Commission* Joined cases C-395/96 P and C-396/96 P [2000] All ER (EC) 385, [2000] ECR I-1365 (para 37)).

b 91. Consequently, the Commission, in taking into consideration the popularity of HB's ice creams and its position on the relevant market, is not penalising it for its legitimate business success. It has merely identified the effective dependence of retailers which results from the presence in the sales outlets of freezer cabinets supplied by HB, the dominant position of HB on the relevant market, the popularity of its product range, the constraints associated with the lack of space characterising typical sales outlets, the disadvantages and risks associated with stocking a second range of ice cream, as features that all form part of the economic context of the present case.

c 92. The court finds that the effect of the measures taken by HB in order to ensure compliance with the exclusivity clause is to cause retailers to act differently in regard to its products than they do in regard to the ice creams of other brands and in a way which is liable to distort competition in the relevant market. Those effects are clearly shown by the fact that the retailers do stock ice creams of other brands alongside those of HB, in the same freezer, whenever they consider that they are free to do so.

d 93. It is apparent from the file and from the contested decision (see recital (48)) that after its entry onto the relevant market in 1989 Mars gained a share of it, but that the reaction of HB, and its insistence that retailers complied with the exclusivity clause, reversed that development. Following the injunction against Mars granted by the High Court in 1990, which prohibited it from inducing retailers to stock its ice creams in HB freezers, the numeric distribution of its ice creams for immediate consumption in Ireland fell from 42% to less than 20%. This fact in itself indicates that there was a demand on the relevant market for products manufactured by HB's competitors and that the exclusivity clause does have a bearing on the ability of its competitors to penetrate that market and establish themselves on it.

e 94. The B&A survey also shows that a significant proportion [...] %<sup>1</sup> (more than 35%) of retailers would be prepared to stock a wider range of products if the exclusivity clauses no longer existed in the distribution agreements of ice cream manufacturers (see recital (120) of the contested decision), which shows that the effect of those clauses may be, contrary to HB's arguments (see para 51, above), to reduce not only the choice of consumers but also price competition between suppliers. Similarly, contrary to HB's submission, the fact that around 44% of sales outlets sell two brands of ice cream does not show that intra-brand competition is not affected by the exclusivity clause.

f 95. Furthermore, in Irish supermarkets that do not practise freezer cabinet exclusivity, the ice creams of suppliers other than HB are sold alongside HB products. At the hearing, Richmond stated that in Ireland it supplies 65% of supermarkets and only 8% of retailers. Moreover, it must be pointed out that in the United Kingdom, where the distribution system for impulse ice creams is different, Richmond has obtained a market share of 24%, whereas its share of the relevant market is no more than 2%. All those factors confirm that where it is possible to stock a second brand of ice cream in one and the same freezer, a significant number of retailers are prepared to do so. The fact that they do not do so is the result of the prevalence of exclusivity clauses in the relevant market.

1 Confidential data omitted.

96. The court also notes that the Commission's conclusion that entry onto the relevant market by HB's competitors is hindered by the existence of the exclusivity clause is confirmed by HB's own assessment of the advantages of that clause. It is apparent from the contested decision that the Unilever group, upon the entry of Mars into the European market at the end of the 1980s, placed particular importance on the supply of freezer cabinets intended for the exclusive use of its companies (see recitals (64) to (68) of the contested decision) and itself took the view that this practice might have the effect of imposing exclusivity on the sales outlets in question. In a document of the Unilever group of 1989, entitled 'European ice cream marketing strategy', reference is made to the importance of the exclusivity clause and to the maintenance of the scheme of retaining ownership of the freezers, in the following terms:

'We must retain ownership of the cabinet, particularly where distribution is performed by third parties, in order to retain, as far as possible through exclusivity contracts, sole brand supply to the fridge, and de facto, to the outlet.'

97. In the light of the foregoing, the court finds that the Commission has proved to the required legal standard that, notwithstanding the high degree of recognition of HB's products on the relevant market and the fact that it offers a complete range of ice creams, many of which are highly popular with consumers, there is objective and specific evidence demonstrating the existence of demand in Ireland for the ice creams of other manufacturers where they are available, even though those manufacturers have a smaller range of ice creams, namely the ice creams of manufacturers who, like Mars, occupy quite specific niches. The Commission has shown in that regard that a considerable number of retailers are prepared to stock impulse ice creams from various manufacturers, provided that they may stock them in one and the same freezer and that they are not inclined to do so when they have to install an additional freezer of their own or one belonging to another manufacturer. Consequently, the court cannot accept HB's argument that the reluctance of retailers to sell products of other ice cream manufacturers must be attributed not to the exclusivity clause but rather to the fact that there is no demand for those products on the relevant market.

98. The court also finds that the Commission rightly held, having regard to the specific features of the product in question and the economic context of this case, that the network of HB's distribution agreements together with the supply of freezer cabinets 'without charge' subject to the condition of exclusivity, have a considerable dissuasive effect on retailers with regard to the installation of their own cabinet or that of another manufacturer and operate de facto as a tie on sales outlets that have only HB freezer cabinets, that is to say 40% of sales outlets in the relevant market. Despite the fact that it is theoretically possible for retailers who have only an HB freezer cabinet to sell the ice creams of other manufacturers, the effect of the exclusivity clause in practice is to restrict the commercial freedom of retailers to choose the products they wish to sell in their sales outlets.

99. However, HB submits that, if the court were to conclude that the exclusivity clause operates as a de facto tie in regard to the sales outlets, the degree of foreclosure resulting from its distribution agreements is no more than 6% of the entirety of sales outlets on the relevant market and does not lead to an appreciable restriction of competition on that market. It therefore



a considers that the Commission's finding that 40% of sales outlets of the relevant market are in fact foreclosed is manifestly erroneous. HB says that this percentage is too high, in particular because it includes three categories of sales outlets which cannot be regarded as foreclosed (see para 46, above). It states in that regard that, in order to calculate the degree of foreclosure of the relevant market, account should be taken only of sales outlets where retailers wish to change their ice cream supplier but are unable to do so.

b 100. Those arguments must be rejected.

101. Contrary to HB's submission (see paras 46, 47, above), in the 6% of sales outlets with more than one HB freezer cabinet (and which therefore have space to install more than one cabinet) the retailers are not likely to replace an HB cabinet unless they take the view that this replacement and the sale of another brand of ice cream will enable them to obtain at least the same turnover as that which they previously achieved with HB ice creams. It is apparent from the file that in reality retailers only very rarely opt to replace one of the freezer cabinets supplied by HB with their own cabinet or with one belonging to another manufacturer, particularly because of the position and popularity of HB on the relevant market.

102. The court considers that the 6% of sales outlets in question together with the 27% of sales outlets which have an HB freezer cabinet, and in which the retailers are allegedly not interested in stocking a brand of ice cream other than HB (according to the analysis made by HB of the Lansdowne survey data), must not be excluded when calculating the degree of foreclosure of the relevant market. Owing to the operation of the exclusivity clause, those retailers are faced with a situation which distorts their business options. In the light particularly of HB's position on the relevant market, the fact that none of its competitors has a range of products as well known or complete as its own, and the space constraints already referred to in para 87, above, the ability of the retailers concerned to sell products of other manufacturers, especially where those manufacturers have a limited range of products, is in general an insufficient inducement to replace HB freezer cabinets or to install another cabinet (see, by analogy, the *Langnese-Iglo* case (para 108)).

103. With regard to the third category of sales outlets, namely those in which retailers are allegedly interested in stocking other brands of ice cream and are able to do so but have not done so, their number varies between 2% and 5%—according to the figures submitted by HB and based on the analysis of the Lansdowne survey. Even though this category was not clearly defined by HB, it still represents only a tiny part of the 40% total and is not such as to invalidate the Commission's finding in the contested decision that the identified part of HB's network of agreements involved around 40% of all sales outlets on the relevant market.

104. Furthermore, with regard to the two latter categories of sales outlets, the court also observes that the figures presented by HB based on its analysis of the Lansdowne survey are not such as to vitiate the Commission's assessment of the degree of foreclosure of the relevant market. In the absence of any indication on the part of HB of the reasons for which, first, 27% of the sales outlets in question are not interested in stocking a brand of ice cream other than HB and, second, 2–5% of the sales outlets in question which are interested in stocking other brands nevertheless do not take the steps necessary to do so, the court considers that it is entirely possible that the circumstances are attributable to the factors identified by the Commission (see in particular recitals (157) to (184) of the contested decision) which reinforce the restrictions

on competition in the relevant market resulting from the exclusivity clause and in fact create commercial dependence of retailers on HB. a

105. As to HB's argument alleging that the freezer cabinet exclusivity imposed by the exclusivity clause cannot be regarded as an outlet exclusivity because the retailers have the option of terminating their distribution agreements with HB at any time, the court considers that this possibility in no way precludes the effective enforcement of the agreements in question during the period in which that option is not used. Consequently, in assessing the effects of the distribution agreements on the relevant market, the court must take their actual duration into consideration (see, by analogy, the *Langnese-Iglo* case (para 111)). HB rightly submits that, unlike the situation in other member states, where the exclusivity clause is combined with a contractual obligation of several months or even several years, the situation in the present case, as the Commission acknowledges, offers retailers the possibility of terminating the exclusivity clause on very short notice, or even immediately. Such an argument might be convincing if that option were exercised in practice and if outlets were thus to become regularly available to new entrants on the relevant market. However, as the Commission has shown, that is not the case, because HB's distribution agreements are terminated on average every eight years. It follows that the argument to the effect that it is possible to terminate the HB distribution agreements is unsound, since the possibility of so doing does not in fact operate to reduce the degree of foreclosure of the relevant market. b  
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106. As regards HB's argument relating to application of the rule of reason in the present case, the court would point out that the existence of such a rule in Community competition law is not accepted. An interpretation of art 85(1) of the Treaty, such as suggested by HB, is moreover difficult to reconcile with the structure of the rules prescribed by art 85. e

107. Article 85 of the Treaty expressly provides, in its third paragraph, for the exemption of agreements that restrict competition where they satisfy a number of conditions, in particular where they are indispensable to the attainment of certain objectives and do not afford undertakings the possibility of eliminating competition in respect of a substantial part of the products in question. It is only within the specific framework of that provision that the pro and anti-competitive aspects of a restriction may be weighed (see, to that effect, the *Pronuptia* case (para 24), *Matra SA v EC Commission* Case C-225/91 [1993] ECR I-3203 (para 48) and *European Night Services Ltd (ENS) v European Commission* Joined cases T-374/94, T-375/94, T-384/94 and T-388/94 [1998] ECR II-3141 (para 136)). Article 85(3) of the Treaty would lose much of its effectiveness if such an examination had already to be carried out under art 85(1) of the Treaty (see, to that effect, *Montecatini SpA v European Commission* Case C-235/92 P [1999] ECR I-4539 (para 133), *Montedipe SpA v EC Commission* Case T-14/89 [1992] ECR II-1155 (para 265), *Tréfilunion SA v European Commission* Case T-148/89 [1995] ECR II-1063 (para 109) and also *Métropole Télévision (M6) v European Commission* Case T-112/99 [2002] All ER (EC) 1, [2001] ECR II-2459 (paras 72–74)). f  
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108. Furthermore, it cannot be inferred with certainty from the sole fact that the identified part of the HB network of agreements involved around 40% of all sales outlets in the market, that that part is automatically capable of preventing, restricting or distorting competition appreciably. That implies, as HB contended at the hearing, that 60%, therefore a majority, of sales outlets in the relevant market are not foreclosed as a result of the exclusivity clause. i

- a 109. When assessing the effects of such a network of distribution agreements, it is necessary to have regard to the economic and legal context in which it operates and in which it might combine with others so as to have a cumulative effect on competition (see *Delimitis*’ case (para 14) and the *Langnese-Iglo* case (para 100)).
- b 110. In the present case, the Commission took into consideration in the contested decision the effects on competition not only of HB’s distribution agreements but also of the various networks of agreements relating to freezer cabinets that were subject to an exclusivity clause, operated by other suppliers on the relevant market. According to the contested decision, 55% of sales outlets possessed only one or two HB freezer cabinets, 14% had one HB cabinet and a Mars cabinet, 7% had an HB cabinet and a cabinet from a manufacturer other than Mars (recital (108)). The Commission also observed that the exclusivity condition applicable to freezer cabinets in 83% of the sales outlets on the relevant market (see paras 18, 86, above) constituted a significant practical and financial obstacle to market entry and to the expansion of other suppliers (see recitals (185) to (194)).
- c 111. The court finds that, given that suppliers other than HB also make freezer cabinets available to retailers under very similar conditions (see in particular para 85, above) and with the same constraints in terms of space, the Commission rightly held in the contested decision that the difficulties encountered in the outlets equipped only with HB freezer cabinets, in persuading retailers to replace the existing HB cabinet or to install additional freezer cabinets for impulse ice creams, apply also to any freezer cabinet subject to a condition of exclusivity, even if the other suppliers do not have the same position and same popularity as HB on the relevant market. Competing suppliers are in effect prevented from gaining access to the relevant market by a series of factors including the burden which the purchase and maintenance of a freezer cabinet represents for retailers, their aversion to risk and their reluctance to sever established relations with their suppliers. It follows that the networks of agreements in place on the relevant market affect 83% of outlets in that market.
- d 112. However, the extent of tying-in brought about by networks of agreements, although of some importance in assessing the partitioning of the market, is only one factor amongst others pertaining to the economic and legal context in which the network of agreements must be assessed (see *Delimitis*’ case (paras 19, 20) and the *Langnese-Iglo* case (para 101)). It is also necessary to analyse the market conditions and in particular the real and specific opportunities for new competitors to penetrate that market notwithstanding the existence of those networks.
- e 113. The court also finds that the Commission rightly held in the contested decision that the provision to retailers of freezer cabinets subject to a condition of exclusivity and the running maintenance costs of those freezers represent a financial barrier to the entry of new suppliers on the relevant market and to the expansion of existing suppliers. The court finds that there is no objective link between the supply of freezer cabinets subject to a condition of exclusivity and the sale of ice creams. It is apparent from the contested decision that retailers are not inclined to accept freezer cabinets from suppliers who do not offer terms that are at least as advantageous as those offered by the suppliers of the cabinets already in place in the outlets concerned, or those offered by suppliers to that market in general. In the context of the relevant market, that means that the supplier must be ready to offer a freezer cabinet ‘without
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charge' and to service it. It follows that, in accordance with the Commission's findings in the contested decision (see in particular recital (189)), the expense involved in acquiring a stock of freezer cabinets for installation in outlets which will ensure that the supplier's products can achieve viable distribution levels, renders it very difficult to enter the relevant market, particularly for small companies and the suppliers of impulse ice creams which occupy quite specific niches, because it is difficult to justify the investment in freezer cabinets from suppliers who offer a smaller range of products. Moreover, HB's argument, set out in para 59, above, that it is viable for 47% of outlets to have a freezer owned by the retailer, must be rejected because, given the practice not only of HB but also of other suppliers of making freezers available 'without charge' to retailers, the latter have no reason to buy their own freezer. a

114. The court also finds that HB has not proved to the requisite legal standard that it is impractical to impose a separate rental in respect of the supply of freezers (see para 50, above). It is apparent from the contested decision that in Northern Ireland HB charges retailers an annual rent for the loan of its freezer cabinets and applies a price reduction to products which it supplies to retailers with their own cabinets (see recital (127)). It follows that, having regard to the fact that it is possible to charge a separate rent for the supply of freezers in another geographic market, it cannot be regarded as necessary to have an exclusivity clause in order for a given supplier to prevent his competitors from using his freezers to stock their products. For the same reason, it cannot be claimed that HB would be obliged, without remuneration, to carry on its balance sheet freezer cabinets for use not only in its business but also in the business of its retail customers and competitors (see paras 49, 50, above). b

115. Furthermore, although it is not disputed that the provision to retailers of freezer cabinets presents certain economic and practical advantages for suppliers of ice creams and for retailers, the court holds that, when the supply of freezer cabinets to retailers is the subject of an exclusivity clause, the economic advantages of that practice are, in the conditions prevailing in the relevant market, counterbalanced by its negative effects on competition. It follows that the court cannot accept the argument, put forward by HB in its pleadings, to the effect that this practice should be criticised only if there were no objective commercial justification for it. c

116. In addition, it is apparent from the file that the fact that independent wholesale of impulse ice cream is undeveloped in Ireland means that access to distribution via such independent intermediaries is rendered more difficult. Furthermore, the strength of existing brands in the relevant market and customer loyalty towards them amount to a formidable obstacle to new entrants (see recital (195) of the contested decision). d

117. As to HB's argument that the relevant market is disputed by at least five manufacturers, it is apparent from the file that the other suppliers of impulse ice creams hold only very small market shares. During the period June/July 1997, Mars, HB's biggest competitor on the market, had a market share of merely 4-5% in volume and in value. Furthermore, the market share held by Mars, Valley and Leadmore fell during the years preceding the adoption of the contested decision (see recitals (32) to (37)). The court therefore holds that the weak market shares held by HB's competitors are, at least in part, attributable to HB's practice of making freezer cabinets available without charge. e

118. In the light of all the foregoing, the court finds that it is clear from an examination of the entirety of the similar distribution agreements concluded f

a on the relevant market, and other evidence of the economic and legal context of which those agreements form part, that the distribution agreements concluded by HB are liable to have an appreciable effect on competition for the purposes of art 85(1) of the Treaty and contribute significantly to a foreclosure of the market.

b 119. The first and second pleas, alleging manifest errors of assessment of the facts and infringement of art 85(1) of the Treaty are accordingly rejected.

#### THE THIRD PLEA: ERRORS IN LAW IN APPLYING ART 85(3) OF THE TREATY

##### *Arguments of the parties*

c 120. HB claims that the exclusivity clause falls within the scope of art 85(3) of the Treaty and may be the subject of an exemption. It disputes the Commission's assertion in the contested decision that the restrictive effects of such agreements outweigh the advantages flowing from the distribution efficiency produced by them. Likewise it disputes that those advantages accrue solely to it and its retailers and are not, in the light of a broader public interest, of such a character as to compensate for the disadvantages which those d agreements have for competition. Finally, HB disputes the findings in recital (234) of the contested decision that the advantage of total territorial coverage resulting from the exclusivity clause cannot outweigh the disadvantages of the foreclosure of the market caused by HB's network of freezer cabinet agreements.

e 121. HB claims more specifically that the contested decision is vitiated by three fundamental errors of law in relation to art 85(3).

f 122. First, it submits that the contested decision contains a fundamental logical flaw with regard to the relationship between art 85(1) and (3) of the Treaty. It states that according to the contested decision, art 85(3) of the Treaty requires a balancing exercise between restriction of competition and availability of benefits of a type to justify exemption (see recitals (222) to (225)). According to the contested decision, by competing too effectively in providing benefits to retailers and consumers, HB restricts competition contrary to art 85(1) of the Treaty (see recital (226)). Given that the benefits in question allegedly produce a restriction of competition under art 85(1), those benefits cannot be taken into account for the grant of an exemption under g art 85(3) of the Treaty. The Commission's argument is therefore circular.

h 123. Second, according to HB, the various conditions for the application of art 85(3) of the Treaty are cumulative, in the sense that each of the criteria must be satisfied before an exemption can issue. However, the question whether the criteria are satisfied must be the subject of a separate examination in respect of each of them. The Commission cannot contend that the benefits i produced by the HB freezer cabinet agreements are de facto negated by the restrictive effects of those agreements; the question of a substantial elimination of competition must be addressed separately from the question of the benefits arising from the agreements. The court made the need for separate analysis clear in para 122 of its judgment in the *Matra Hachette* case. HB observes that the Commission considers that improvement of distribution at retail level in terms of reduced costs of transport and regular supply, distribution efficiencies at supply level in planning and logistics terms, and stimulation of demand by maximisation of product availability and visibility can be ignored because of alleged negative implications for competition in the relevant market. Contrary to what is alleged by the Commission (see para 130, below), once objective advantages arising from an agreement have been identified, the question of

foreclosure is relevant only to the test of a substantial elimination of competition under art 85(3) of the Treaty. Paragraph 180 of the judgment in the *Langnese-Iglo* case, cited by the Commission, is not inconsistent with HB's arguments in that regard (see again para 130, below). a

124. Third, HB submits that the Commission erred in its examination under art 85(3) of the Treaty in relying on the fact that the relevant market is foreclosed. The true measure of foreclosure in that market is no more than 6%. b

125. HB also submits that the detailed application by the Commission of some of the criteria in art 85(3) of the Treaty also constitutes an error of law. It observes that the contested decision (see recital (227)) acknowledges that the wider availability of freezer cabinets in retail outlets covering the entire geographic market and brought about largely by HB's freezer cabinet network can be considered an objective advantage, particularly in the distribution of products, and that the exclusivity clause contributes to the attainment of that advantage. The Commission seeks, however, to negate the advantage by asserting that it can be assumed that HB, in the interest of profit maximisation, will continue to supply cabinets even on a non-exclusive basis. The Commission is not, however, entitled to presume that HB will continue to supply cabinets in the absence of an exclusivity clause. Moreover, HB submits that the Commission, contrary to its statements in recitals (232) and (233) of the contested decision, cannot assume that there are competing suppliers who can manufacture a range of products comparable to HB's, and as cost-effectively as HB, so as to be able profitably to distribute those products to sales outlets with a turnover that is too low to interest it and to retailers who, if they should cease to be supplied with ice cream by HB, would be able to provide their own cabinets. Similarly, it submits that there is no evidence that an independent dealer could provide a distribution service more cheaply and cost-effectively than HB or that the emergence of a new entrepreneurial type of independent wholesaler is precluded by reason only of HB's form of freezer cabinet agreement. c  
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126. HB submits that, in the context of distribution, 'indispensable' does not mean that there is no other way of distributing the products, but only that the restrictions are necessary to achieve the particular marketing strategy adopted by the manufacturer which brings benefits under art 85(3) of the Treaty. It submits that if outlet exclusivity can be regarded as indispensable to realisation of those benefits, as the block exemptions for exclusive distribution and exclusive purchasing agreements clearly recognise, the same must be true of the exclusivity clauses in respect of freezer cabinets. g

127. HB adds that if the exclusivity clause were to be held unlawful, that would clearly adversely affect its situation and its distribution arrangements. First, it would suffer a competitive disadvantage in that a third party competitor would be able to use HB's assets without making its own investment in cabinet provision in the outlets concerned but at the same time exclude HB from any cabinets that it provides. Second, it would not be possible to make the same full product offering of HB products in the cabinet, thereby resulting in lost sales. Inasmuch as costs of cabinet provision and maintenance are recouped through sales of HB ice cream, those costs would be pro tanto unrecovered. Third, there would be an increase in the costs of distribution of ice cream to the outlets concerned by the contested decision and to other outlets. h  
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128. HB submits that its distribution system has benefits for consumers, in accordance with art 85(3) of the Treaty. Otherwise the Commission would not previously have been satisfied that an exemption was justified at the time when



a it issued the notice under art 19(3) of Regulation 17/62 (see para 12, above) stating that an exemption was justified. Indeed, much of the logic of the block exemption under Commission Regulation (EEC) 1984/83 (on the application of art 85(3) of the Treaty to categories of exclusive purchasing agreements) (OJ 1983 L173 p 5) would also be removed.

b 129. HB adds that its distribution agreements do not afford the possibility of eliminating competition in respect of a substantial part of the products in question, since, even on the Commission's view, 60% of the market is not foreclosed. It also observes that the reference in recital (245) of the contested decision to the fact that it is a long time since a substantial change in the competitive structure of the relevant market has occurred is wrong on the facts, inasmuch as it ignores new market entry by large and sophisticated suppliers like Mars, Nestlé and Häagen-Dazs.

c 130. The Commission submits that the contested decision is not vitiated by a fundamental logical flaw. An exemption can be given only after the restrictive effects of an agreement are balanced against the benefits which it produces. Those benefits cannot be identified with all the advantages which the parties obtain from the agreement. It also submits that the contested decision examines separately each of the criteria under art 85(3) of the Treaty. It points out that in the contested decision it found that HB's agreements did not satisfy those criteria because they did not contribute to an improvement in the distribution of goods, did not allow consumers a fair share of the benefit of that system, were not indispensable to attain the benefits claimed and left HB the possibility of eliminating competition in respect of a substantial part of the products in question. The Commission, referring more specifically to para 180 of the judgment in the *Langnese-Iglo* case, and to para 142 of the judgment in the *Schöller* case, submits that its analysis of the first of the four criteria set out in art 85(3) of the Treaty is not vitiated by an error of law.

f 131. According to the Commission, HB's application focuses on only one of the four criteria which have to be satisfied in order to obtain an exemption, namely an improvement in the distribution of goods or the promotion of technical or economic progress, and does not deal with the other criteria in detail. Furthermore, HB has not shown how the benefits resulting from its distribution system, if there are any, are the result of the exclusivity clause and not of other factors.

g 132. The Commission submits that all the requirements in art 85(3) must be satisfied simultaneously. It also submits that HB has not disputed, nor even called into question, the findings in recitals (239) and (240) of the contested decision that the exclusivity clause reduces the choices available to consumers and does not guarantee that any savings in efficiency are passed on to them.

h The Commission contests HB's assertion that the exclusivity clause could benefit from an exemption by analogy with the block exemptions for exclusive distribution and exclusive purchasing. It states that the balance between the restrictions and the benefits—of which the notion of indispensability is an important part—is different in the case of impulse ice cream. While, for many products, vertical restraints on the freedom of retailers can be accepted because they stimulate interbrand competition, such interbrand competition is less likely for impulse products, because customers do not in general enter a shop with the intention of buying those products and do not seek to compare the products of one sales outlet with those of another. Moreover, the benefits of the block exemptions in question could be lost if there was insufficient competition in the goods in question. That occurred in the *Langnese-Iglo* case.

In addition, the fact that HB might suffer detriment if it abandoned a particular business practice does not mean that the practice is indispensable. a

133. With regard to the criterion in art 85(3) of the Treaty relating to the possibility of eliminating competition, the Commission states that HB has not commented on recitals (242) to (246) of the contested decision concerning the lack of competition on the relevant market and the barriers to entry facing any new entrant. The Commission states that HB merely disputes its argument that it is a long time since any substantial change in the competitive structure on the relevant market has occurred (recital (245) of the contested decision). The Commission reaffirms that the relevant market in fact continues to be dominated, at a level of 80%, by HB. b

134. The Commission submits that HB's argument, set out in para 128, above, is incorrect and constitutes a new plea in law which was not raised in the application and is therefore inadmissible under art 48(2) of the Rules of Procedure. c

#### *Findings of the court*

135. It is settled case law that the review carried out by the court of the complex economic assessments undertaken by the Commission in the exercise of the discretion conferred on it by art 85(3) of the Treaty in relation to each of the four conditions laid down therein, must be limited to ascertaining whether the procedural rules have been complied with, whether proper reasons have been provided, whether the facts have been accurately stated and whether there has been any manifest error of appraisal or misuse of powers (see, to that effect, *Groupement des Cartes Bancaires CB v European Commission* Joined cases T-39/92 and T-40/92 [1994] II-49 (para 109), the *Matra Hachette* case (para 104) and *Vereniging van Samenwerkende Prijsregelende Organisaties in de Bouwnijverheid v European Commission* Case T-29/92 R [1995] ECR II-289 (para 288)) (the *SPO* case). It is not for the Court of First Instance to substitute its own assessment for that of the Commission. d

136. It is also settled law that, where an exemption is being applied for under art 85(3) of the Treaty, it is for the undertakings concerned in the first place to present to the Commission the evidence intended to establish that the agreement fulfils the conditions laid down by that provision (see, to that effect, *Vereniging ter Bevordering van het Vlaamse Boekwezen (VBVB) v EC Commission* Joined cases 43/82 and 63/82 [1984] ECR 19 (para 52), *Remia BV v EC Commission* Case 42/84 [1985] ECR 2545 (para 45) and the *Langnese-Iglo* case (para 179)). e

137. The grant by the Commission of an individual exemption decision presupposes that the agreement or the decision of an association of undertakings satisfies all the four conditions laid down by art 85(3) of the Treaty. If one of those four conditions is not satisfied, the exemption must be refused (see, to that effect, the *VBVB* case (para 61); order of the Court of Justice of 25 March 1996 in *Vereniging van Samenwerkende Prijsregelende Organisaties in de Bouwnijverheid v European Commission* Case C-137/95 P [1996] ECR I-1611 (para 34), the *Matra Hachette* case (para 104) and the *SPO* case (paras 267, 286)). f

138. The court finds that, contrary to HB's submission in para 123, above, it is clear from the contested decision that the Commission carried out a detailed analysis of the HB distribution agreement in the light of each of the four conditions laid down by art 85(3) of the Treaty (see recitals (221) to (254) of the contested decision). g

a 139. As regards the first of those conditions, the agreements capable of being exempted are those which contribute 'to improving the production or distribution of goods or to promoting technical or economic progress'. The court would point out in that regard that it is settled law of the Court of Justice and of the Court of First Instance that the improvement cannot be identified with all the advantages which the parties obtain from the agreement in their  
b production or distribution activities. The improvement must in particular display appreciable objective advantages of such a character as to compensate for the disadvantages which they cause in the field of competition (see *Établissements Consten SARL v EEC Commission* Joined cases 56/64 and 58/64 [1966] ECR 299 at 348 and the *Langnese-Iglo* case (para 180)).

c 140. The first condition is examined in recitals (222) to (238) of the contested decision. The Commission acknowledged in particular that the agreements whereby freezer cabinets are made available might secure some or all of the benefits described in the fifth recital to Regulation 1984/83 for HB itself and for the retailers who are the other parties to the agreements, and that the distribution method currently used by HB might offer it and its retailers certain  
d advantages in terms of efficiency of planning, organisation and distribution. Therefore, the Commission held that those arrangements did not present appreciable objective advantages of such a character as to compensate for the disadvantages caused to competition. In support of that assertion, it pointed out that the freezer cabinet agreements in question considerably strengthened HB's position in the relevant market, especially vis-à-vis potential competitors.  
e It rightly observed in that regard that the strengthening of an undertaking which is as important on the market as HB leads not to more but to less competition because the network of that undertaking's agreements constitutes a major barrier to the entry of others into the market, as well as to expansion within the market by its existing competitors (see in particular recitals (225) and (236) of the contested decision, and, by analogy, the *Langnese-Iglo* case (para 182)). It must also be pointed out that the level of foreclosure of the relevant market is in the order of 40% (see para 98, above) and not 6% as HB submits (see para 124, above).

141. Consequently, the court finds that, contrary to HB's contention (see para 123, above), the Commission rightly took into consideration the barriers to entry to the relevant market resulting from the exclusivity clause, and the consequent weakening of competition, when it assessed HB's distribution  
g agreement in the light of the first condition laid down by art 85(3) of the Treaty (see, by analogy, the *Consten* case (at 348), and the *Langnese-Iglo* case (para 180)). It follows that the court cannot accept HB's argument set out in para 122, above to the effect that recitals (222) to (225) of the contested decision  
h contain a fundamental logical flaw with regard to the relationship between art 85(1) and (3) of the Treaty, as the Commission was obliged, pursuant to settled case law on the subject, to ascertain whether there were objective advantages of such a character as to compensate for the disadvantages which an agreement creates for competition.

i 142. The court also notes that HB's distribution agreements have two particular aspects, namely, first, they make freezer cabinets available 'without charge' to retailers and, second, the retailers undertake to use those cabinets to stock HB ice creams only. The benefits ensured by the agreements in question are the result of the first aspect and can therefore be achieved even without the exclusivity clause.



143. The court also accepts the Commission's argument in recital (227) of the contested decision that although the wide availability in outlets of freezer cabinets intended for the sale of impulse ice creams, covering the entire geographic market and consisting mainly of HB's cabinets, could be considered an objective advantage in the distribution of those products in the public interest, it is nevertheless unlikely that HB would definitely cease to supply freezer cabinets to retailers, whatever the conditions, except in a small number of cases, if its power to impose an obligation of exclusivity in respect of those freezers were to be restricted. HB has not shown that the Commission committed a manifest error in taking the view that business reality for a company such as HB, which wishes to maintain its position on the relevant market, is to be present in the maximum number of outlets possible (see recital (228) and para 125, above). Contrary to HB's submission, the Commission did not merely assume continuity of provision by HB of freezer cabinets on the relevant market, but carried out a prospective analysis of the operation of the market after the adoption of the contested decision. Furthermore, contrary to HB's argument (see para 125, above), the Commission could validly rely on the argument that manufacturers competing with HB might adopt a policy of supplying freezer cabinets to sales outlets whose turnover in impulse ice creams is too low to be of interest to HB, and do so upon more advantageous conditions than those which the retailers might expect to obtain themselves if HB ceased to supply freezer cabinets to certain sales outlets. Similarly, the Commission could validly point to the possibility that cabinets would be installed by independent resellers who would obtain supplies from various sources and satisfy demand from all the sales outlets from which HB had withdrawn its equipment or to which it decided not to supply equipment. HB cannot claim that the Commission's prospective analysis is vitiated by a manifest error of assessment unless it does so on the basis of concrete evidence, which HB has failed to adduce in the present case.

144. As HB's distribution agreements do not satisfy the first of the conditions laid down by art 85(3) of the Treaty, the third plea must therefore be rejected and it is not necessary to consider whether the Commission committed a manifest error in regard to its assessment of the other conditions laid down by that provision. If any one of the four conditions is not satisfied, the exemption must be refused.

#### THE FOURTH PLEA: ERRORS OF LAW IN THE APPLICATION OF ART 86 OF THE TREATY

##### *Arguments of the parties*

145. In its application HB does not contest the findings in the contested decision as to the existence of a dominant position, but only the finding that there was an abuse of that position (see recital (263)), and in particular the fact that it induces retailers to grant it exclusivity by supplying freezer cabinets to them and maintaining them at no direct charge to the retailer.

146. However, at the hearing and in its observations on the statement in intervention of Mars, HB claimed that it did not hold a dominant position. It argued that if, as the Court of Justice has held, a dominant position is defined by the capacity to retain market shares over a period of time 'without those having much smaller market shares being able to meet rapidly the demand from those who would like to break away from the undertaking which has the largest market share' (see *Hoffmann-La Roche & Co AG v EC Commission* Case 85/76 [1979] ECR 461 (para 41)), it manifestly does not have such a position. It

a observes that several other suppliers, in particular multinational undertakings such as Nestlé and Mars, have capacity which is largely sufficient to supply its retail customers if they wished to break away from HB.

147. HB submits that it is odd to classify as an abuse a practice which is widely employed, which the Commission does not argue has the object of restricting competition, and which is accepted as conferring benefits on the parties to the agreement.

b 148. HB contests the Commission's argument that the exclusivity clause interferes with retailers' freedom to choose suppliers on the basis of the merits of the products which they offer. Furthermore, that finding directly conflicts with recital (259) of the contested decision, which expressly recognises that a large majority of retailers choose to sell HB products and many of them exclusively so. HB adds that many of the retailers concerned would not stock ice cream at all if the freezer were not supplied to them. The supply of ice creams to small retailers and the provision of freezer cabinets improve HB's overall efficiency and increase competition. HB submits that the approach of Advocate General Jacobs in his opinion in *Oscar Bronner GmbH & Co KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co KG* Case C-7/97 [1998] ECR I-7791 (particularly in paras 57, 65), is also applicable to the exclusivity clause. Provision of cabinets on exclusive terms is an aspect of competition in the relevant market. HB observes that its cabinets are not an 'essential facility', since there are no material constraints preventing HB's competitors from installing cabinets in retail outlets wishing to stock alternative brands of impulse ice cream.

e 149. HB also submits that the Commission's position on market foreclosure is unsustainable under art 86 of the Treaty, because in all the cases in which vertical exclusivity has been held to be an abuse the Court of Justice or the Court of First Instance has expressly or implicitly applied a threshold or a de minimis test of market foreclosure (see the *Hoffmann-La Roche* case, *AKZO Chemie BV v EC Commission* Case C-62/86 [1991] ECR I-3359 and the *Michelin* case, *BPB Industries plc v EC Commission* Case T-65/89 [1993] ECR II-389). HB submits that, as the percentage of outlets with the potential for foreclosure by reason of HB cabinet provision is no more than 6%, the materiality threshold for an abuse alleged to consist of market foreclosure through the use of an exclusivity clause has not been achieved.

g 150. In its reply, HB observes that the Commission's analyses under arts 85(1) and 86 are inextricably linked to such a degree that the Commission is guilty of the 'recycling' of its art 85 case to form an art 86 case, in the manner criticised by the court in *Società Italiana Vetro SpA v EC Commission* Joined cases T-68/89, T-77/89 and 78/89 [1992] ECR II-1403 (para 360), hereinafter the *Flat Glass* case.

h 151. The Commission, supported by the interveners, points out that the concept of an abuse is an objective one (see the *Hoffmann-La Roche* case). Thus, the 'strengthening of the position of a dominant undertaking may be an abuse and prohibited under Article 86 of the Treaty regardless of the means and procedure by which it is achieved' (see *Europemballage Corp v EC Commission* Case 6/72 [1973] ECR 215 (para 27)). As to HB's argument alleging that the exclusivity clause cannot constitute an abuse as it is a common practice, the Commission submits that even a common practice in the industry may be an abuse of a dominant position. It adds that HB cannot rely on the fact that

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the situation arises because of the free choice of retailers. HB has induced them to enter into agreements containing an exclusivity clause, and this constitutes the abuse. a

152. The exclusivity clause constitutes a barrier to market entry and to the expansion of the relevant market and strengthens the power of the incumbent supplier on the market. Any competition by existing or potential suppliers is thereby minimised. Retailers are prevented from exercising their freedom of choice with regard to the products that they wish to stock and to the optimisation of space at the sales outlets. Moreover, consumer choice is reduced. The Commission submits that HB's practice of tying the cost of the freezer cabinet to an exclusivity clause when there is no objective link between them is at variance with conditions of normal competition for consumable items. Furthermore, the sales outlets in question represent 40% of all sales outlets on the market and not 6% as HB submits. Lastly, the Commission contends that HB has not defined the status or source of its 'materiality threshold' or explained why an abuse on such a scale cannot fall under art 86. b  
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153. The Commission also submits that the analysis which it carried out under art 85 of the Treaty is separate from its analysis under art 86 of the Treaty, so that HB cannot find support in the *Flat Glass* case. It states that in that judgment the court held that the Commission had 'recycled' the facts constituting an infringement of art 85 and had deduced from them, without carrying out any market survey, that the parties jointly held a substantial share of the market, that by virtue of that fact alone they held a collective dominant position, and that their unlawful behaviour constituted an abuse of that position. d  
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#### *Findings of the court*

154. It is settled case law that very large market shares are in themselves, and save in exceptional circumstances, evidence of the existence of a dominant position. An undertaking which has a very large market share and holds it for some time, by means of the volume of production and the scale of the supply which it stands for—without holders of much smaller market shares being able to meet rapidly the demand from those who would like to break away from the undertaking which has the largest market share—is by virtue of that share in a position of strength which makes it an unavoidable trading partner and which, because of this alone, secures for it, at the very least during relatively long periods, that freedom of action which is the special feature of a dominant position (see the *Hoffman-La Roche* case (para 41) and *Amministrazione Autonoma dei Monopoli di Stato (AAMS) v European Commission* Case T-139/98 [2001] ECR II-3413 (para 51)). Moreover, a dominant position is a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers (see *United Brands Co v EC Commission* Case 27/76 [1978] ECR 207 (para 65) and the *AAMS* case (para 51)). f  
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155. The court notes, first, that the contested decision defines the relevant market as the market for single wrapped items of impulse ice cream in Ireland (recitals (138) and (140) of the contested decision) and that HB does not dispute that definition. HB, whilst not challenging the Commission's assertion in recitals (28) and (259) of the contested decision that its share, in volume and in value, of the relevant market exceeds 75% and that it has retained that share over several years, submits that it does not hold a dominant position on that i



a market. When the contested decision was adopted, HB's share of the relevant market was 89% (see para 90, above). It must also be pointed out that the other suppliers of impulse ice cream present on that market, such as Mars and Nestlé, have very small market shares (see recitals (32) and (34) of the contested decision), despite the fact that they are major players on the neighbouring markets for confectionery and chocolate and sell those products in the same outlets as those in question in the present case. Furthermore, Mars and Nestlé have well-known brands for their products and the experience and financial capacity to enter new markets. HB therefore not only has an extremely large share of the relevant market but there is a considerable gap between its market share and those of its immediate competitors.

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c 156. Moreover, it is clear from the documents before the court that HB has the most extensive and most popular range of products on the relevant market, that it is the sole supplier of impulse ice creams in approximately 40% of outlets in the relevant market, that it is part of the multinational Unilever group which has been producing and marketing ice creams for many years in all the member states and many other countries, in which undertakings in the group are very often the major supplier in their respective market, and that the HB brand is very well-known. The court therefore finds that the Commission correctly held that HB is an unavoidable partner for many retailers on the relevant market and that it has a dominant position on that market.

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e 157. It is necessary, next, to ascertain whether the Commission was correct to conclude in the contested decision that HB had abused its dominant position on the relevant market. It is settled case law that the concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of the market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition (see the *Hoffman-La Roche* case (para 91) and the *AKZO* case (para 69)). It follows that art 86 of the Treaty prohibits a dominant undertaking from eliminating a competitor and from strengthening its position by recourse to means other than those based on competition on the merits. The prohibition laid down in that provision is also justified by the concern not to cause harm to consumers (see, to that effect, the *Europemballage* case (para 26) and *Coöperatieve vereniging Suiker Unie UA v EC Commission* Joined cases 40–48/73, 50/73, 54–56/73, 111/73 and 113–114/73 [1975] ECR 1663  
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h (paras 526, 527)).

i 158. Consequently, although a finding that an undertaking has a dominant position is not in itself a recrimination, it means that, irrespective of the reasons for which it has such a dominant position, the undertaking concerned has a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market (see the *Michelin* case (para 57)).

159. The court finds, as a preliminary point, that HB rightly submits that the provision of freezer cabinets on a condition of exclusivity constitutes a standard practice on the relevant market (see para 85, above). In the normal situation of a competitive market, those agreements are concluded in the interests of the two parties and cannot be prohibited as a matter of principle.

However, those considerations, which are applicable in the normal situation of a competitive market, cannot be accepted without reservation in the case of a market on which, precisely because of the dominant position held by one of the traders, competition is already restricted. Business conduct which contributes to an improvement in production or distribution of goods and which has a beneficial effect on competition in a balanced market may restrict such competition where it is engaged in by an undertaking which has a dominant position on the relevant market. With regard to the nature of the exclusivity clause, the court finds that the Commission rightly held in the contested decision that HB was abusing its dominant position on the relevant market by inducing retailers who, for the purpose of stocking impulse ice cream, did not have their own freezer cabinet, or a cabinet made available by an ice cream supplier other than HB, to accept agreements for the provision of cabinets subject to a condition of exclusivity. That infringement of art 86 takes the form, in this case, of an offer to supply freezer cabinets to the retailers and to maintain the cabinets free of any direct charge to the retailers.

160. The fact that an undertaking in a dominant position on a market ties *de facto*—even at their own request—40% of outlets in the relevant market by an exclusivity clause which in reality creates outlet exclusivity constitutes an abuse of a dominant position within the meaning of art 86 of the Treaty. The exclusivity clause has the effect of preventing the retailers concerned from selling other brands of ice cream (or of reducing the opportunity for them to do so), even though there is a demand for such brands, and of preventing competing manufacturers from gaining access to the relevant market. It follows that HB's contention, set out in para 149, above, that the percentage of outlets potentially likely to be inaccessible owing to the provision of freezer cabinets does not exceed 6%, is incorrect and must be rejected.

161. Furthermore, HB's reference to the opinion of Advocate General Jacobs in the judgment in the *Bronner* case, is irrelevant in the present case because, as the Commission correctly submits in its pleadings, it did not claim in the contested decision that HB's freezer cabinets were an 'essential facility', which is the issue examined in his opinion, and it is not necessary for HB to transfer an asset or to conclude contracts with persons which it has not selected in complying with the contested decision.

162. In addition, the court must reject HB's argument relating to the recycling of the file (see para 150, above). Unlike the conduct criticised in the *Flat Glass* case, the Commission did not merely 'recycle' facts constituting an infringement of art 85(1) of the Treaty in order to find that the conduct in question also infringed art 86 of the Treaty. In the present case, the Commission analysed the relevant market at length in the contested decision and concluded that HB had a dominant position on that market. The Commission then correctly concluded that by inducing retailers to obtain supplies exclusively from HB under the conditions referred to in paras 159 and 160, above, HB had recourse to methods different from those which condition normal competition in consumer products.

163. The fourth plea must therefore be rejected.

THE FIFTH PLEA: ERRORS OF LAW RELATING TO RESPECT FOR RIGHTS TO PROPERTY AND INFRINGEMENT OF ART 222 OF THE TREATY

#### *Arguments of the parties*

164. HB submits that the application of the competition rules in the contested decision constitutes an unjustified and disproportionate infringement

a of its rights to property, as recognised in art 222 of the Treaty. It accepts that the right to property is not absolute but says that any restriction on that right must not constitute a disproportionate and intolerable interference with the rights of the owner (see *Hauer v Land Rheinland-Pfalz* Case 44/79 [1979] ECR 3727). The result of the prohibition of the exclusivity clause is to permit freezer cabinets paid for and maintained by HB to be used for the stocking of ice  
b creams supplied by third parties and that seriously affects its property rights in the cabinets and more generally its economic interests. HB submits that, contrary to the Commission's statement in recital (219) of the contested decision, its property rights could not be appropriately protected by the levying of a separate rental fee for the freezer cabinet. It observes that the management  
c and levying of a rental fee would involve substantial operating costs and that rental would not compensate for the economic dysfunctions which would be caused to its distribution system by the stocking of third-party ice creams in its cabinets. Moreover, it would be placed at a manifest disadvantage in comparison with its competitors, who could continue to make freezer cabinets available without charge.

d 165. HB also contests the Commission's claim (see recital (213) of the contested decision) that, as HB has placed the cabinets in retail outlets, any contractual restriction that HB imposes on the use of the cabinet can be subject to the competition rules. It submits that, in the intellectual property field, it is recognised that matters going to the essence of a property owner's rights include not only the rights to licence (see *Allen & Hanburys Ltd v Generics*  
e (UK) Ltd Case 434/85 [1988] 2 All ER 454, [1988] ECR 1245 (para 11)), to refuse third parties the grant of licences (see *AB Volvo v Erik Veng* (UK) Ltd Case 238/87 [1988] ECR 6211 (para 8)), to prevent infringements of rights (see *Collins v Imtrat Handelsgesellschaft mbH* Case C-92/92, *Patricia Im- und Export Verwaltungsgesellschaft mbH v EMI Electrola GmbH* Case C-326/92 [1993] ECR I-1545), but also particular provisions of a licence agreement (see paras 75, 79,  
f 85, 86, 90 and 100 of Commission Decision (EEC) 83/400 (relating to a proceeding under art 85 of the EEC Treaty (IV/29.395—Windsurfing International)), OJ 1983 L229 p 1). The exclusivity clause is qualitatively comparable to the types of clauses authorised in licences of intellectual property rights.

g 166. HB observes that the economic value of its network of freezer cabinets lies in its having a necessary facility available at the outlets for storage and sale of its ice creams, in particular in outlets which, without the provision of a freezer cabinet, could not sell ice creams, as they would be unable to invest in their own cabinets. Therefore, HB's rights to control the freezer cabinets, and the fact that it insists on the exclusivity attached to them, goes to the substance  
h or essence of its rights (see *Société Alsacienne et Lorraine de telecommunications et d'électronique (Alsatel) v SA Novasam* Case 247/86 [1988] ECR 5987).

i 167. The Commission, supported by the interveners, contends that there has been no impairment of HB's property rights. It states that HB has already given up some of its rights over the freezer cabinets to the retailers in return for payment. HB thus remains owner but has conferred certain rights on those retailers. Consequently, HB's claim that its property rights have been 'confiscated' is purely rhetorical. It is the retailers who pay for the cabinet provision, the cost of which is included in the cost of the ice cream.

168. Furthermore, the Commission submits that if the retailers are authorised to use HB freezer cabinets to sell other brands of ice cream, they would not be free-riding in that respect, because HB could recover the cost of



its investment in several ways, and in particular by requiring payment of a separate fee for the rental of the freezer. It disputes HB's claim that it would be difficult to collect such a fee, as HB already invoices retailers for supplies of ice cream. It states that HB has not proved that a separate system of rental would introduce economic dysfunctions into its distribution network. Moreover, the Commission submits that HB is not placed at a disadvantage in comparison with its competitors if they continue to make freezer cabinets available to retailers without charge, because if the cost of ice cream and the cost of the freezer cabinet are separated, the result should be financially neutral for retailers who continue to buy HB ice cream and stock it in freezers supplied by HB.

169. The Commission states that the analogy drawn by HB between its property rights and the field of intellectual property is erroneous, as the owners of intellectual property rights obtain certain protection to enable them to recoup the investment they have made in the products in question. According to the Commission, the public interest in competition must be balanced against the public interest in the development of new medicines or other useful results which benefit society as a whole, as well as manufacturers. The public interest in ice cream is different. In any event, even if HB's situation were covered by the intellectual property rules, the cases cited by it in para 165, above demonstrate that the owner of an intellectual property right is not entirely immune from the competition rules in the way he sells his products.

#### *Findings of the court*

170. It is settled case law that, although the right to property forms part of the general principles of Community law, it is not an absolute right but must be viewed in relation to its social function. Consequently, its exercise may be restricted, provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and do not constitute a disproportionate and intolerable interference, impairing the very substance of the rights guaranteed (see *Hauer's case* (para 23), *Hermann Schröder HS Kraftfutter GmbH & Co KG v Hauptzollamt Gronau* Case 265/87 [1989] ECR 2237 (para 15), *Germany v EU Council* Case C-280/93 [1994] ECR I-4973 (para 78)). Article 3(g) of the EC Treaty (now, after amendment, art 3(1)(g) EC) provides that in order to achieve the aims of the Community, its activities are to include 'a system ensuring that competition in the internal market is not distorted'. It follows that the application of arts 85 and 86 of the Treaty constitutes one of the aspects of public interest in the Community (see, to that effect, the opinion of Advocate General Cosmas in *Masterfoods Ltd v HB Ice Cream Ltd* Case C-344/98 [2001] All ER (EC) 130 at 133, [2000] ECR I-11369 at 11371). Consequently, pursuant to those articles, restrictions may be applied on the exercise of the right to property, provided that they are not disproportionate and do not affect the substance of that right.

171. The property right at issue in the present case concerns HB's network of freezer cabinets and its right to exploit them commercially. The contested decision in no way affects HB's ownership of its assets, but merely regulates, in the public interest, one particular manner of exploiting them, in the same way as, for example, the legislature in many member states intervenes in order to protect a tenant. The contested decision does not deprive HB of its rights of property in its stock of freezer cabinets or prevent it from exploiting those assets by renting them out on commercial terms. It provides merely that if HB decides to exploit them by making them available 'without charge' to retailers,

- a it may not do so on the basis of an exclusivity clause so long as it holds a dominant position on the relevant market. It follows that the Commission correctly held in the contested decision that the exclusivity clause infringes arts 85(1) and 86 of the Treaty in outlets which have only freezer cabinets supplied by HB for the stocking of impulse ice creams and do not have a freezer cabinet of their own or one provided by another manufacturer.
- b It rightly rejected the request for an exemption, pursuant to art 85(3) of the Treaty, which HB had submitted in respect of the exclusivity clause. It then simply gave HB formal notice to cease those infringements immediately and to refrain from taking any measure having the same object or effect. The contested decision does not, therefore, contain any undue limitation on the exercise of HB's right to property in its freezer cabinets.

- c 172. Moreover, in the light of its findings in para 114, above, the court must reject HB's argument, set out in para 164, above, based on the disadvantages linked to the imposition of a separate fee for the freezer cabinets. As regards HB's argument, set out in para 164, above, that it is disadvantaged in comparison with its competitors, who would be able to continue to make
- d freezer cabinets available to retailers without charge, the court points out that the HB distribution agreements, unlike those of its competitors, contribute significantly to the foreclosure of the relevant market. In addition, as HB has a dominant position on that market, it has, irrespective of the reasons for such a position, a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market (see the *Michelin* case
- e (para 57) and para 158, above).

173. Consequently, the fifth plea must also be rejected.

#### THE SIXTH PLEA: INFRINGEMENT OF ART 190 OF THE TREATY

##### f *Arguments of the parties*

174. HB submits that the contested decision infringes art 190 of the Treaty in at least four respects. First, the definition of 'foreclosure' of the market used by the Commission evolved between the 1993 statement of objections and that issued in 1997. HB adds that the Commission altered its view in regard to HB during that same period. Second, the fact that the Commission did not apply
- g the reasoning followed in the *Langnese-Iglo* case relating to the application of art 85(1) of the Treaty to the exclusivity clause means that the contested decision is inadequately reasoned. Third, HB submits that the inferences which the Commission draws from the facts of the present case are not well founded as a matter of logic and thus the decision is vitiated by an inadequate statement
- h of reasons. Fourth, the fact that the Commission failed to explain why HB freezer cabinet exclusivity is not indispensable to attainment of the benefits arising from the HB agreements making those cabinets available, for the purposes of art 85(3) of the Treaty, when it had recognised both in the 1993 statement of objections and in its 1995 notice (see para 12, above) that such exclusivity could merit an exemption, is a defect of reasoning which vitiates the
- i contested decision.

175. The Commission, supported by the interveners, observes, first, that under art 190 of the Treaty it is required to state the reasons which led to the decision actually adopted, not the reasons which at an earlier stage might or might not have led it to adopt a different decision. Second, it submits that it has not significantly altered its analysis since 1993. In any event, it is entitled to alter

its position in the light of new facts. It took into account the judgments in the *Langnese-Iglo* case and the *Schöller* case, which were delivered after the 1993 statement of objections. a

### *Findings of the court*

176. According to settled case law, the extent of the obligation to state reasons depends on the nature of the measure in question and on the context in which it was adopted. The statement of reasons must disclose in a clear and unequivocal fashion the reasoning of the institution, in such a way as to give the persons concerned sufficient information to enable them to ascertain whether the decision is well founded or vitiated by a defect which may permit its legality to be contested, and to enable the Community judicature to carry out its review of the legality of the measure (see *Stichting Certificatie Kraanverhuurbedrijf (SCK) v European Commission* Joined cases T-213/95 and T-18/96 [1997] ECR II-1739 (para 226) and *Stork Amsterdam BV v European Commission* Case T-241/97 [2000] ECR II-309 (para 73)). It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of art 190 of the Treaty must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (see, in particular, *Netherlands v EC Commission* Joined cases 296/82 and 318/82 [1985] ECR 809 (para 19), *Société française de Biscuits Delacre v EC Commission* Case C-350/88 [1990] ECR I-395 (paras 15, 16) and *Belgium v European Commission* Case C-56/93 [1996] ECR I-723 (para 86)). b  
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177. The court finds, first, that in its second and third arguments set out in para 174, above, HB fails to draw the necessary distinction between the requirement for a statement of reasons and the substantive legality of the contested decision. Under cover of its allegation that the statement of reasons is inadequate, it complains that the Commission erred in law and made a manifest error in its assessment of the facts. HB is not criticising a failure to state reasons but rather the correctness of the decision. It follows that those arguments must be rejected in the context of this plea. e  
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178. With regard to HB's first and fourth arguments, the court finds that the Commission explained, in particular in recitals (7) and (247) of the contested decision, that it revised its initial favourable view, contained in its statement of 15 August 1995, because the amendments proposed by HB to its distribution system had not brought about the expected results in terms of free access to sales outlets. In so doing, the Commission gave sufficient reasons in law for its decision to depart from its initial position. Moreover, it is clear from recital (241) of the contested decision that the Commission considered that HB had not shown that the alleged advantages brought about by the distribution agreements, leading to a general improvement of production and distribution for the benefit, *inter alia*, of consumers, could not be secured equally effectively by removing the exclusivity in favour of HB's products and thus the tie between the provision of freezer cabinets and the supply of ice creams. As recital (247) makes clear, it is for this reason in particular, that the agreements in question could not benefit from an exemption under art 85(3) of the Treaty. g  
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179. It follows that the plea alleging infringement of the obligation to state reasons under art 190 of the Treaty is unfounded.



a THE SEVENTH PLEA: FAILURE TO RESPECT FUNDAMENTAL PRINCIPLES OF COMMUNITY LAW

*Arguments of the parties*

180. HB submits that the Commission, in departing from the terms of its 1995 notice (see para 12, above), infringed the principle of the protection of legitimate expectations, there being no 'overriding public interest'. The circumstances surrounding the 'settlement' concluded in 1995 between HB and the Commission concerning changes to its distribution system and its implementation by HB were of such a nature as to create the legitimate expectation that the Commission, first, would adopt a favourable view in regard to its revised agreements concerning freezer cabinet exclusivity and, second, would not alter its previous position or reformulate its case with regard to the facts and law. HB adds that if business cannot trust the Commission to behave as agreed, the system of comfort letters and informal settlements of disputes will fall into disrepute.

181. HB submits that the Commission also infringed the principle of subsidiarity and its obligation of sincere co-operation with the national courts. It points out that identical proceedings were pending before the Irish courts and submits that there was no Community interest to justify the Commission's intervention, since the case concerned the supply by an Irish company to Irish consumers, through Irish retailers, of products specific to the Irish market.

182. HB also submits that the Commission infringed the principle of legal certainty in adopting the contested decision at a time when appeal proceedings, for which a hearing date had been fixed before the decision was taken, were pending before the Irish courts. Moreover, HB observes that the decision of the High Court was the complete opposite of the Commission's. Even though the Commission has a duty to take into account the interests of complainants, the Commission's notice on co-operation between national courts and the Commission in applying arts 85 and 86 of the Treaty (OJ 1993 C39 p 6) clearly indicates that—

'there is not normally a sufficient Community interest in examining a case when the plaintiff is able to secure adequate protection of his rights before the national courts. In these circumstances the complaint will normally be filed.'

183. Furthermore, the contested decision infringes the principle of proportionality in that it deprives HB of the economic value of its freezer cabinets in such a way that it disproportionately affects its property rights. Similarly, it is disproportionate in that it invalidates all HB's agreements concerning the provision of freezer cabinets in the allegedly foreclosed part of the market, which is contrary to the judgment in the *Langnese-Iglo* case and *Delimitis*' case, which recognise that it is not necessary for all impediments to market access to be removed, provided that real possibilities for market penetration and expansion exist. Moreover, the contested decision infringes the principle of proportionality and is discriminatory in that it prohibits, not only for the past but also for the future, HB freezer cabinet exclusivity in relations with the relevant category of retailers. In the *Langnese-Iglo* case the court annulled the part of the Commission's decision prohibiting Langnese-Iglo from concluding exclusive purchasing agreements until after 31 December 1997, holding that it would be contrary to the principle of equal treatment to exclude for certain undertakings the benefits of a block exemption regulation as

regards the future whilst other undertakings could continue to conclude exclusive purchasing agreements such as those prohibited by the decision. a

184. HB also argues that the contested decision is discriminatory in that it constitutes an arbitrary attack on HB's ability to compete on the basis adopted by all other companies carrying on business on the relevant market.

185. Lastly, HB submits that the arguments relied on in support of the pleas alleging infringement of art 190 of the Treaty equally support the plea of infringement of an essential procedural requirement. Furthermore, it asserts that the Commission, by refusing any dialogue in order to find a solution to the breakdown in the '1995 deal', fell short of accepted standards of proper administration and thereby infringed essential procedural requirements. b

186. The Commission, supported by the interveners, contends that it cannot have violated a legitimate expectation of HB by virtue of HB's failure to obtain an exemption under art 85(3) of the Treaty. HB did not receive 'precise assurances' to that effect and, in any event, legitimate expectations cannot be invoked where there has been a breach of Community law. c

187. The Commission submits that the notion of subsidiarity does not concern the question whether Community law is to be applied by national courts or by the Commission; that question has long since been settled. According to the Commission, HB's argument is based on the mistaken premiss that the Commission cannot sanction an infringement of arts 85 and 86 of the Treaty which has been brought to its attention if that infringement (which, by definition, requires an effect on trade between member states) produces effects only on the market of a member state. d

188. The Commission also contends that it did not infringe the principle of legal certainty by adopting the contested decision at a time when proceedings were pending before the Irish courts. It submits that it was entitled to adopt that decision for a number of reasons. First, HB had notified an agreement, seeking a negative clearance or an exemption. Only the Commission has the power to take a decision to grant an exemption under art 85(3) of the Treaty. Second, when the Commission adopted the contested decision, a number of actions were pending before national courts and competition authorities. It submits that it had a duty to take account of the interests of complainants and, therefore, was required to take a rapid decision once it had reached the conclusion that there had been a breach of arts 85(1) and 86 of the Treaty. According to HB, the Commission ought to have awaited the outcome of the appeal lodged before the Irish courts before adopting the contested decision. That would not have resolved the problem of legal certainty, but merely deferred the adoption of the contested decision. e

189. The Commission submits that the contested decision does not infringe the principle of proportionality. That decision does not abolish HB's rights of ownership over the freezers. The decision gives a specific example of how HB could recoup its investment in the freezers by lawful means. HB has not put forward any valid reason why it cannot administer a separate billing system for ice creams and freezers. HB claims that the contested decision invalidates all the agreements in question, but interprets the judgments in the *Langnese-Iglo* case and *Delimitis*' case as meaning that not all impediments to market access need be removed. However, the Commission submits that in its judgment in *Delimitis*' case the Court of Justice held that the agreements have to be taken as a whole and not subdivided. Furthermore, with regard to HB's argument that the contested decision prohibits the exclusivity clause not only for the past but f

a also for the future, the Commission submits that the decision merely prevents HB from concluding new agreements with the same effect or the same object as the existing ones.

b 190. The Commission disputes HB's claim that it was treated unfairly and discriminated against. In the decision (recital (204)) the Commission took into account the effects produced by the other networks of agreements, but established that none of those other networks had contributed significantly to the foreclosure of the relevant market. The principle of equal treatment does not require those agreements to be forbidden where they have no significant restrictive effect.

c 191. Lastly, the Commission denies that it has infringed any essential procedural requirement.

#### *Findings of the court*

d 192. With regard to infringement of legitimate expectations, it is settled case law that the right to rely on the principle of the protection of legitimate expectations, which is one of the fundamental principles of the Community, extends to any individual who is in a situation in which it is apparent that the Community administration has led him to entertain reasonable expectations by giving him precise assurances (see, to that effect, *Vlaamse Televisie Maatschappij NV v European Commission* Case T-266/97 [1999] ECR II-2329 (para 71) and *SA Louis Dreyfus & Cie v European Commission* Joined cases T-485/93, T-491/93, T-494/93 and T-61/98 [2000] ECR II-3659 (para 85)).

e 193. The court finds, first, that the Commission did not give HB specific assurances as to the consequences of the commitments notified by the letter of 8 March 1995 (see para 12, above). Furthermore, it did not adopt a decision applying art 85(3) of the Treaty, a decision which it could in any event have revoked or amended pursuant to art 8(3) of Regulation 17/62 if there were a change in the facts that were basic to the making of the decision.

f 194. The notice of 15 August 1995 was issued expressly under art 19(3) of Regulation 17/62. In that notice, the Commission proposed—on a preliminary basis—to adopt a favourable attitude to HB's distribution agreements, as revised by HB, and invited all the interested third parties to submit their observations to it within a specified time. It follows that the notice in question merely indicated a preliminary position of the Commission, which was subject to change, in the light particularly of the observations of third parties. Consequently, HB could not have had a legitimate expectation that the Commission would grant it an exemption under art 85(3) of the Treaty in accordance with that notice, solely on the basis of publication of the notice.

g 195. As regards HB's argument that it acted irreversibly to its detriment in adopting changes to its distribution system on the basis of the Commission's 'proposal' to adopt a favourable position in regard to its distribution agreements, the court considers that, if HB could have had a legitimate expectation in regard to the notice in question, that expectation would have been confined to the procedure initiated by the Commission by its 1993 statement of objections and the objections raised in it relating to the HB distribution agreements at that date. However, in the present case, the Commission did not act on the basis of its 1993 statement of objections but, having found that the changes made by HB to its distribution system had not had the expected results in terms of freedom of access to sales outlets, it initiated a new procedure and raised new objections to that system in its 1997 statement of objections. Given that, even if the Commission had granted an



exemption to HB, it would have had the power, and even the obligation, under art 8(3) of Regulation 17/62, to revoke or amend that exemption if it had found that the exempted agreements nevertheless had certain effects that were incompatible with the conditions laid down in art 85(3) of the Treaty, and particularly if experience had shown that the changes made by HB to its distribution system had not brought about the expected results, the court finds that the Commission, in adopting the 1997 statement of objections, did not infringe the principle of protection of legitimate expectations in the present case. a  
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196. It follows that this objection must be rejected.

197. As regards HB's claims that the principles of subsidiarity, sincere co-operation and legal certainty have been infringed, the court points out that, although arts 85(1) and 86 of the Treaty produce direct effects in relations between individuals and create direct rights in respect of the individuals concerned which the national courts must safeguard, that does not mean that the Commission has no right to adopt a position in a case, even though an identical or similar case is pending before one or more national courts, provided in particular that trade between member states is capable of being affected. Such an effect has not been called into question in the present case. c  
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198. In pointing to the fact that the present case concerns the supply by an Irish company to Irish consumers, through Irish retailers, of products that are specific to the Irish market and to the fact that when the contested decision was adopted parallel proceedings had been decided by the High Court or were pending before the Supreme Court, HB has not proved to the requisite legal standard that the Commission infringed those principles or its notice on co-operation between itself and national courts in the application of arts 85 and 86 of the Treaty. It is clear from the contested decision and the Commission's written pleadings that the application of a condition of exclusivity for freezer cabinets supplied to retailers is a contractual practice adopted by the majority of ice cream manufacturers in the Community. Furthermore, companies in the Unilever group play a significant role in the impulse ice cream market in several member states. It follows that the issues dealt with in the contested decision had a wider Community importance, in particular in light of the fact that various national courts and competition authorities were dealing with parallel cases raising similar issues to those in the present case (see, in particular, recitals (275) to (280) of the contested decision). In those circumstances, the adoption of the contested decision by the Commission was appropriate in order to ensure that the Community competition rules would be applied coherently to the various forms of exclusivity practised by ice cream manufacturers throughout the Community. e  
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199. Furthermore, as the Court of Justice held in its judgment in the *Masterfoods* case, the Commission has exclusive competence to adopt decisions in implementation of art 85(3) of the Treaty, pursuant to art 9(1) of Regulation 17/62. The Commission is also entitled to adopt, at any time, individual decisions applying arts 85 and 86 of the Treaty, even though it shares competence to apply arts 85(1) and 86 of the Treaty with the national courts, and even where an agreement or practice has already been the subject of a decision by a national court and the decision contemplated by the Commission conflicts with the national court's decision (see, to that effect, the *Masterfoods* case (paras 47, 48) and *Delimitis*' case (paras 44, 45)). Given that during the h  
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a negotiations the Commission had received HB's application for an exemption as well as third-party complaints, HB's arguments relating to subsidiarity are unfounded.

200. The present objections must therefore be rejected.

b 201. As regards HB's assertions that the contested decision infringes the principle of proportionality and is discriminatory, the court finds that those allegations are unfounded. The principle of proportionality requires that the acts of the Community institutions do not exceed the limits that are appropriate and necessary in order to achieve the aim pursued (see *Denkavit Nederland BV v Hoofdproduktschap voor Akkerbouwprodukten* Case 15/83 [1984] ECR 2171 (para 25)). Moreover, discrimination is the different treatment of identical situations or the treatment of different situations identically.

c 202. First, in light of the court's assessment set out in paras 170–173, above, the court finds that the contested decision does not contain any undue or disproportionate limitation of HB's property rights in its freezer cabinets. Nor does it constitute an arbitrary or discriminatory impairment of HB's ability to compete with other suppliers on the basis adopted by all the other companies  
d active on the relevant market, in the light especially of the overwhelming position which HB holds on that market and the significant contribution by HB, unlike the other suppliers, to the foreclosure of that market (see para 172, above).

e 203. Second, the fact that the contested decision invalidates the exclusivity clause in the agreements for the supply of freezer cabinets concluded between HB and retailers in Ireland that are applicable to cabinets installed in outlets equipped only with cabinets supplied by HB for the storage of single-wrapped impulse ice creams and which have neither their own freezer cabinet nor a cabinet from another ice cream manufacturer, does not mean that the decision is disproportionate.

f 204. A network of distribution agreements set up by a single supplier may escape the prohibition laid down in the competition rules provided that it does not significantly contribute, in conjunction with all the similar contracts found on the relevant market, including those of other suppliers, to denying access to the market to new national and foreign competitors (see, by analogy, *Delimitis'* case (paras 23, 24) and the *Langnese-Iglo* case (para 129)). That means that  
g where a network of similar agreements concluded by a single manufacturer exists, the assessment of the effects of that network on competition applies to the entire set of individual contracts constituting the network. The court finds, therefore, that the Commission correctly assessed the bundle of HB's distribution agreements as a whole and, in consequence, did not split the agreements, as HB alleges. It is clear from the judgment in *Neste Markkinointi Oy v Yötuuli Ky* Case C-214/99 [2001] All ER (EC) 76, [2000] ECR I-11121: see, in  
h particular, paras 36, 37) that it is only exceptionally, and in specific circumstances which are not present in this case, that the network of the same supplier may be subdivided.

i 205. Third, it is apparent from art 4 of the contested decision that the Commission required HB immediately to cease the infringements of arts 85(1) and 86 of the Treaty constituted by its network of distribution agreements and to refrain from taking any measure having the same object or effect. The court finds that this provision is not disproportionate or discriminatory, as it merely prohibits HB from reintroducing the exclusivity clause in the same circumstances as those referred to in arts 1 and 3 of the contested decision, and thereby guarantees the effectiveness of the contested decision, by preventing a

return in the future to the anti-competitive practice found to exist (see, by analogy, the opinion of Advocate General Ruiz-Jarabo Colomer in *Langnese-Iglo GmbH v European Commission* (supported by *Mars GmbH*) Case C-279/95 P [1999] All ER (EC) 616, [1998] ECR I-5609 (para 39)).

206. It follows that this objection must be rejected.

207. Inasmuch as HB's objection relating to infringement of essential procedural requirements and an inadequate statement of reasons consists of a mere reference by it to its arguments set out in the context of the fifth plea, alleging infringement of art 190 of the Treaty, the court finds that that objection cannot be upheld in view of the assessment made by the court in paras 176–179, above. As to HB's argument relating to the need to extend the negotiations in order to find a solution to the breakdown in the '1995 settlement', the court also considers that the Commission has not infringed any essential procedural requirements. As the Commission found that the changes made by HB to its distribution system had not brought about the expected results in terms of freedom of access to sales outlets, it was not obliged to pursue the negotiations indefinitely, particularly when the case had extended over a lengthy period. The Commission was therefore entitled to initiate a new procedure and to raise new objections to that system in its 1997 statement of objections, leaving HB an opportunity to respond to it.

208. This objection must therefore be rejected.

209. Consequently, the seventh plea is unfounded.

210. It follows that the entire application must be dismissed.

#### COSTS

211. Under art 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. As HB has been unsuccessful in its submissions and the Commission has asked for costs, HB must be ordered to bear its own costs and to pay the Commission's costs, including those relating to the interim proceedings.

212. Under the third subparagraph of art 87(4) of the Rules of Procedure, the court may order an intervener other than those mentioned in the preceding subparagraph of art 87(4) to bear its own costs. In the present case, Mars and Richmond, which intervened in support of the Commission, must bear their own costs.

On those grounds, the Court of First Instance (Fifth Chamber), hereby:

(1) Dismisses the application as unfounded;

(2) Orders Van den Bergh Foods Ltd to bear its own costs and to pay those of the Commission, including the costs of the interim proceedings;

(3) Orders Masterfoods Ltd and Richmond Frozen Confectionery Ltd to bear their own costs.



*a* **Proceedings brought by Manninen**  
(Case C-319/02)

COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES (GRAND CHAMBER)

*b* JUDGES SKOURIS (PRESIDENT), JANN, TIMMERMANS, GULMANN, PUISOCHET AND CUNHA RODRIGUES (PRESIDENTS OF CHAMBERS), SCHINTGEN, MACKEN, COLNERIC, VON BAHR AND LENAERTS (RAPPORTEUR)  
ADVOCATE GENERAL KOKOTT

17 FEBRUARY, 18 MARCH, 7 SEPTEMBER 2004

*c* *European Community – Freedom of movement – Capital – Principle of non-discrimination – Finnish law providing that tax credit on dividends only available if company paying dividend established in same member state as person receiving it – Whether contrary to Community law – Articles 56, 58 EC (formerly EC Treaty, arts 73b, 73d).*

*d* By Finnish law, persons who were fully taxable in Finland were subject to income tax at the rate of 29% on dividends received from Finnish or foreign companies. Companies established in Finland were liable to corporation tax on their profits, also at the rate of 29%, and where such profits were distributed as dividends, a shareholder received, as well as the net amount of the dividend, a tax credit equal to 29/71ths of that amount which was set off against the income tax, in the same sum, to which he was subject. Adjustments were made if there was ultimately a difference between the amounts of the corporation tax and the tax credits, and the result of the process was that the total tax paid on distributed profits was 29%. There was no such tax credit in the case of dividends paid by companies established elsewhere. Consequently, when the claimant, who was fully taxable in Finland, received dividends from a Swedish company on which, by a tax agreement between the Nordic states, withholding tax at a maximum rate of 15% was levied, which in Finland was deducted from the 29% of the value of the dividends to which he was subject, the full amount of the corporation tax paid in Sweden was not taken into account. The claimant maintained that in those circumstances, and regard being had to arts 56 EC<sup>a</sup> and 58 EC<sup>b</sup> of the EC Treaty, he was not liable to Finnish tax on the Swedish dividends, and questions arising were referred by the Korkein hallinto-oikeus to the Court of Justice of the European Communities for a preliminary ruling. Article 56(1) EC provided that ‘all restrictions on the movement of capital between Member States ... shall be prohibited’. Article 58 EC provided that: ‘1. The provisions of Article 56 shall be without prejudice to the right of Member States: (a) to apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to ... the place where their capital is invested ... 3. The measures and procedures referred to in [para 1] shall not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital ...’

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**Held** – (1) The tax credit system was designed to prevent double taxation of distributed profits (in the hands of the company and again in the hands of the

*a* Article 56 EC, so far as material, is set out at judgment para 3, below

*b* Article 58 EC, so far as material, is set out at judgment paras 4, 5, below

shareholder), and the end result, in the case of Finnish companies, was that dividends were not taxed in the hands of the shareholder, but in the case of dividends received from companies outside Finland, the shareholders did have to pay income tax. While the Nordic states convention attenuated the effects of that double taxation in some degree, it did not eliminate it as it did not provide for the setting-off of corporation tax against the income tax. The result was both that Finnish taxpayers were deterred from investing their capital in companies in other member states, and that an obstacle was placed in the way of such companies raising capital in Finland: there was therefore a restriction on the free movement of capital that in principle was prohibited by art 56 EC. The question then was whether the restriction was justified (see judgment paras 20–24, below).

(2) Article 58(1)(a) EC, as a provision derogating from a fundamental freedom, was to be interpreted restrictively, and a distinction was to be made between unequal treatment which was permitted under art 58(1)(a) EC, and arbitrary discrimination prohibited by art 58(3) EC. To be permitted, the unequal treatment had either (1) to concern situations which were not objectively comparable or (2) to be justified by overriding reasons in the general interest such as the need to safeguard the cohesion of the tax system. With regard to (1), the Finnish shareholders were in a comparable situation with regard to Finnish dividends on the one hand and foreign ones on the other, as in both cases the dividends were—apart from the tax credit in the case of Finnish dividends—capable of being subject to double taxation, and in both cases distributed company profits were subject to corporation tax and then in principle to income tax in the hands of shareholders. The cohesion of the tax system argument could only succeed if a direct link was established between the tax advantage in question and the offsetting of that advantage by a particular tax deduction. Even if, arguably, there was such a direct link in the present case, it had further to be shown that the legislation was necessary in order to preserve the cohesion of the tax system, but that was not established in the present case, as the simple granting to a Finnish taxpayer who held shares in a Swedish company of a tax credit calculated by reference to the corporation tax owed by that company in Sweden both would not threaten the cohesion of the system and would be a measure less restrictive of the free movement of capital. Counter arguments based on practical difficulties and other considerations were not acceptable (see judgment paras 28, 29, 35, 42, 45, 46, 51–55, below); *Staatssecretaris van Financiën v Verkooijen* Case C-35/98 [2002] STC 654 (para 43) applied.

Accordingly, arts 56 and 58 EC precluded legislation whereby the entitlement of a person fully taxable in one member state to a tax credit in relation to dividends paid to him by limited companies was excluded where those companies were not established in that state.

## Notes

For freedom of movement of capital, see 52 *Halsbury's Laws* (4th edn) 17.01–17.23.

For the EC Treaty, arts 56, 58 EC (formerly arts 73b and 73d), see 50 *Halsbury's Statutes* (4th edn) Current Statutes Service (issue 88) 371, 372.

## Cases cited

*Asscher v Staatssecretaris van Financiën* Case C-107/94 [1996] All ER (EC) 757, [1996] ECR I-3089, ECJ.

- a* Association Église de Scientologie de Paris v Prime Minister Case C-54/99 [2000] ECR I-1335, ECJ.  
*Baars v Inspecteur der Belastingdienst Particulieren/Ondernemingen Gorinchem* Case C-251/98 (2000) 2 ITLR 660, [2000] ECR I-2787, ECJ.  
*Bachmann v Belgian State* Case C-204/90 [1994] STC 855, [1992] ECR I-249, ECJ.
- b* *Barbier (Heirs of) v Inspecteur van de Belastingdienst Particulieren/Ondernemingen buitenland te Heerlen* Case C-364/01 [2004] 1 CMLR 1283, ECJ.  
*Bosal Holding BV v Staatssecretaris van Financiën* Case C-168/01 [2003] All ER (EC) 959, [2003] ECR I-9409, ECJ.  
*Danner (Proceedings brought by)* Case C-136/00 [2002] STC 1283, [2002] ECR I-8147, ECJ.
- c* *de Groot v Staatssecretaris van Financiën* Case C-385/00 [2004] STC 1346, [2002] ECR I-11819, ECJ.  
*de Lasteyrie du Saillant v Ministère de l'Économie, des Finances et de l'Industrie* Case C-9/02 (2004) 6 ITLR 666, ECJ.  
*EC Commission v Belgium* Case C-300/90 [1992] ECR I-305, ECJ.  
*European Commission v Belgium* Case C-478/98 [2000] STC 830, [2000] ECR I-7587, ECJ.
- d* *European Commission v France* Case C-334/02 (2004) 6 ITLR 642, ECJ.  
*Finanzamt Köln-Altstadt v Schumacker* Case C-279/93 [1995] All ER (EC) 319, [1996] QB 28, [1995] 3 WLR 498, [1995] ECR I-225, ECJ.  
*Försäkringsaktiebolaget Skandia (publ) v Riksskatteverket* Case C-422/01 [2003] All ER (EC) 831, [2003] ECR I-6817, ECJ.
- e* *Futura Participations SA v Administrations des Contributions* Case C-250/95 [1997] STC 1301, [1997] ECR I-2471, ECJ.  
*Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* Case C-55/94 [1996] All ER (EC) 189, [1995] ECR I-4165, ECJ.  
*Gerritse v Finanzamt Neukölln-Nord* Case C-234/01 [2004] STC 1307, [2003] ECR I-5933, ECJ.
- f* *Grundig Italiana SpA v Ministero delle Finanze* Case C-255/00 [2003] All ER (EC) 176, [2002] ECR I-8003, ECJ.  
*Imperial Chemical Industries plc v Colmer (Inspector of Taxes)* Case C-264/96 [1998] All ER (EC) 585, [1999] 1 WLR 108, [1998] ECR I-4695, ECJ.  
*Lenz v Finanzlandesdirektion für Tirol* Case C-315/02 (2004) Transcript (opinion), 25 March, (2004) Transcript (judgment), 15 July, ECJ.
- g* *Ministre des Finances v Weidert* Case C-242/03 (2004) Transcript (opinion) 12 February, (2004) Transcript (judgment) 15 July, ECJ.  
*Procureur du Roi v Dassonville* Case 8/74 [1974] ECR 837, ECJ.  
*Rewe-Zentralfinanz eG v Landwirtschaftskammer für das Saarland* Case 33/76 [1976] ECR 1989, ECJ.
- h* *Royal Bank of Scotland plc v Greek State* Case C-311/97 [2000] STC 733, [1999] ECR I-2651, ECJ.  
*Säger v Dennemeyer & Co Ltd* Case C-76/90 [1991] ECR I-4221, ECJ.  
*Sanz de Lera (Criminal proceedings against)* Joined cases C-163/94, C-165/94 and C-250/94 [1995] ECR I-4821, ECJ.
- i* *Schmid (Proceedings brought by)* Case C-516/99 [2002] ECR I-4573, ECJ.  
*Skatteministeriet v Vestergaard* Case C-55/98 [1999] ECR I-7641, ECJ.  
*Staatssecretaris van Financiën v Verkooijen* Case C-35/98 [2002] STC 654, [2000] ECR I-4071, ECJ.  
*Svensson v Ministre du Logement et de l'Urbanisme* Case C-484/93 [1995] ECR I-3955, ECJ.



*Trummer* (Proceedings brought by) Case C-222/97 [1999] ECR I-1661, ECJ. a  
*Wielockx v Inspecteur der Directe Belastingen* Case C-80/94 [1995] All ER (EC) 769,  
 [1996] 1 WLR 84, [1995] ECR I-2493, ECJ.  
*X v Riksskatteverket* Case C-436/00 [2004] STC 1271, [2002] ECR I-10829, ECJ.

## Reference

The Korkein hallinto-oikeus (Supreme Administrative Court) referred to the Court of Justice of the European Communities two questions relating to proceedings brought before the Supreme Administrative Court by Petri Manninen, who was challenging the compatibility of Finnish legislation on the taxation of dividends with arts 56 and 58 EC (formerly arts 73b and 73d of the EC Treaty). Observations were submitted on behalf of: Mr Manninen, by himself; the Finnish government, by E Bygglin and T Pynnä, acting as agents; the French government, by G de Bergues and D Petrausch, acting as agents; the United Kingdom government, by K Manji, acting as agent, assisted by M Hoskins, Barrister; and the Commission of the European Communities, by R Lyal and I Koskinen, acting as agents. The language of the case was Finnish. The facts are set out in the judgment. b  
c  
d

18 March 2004. **The Advocate General (J Kokott)** delivered the following opinion<sup>1</sup>.

## I—INTRODUCTION

1. This reference for a preliminary ruling from the Korkein Hallinto-Oikeus (Supreme Administrative Court) (Finland) relates to the Finnish regulations on the taxation of dividends. They provide that a shareholder of a domestic company receives, in addition to the dividend, a tax credit in proportion to the corporation tax paid by the undertaking. The tax credit is offset against tax on the dividend, so that in practice the shareholder has no further tax to pay on this capital-derived income. By contrast, a recipient of dividends from foreign companies cannot offset the corporation tax paid in the country where the company is established against his tax liability. e  
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2. Mr Manninen lives in Finland and is liable for income tax in Finland on dividends he received from a Swedish company. He considers that the Finnish legislation preventing him from offsetting the corporation tax paid in Sweden is incompatible with the free movement of capital. g

3. The idea underlying the Finnish legislation is to avoid the double taxation of corporate profits by the Finnish tax authorities (economic double taxation), which would occur if tax were charged on profits first in the form of corporation tax levied on the undertaking and then again in the form of income tax on the dividends. h

4. Many member states have or had comparable set-off or exemption schemes to prevent or attenuate such double taxation<sup>2</sup>. As in the present case, however, these schemes often apply only to purely domestic situations, as the

<sup>1</sup> Original language: German.

<sup>2</sup> In Communication COM(2003) 810 final of 19 December 2003 on the dividend taxation of individuals in the internal market, the Commission of the European Communities gives an up-to-date survey of the systems in the member states. See also the regime in the Netherlands, which was the subject of the judgment in *Staatssecretaris van Financiën v Verkooijen* Case C-35/98 [2002] STC 654, [2000] ECR I-4071, and the Austrian scheme, which was examined by Advocate General Tizzano in his opinion in *Proceedings brought by Schmid* Case C-516/99 [2002] ECR I-4573 (see also *Lenz v Finanzlandesdirektion für Tirol* Case C-315/02 (2004) Transcript (opinion), 25 March, (2004) Transcript (judgment), 15 July). i

a member states consider it appropriate to offset corporation tax when taxing dividends only if the corporation tax has also been received by the national tax authorities<sup>3</sup>.

5. The court has already found, in particular in *Verkooijen's* judgment<sup>4</sup>, that an exemption from the income tax payable on dividends may not be made subject to the condition that the company paying those dividends has its seat in that member state. However, in none of the cases decided hitherto has the economic and legal link between corporation tax on the one hand and income tax on dividends on the other been as close as in the present case. For that reason, the question of justification on grounds of tax cohesion, which the court has recognised so far only in the judgments in *Bachmann v Belgian State*<sup>5</sup> and *EC Commission v Belgium*<sup>6</sup>, is again raised.

## II—THE NATIONAL LEGISLATION ON CORPORATION TAX CREDITS

6. In Finland dividends received by fully taxable individuals are taxed at a rate of 29%. The rate of corporation tax that companies must pay on their profits is also 29%. In order to prevent the double taxation of profits distributed in the form of dividends, art 4 of the Law on Corporation Tax Credits grants the recipient of dividends a credit equal to 29/71 of the dividend. The tax credit and the cash dividend are added together and subjected to the tax on capital-derived income.

7. The effect of the tax credit is illustrated by the following hypothetical calculation. Assuming that a company's pre-tax profit is 100 cents per share, the undertaking deducts 29 cents from this as corporation tax. The remaining 71 cents are distributed in the form of a dividend. The corporation tax credit amounts to 29/71 of the dividend (71 cents), in other words 29 cents. The recipient of the dividend receives 71 cents per share in cash and 29 cents in the form of a corporation tax credit, in other words 100 cents in total. As the income tax on capital-derived income is 29% of these 100 cents, the tax amounts to 29 cents, which is offset against the credit for the same amount. After tax, the recipient of the dividend is therefore left with precisely the amount of the cash dividend of 71 cents. The taking into account of the corporation tax paid by the company therefore leads in practice to full settlement of the income tax liability on the capital-derived income.

8. There is a reciprocal effect between the corporation tax payable by the company and the corporation tax credit. If the corporation tax actually paid is less than 29/71 of the dividend, in other words less than the corporation tax credit, the company must make up the difference in the form of additional tax. This occurs if the distributed dividends exceed the company's after-tax profits.

9. If on the other hand the company has paid more corporation tax than the corporation tax credits granted to shareholders, the company retains the difference as a credit balance, which it can offset against corporation tax liabilities over the ensuing ten years.

10. However, under art 1(1) of the Law on Corporation Tax Credits, that Law applies only to the central and local taxation of dividends distributed by

i 3 The problems that this taxation practice causes for the internal market have been examined by the Commission since the 1960s (see Lupo 'Reliefs from Economic Double Taxation on EU Dividends: Impact of the Baars and Verkooijen Cases', in *European Taxation* (2000) p 270, 271). See also the Communication cited in footnote 2, above.

4 Cited in footnote 2, above.

5 Case C-204/90 [1994] STC 855, [1992] ECR I-249.

6 Case C-300/90 [1992] ECR I-305.

domestic share companies and of the fully taxable recipients of dividends from such companies. Under para 4, the provisions of this Law also apply to companies established in a member state of the European Economic Area whose shares giving rise to dividends are in fact linked to a fixed place of business which the company in question has in Finland. a

11. In Sweden dividends paid to domestic taxpayers are fully subject to income tax. A withholding tax is levied on recipients who are not resident in Sweden. Under a double taxation agreement concluded by the Nordic states, the state of payment may deduct a maximum of 15% withholding tax on dividends, which is set against the income tax payable in the recipient's country of residence. b

12. Continuing with the example given above, the tax works out as follows if a Swedish undertaking pays a dividend of 71 cents per share to a taxpayer resident in Finland. The Swedish tax authorities retain a withholding tax of (at most) 15%, in other words 10.65 cents. In Finland the recipient must deduct 29% income tax on 71 cents (20.59 cents), against which is set the 10.65 cents deducted at source. As a result, the dividend remaining after tax amounts to 50.41 cents. The corporation tax already paid in Sweden by the company is not taken into account. c  
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### III—FACTS OF THE DISPUTE IN THE MAIN PROCEEDINGS AND THE QUESTIONS REFERRED FOR A PRELIMINARY RULING

13. In his application to the *keskusverolautakunta* (Central Tax Commission), Mr Manninen sought a preliminary ruling on the question whether he, as a person fully taxable in Finland, could be charged tax in Finland on dividends paid by the Swedish listed company *Telia Ab* (publ), having regard to arts 56 and 58 EC (formerly arts 73b and 73d of the EC Treaty). The *keskusverolautakunta* stated in its preliminary ruling that the dividends paid by *Telia Ab* (publ) were fully liable to income tax in Finland in the 2001 tax year and that there was no entitlement to a corporation tax credit. e  
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14. Mr Manninen appealed against the preliminary ruling to the *Korkein Hallinto-Oikeus*, which by order of 10 February 2002 submitted the following questions to the Court of Justice for a preliminary ruling under art 234 EC (formerly art 177 of the EC Treaty):

'(1) Is Article 56 EC to be interpreted as precluding a corporation tax credit system like the Finnish one described above, in which the recipient of a dividend who is generally liable to tax in Finland is granted a corporation tax credit in respect of a dividend paid by a domestic share company, but not in respect of dividends he receives from a share company registered in Sweden? g

(2) If the answer to the first question is in the affirmative, may Article 58 EC be interpreted as meaning that the provisions of Article 56 EC are without prejudice to Finland's right to apply the relevant provisions of the Law on Corporation Tax Credits, since it is a condition for obtaining a corporation tax credit in Finland that the company distributing the dividend has paid the corresponding tax or supplementary tax in Finland, which does not take place with respect to a dividend paid from abroad, in which case taxation is not even carried out once?' h  
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### IV—ARGUMENTS OF THE PARTIES

15. In the proceedings before the court Mr Manninen, the Finnish, French and United Kingdom governments and the Commission of the European



a Communities submitted observations. Whereas Mr Manninen and the Commission consider the Finnish system of corporation tax credits to be incompatible with arts 56 and 58 EC, the governments unanimously take the opposite view.

b 16. According to Mr Manninen and the Commission, the free movement of capital is impeded because the way in which the regulations on corporation tax credits are couched is liable to deter investors from investing in another member state. As no corporation tax credit can be set against tax on dividends from abroad, such income is taxed more heavily than dividends from domestic companies. At the same time, they contend that the scheme makes it more difficult for companies with their seat in another member state to raise capital in Finland.

c 17. In their opinion, the regulations cannot be justified by reference to art 58 EC and the cohesion of the tax system. As the court has ruled in *Verkooijen's* judgment (paras 57, 58)<sup>7</sup>, it is not possible to plead the cohesion of the tax system where different taxpayers and different taxes are involved. The contested regulations relate on the one hand to the corporation tax payable by  
d the company and on the other to taxation of the income of the recipient of dividends.

18. The Commission considers that a system of corporation tax credits to prevent double taxation is permissible only if it is not discriminatory and is actually coherent. In its view, the Finnish regulations do not meet those criteria, as no corporation tax credit is granted in respect of investments  
e abroad. Furthermore, taxpayers resident in another state receive no tax credit in respect of dividends from Finnish companies. It contends that the real purpose of the disputed regulations is to safeguard the revenues of the tax authorities.

f 19. Mr Manninen also maintains that the system would be coherent only if a corporation tax credit were also granted in respect of dividends from abroad. In his view, that this is possible is proved by a corresponding provision in the Irish-Finnish double taxation agreement, under which taxpayers resident in Ireland receiving dividends from Finnish companies are also granted a corporation tax credit up to certain limits.

g 20. The Finnish, French and United Kingdom governments cite the case law of the court, which permits differences in the treatment of taxpayers, provided that their situation is not the same<sup>8</sup>. In their view, the situation differs primarily in that in the case of undertakings in Finland complete identity between the tax credit granted to the recipient of dividends and the corporation tax actually paid by the company can be achieved by means of the additional tax. This is not possible in the case of foreign companies that are not subject to the  
h additional tax. For the French government the scheme is an expression of the principle of territoriality recognised by the court<sup>9</sup>.

21. In the opinion of the United Kingdom, French and Finnish governments it is also a coherent system. They contend that the regulations ensure that the same income is taxed only once in Finland. As the income of foreign

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<sup>7</sup> Cited in footnote 2, above. See also the opinion of Advocate General Tizzano in *Schmid's* case (para 51), cited in footnote 2, above.

<sup>8</sup> See *Verkooijen's* judgment (para 43), cited in footnote 2, above, and the judgment in *Finanzamt Köln-Alstadt v Schumacker* Case C-279/93 [1995] All ER (EC) 319, [1995] ECR I-225 (para 26 et seq).

<sup>9</sup> See the judgment in *Futura Participations SA v Administrations des Contributions* Case C-250/95 [1997] STC 1301, [1997] ECR I-2471 (para 22).

companies is not taxed in Finland, the taxation of dividends paid by those companies to taxpayers in Finland does not lead to double taxation by the Finnish tax authorities. a

22. They assert that there is a direct link between taxation of the recipient of dividends and that of the company, as the granting of a corporation tax credit depends on the corresponding corporation tax having actually been paid. In that respect they consider that the contested scheme differs from the exemption scheme that was the subject of the dispute in *Verkooijen's* case. b

23. The offsetting of corporation tax paid abroad that Mr Manninen seeks would, in their view, run counter to the system, which rests precisely on the link between the tax credit and the corporation tax. In the case of companies with their seat abroad this link does not exist. c

24. The United Kingdom and French governments question whether art 58(1)(a) EC and the principle of tax coherence would be left with any scope at all if the Finnish system were deemed not to meet the requirements of these provisions. They concede that coherence is not achieved in the taxation of a single taxpayer, but contend that the regulations pursue the legitimate objective of avoiding double taxation. In the absence of Community-wide harmonisation, the court should not, in their opinion, interfere too deeply in the configuration of national tax systems by permitting only one particular form of corporation tax set-off or exemption. d

#### V—LEGAL ASSESSMENT

25. In its two questions, which must be examined together, the referring court essentially seeks to ascertain whether arrangements such as the contested Finnish regulations on corporation tax credits are compatible with the provisions on the free movement of capital, and especially with art 56 EC and paras (1)(a) and (3) of art 58 EC. e

26. As regards the applicability of the free movement of capital to national provisions on direct taxation, note has to be taken of consistent case law, according to which— f

[a]lthough, as Community law stands at present, direct taxation does not as such fall within the purview of the Community, the powers retained by the member states must nevertheless be exercised consistently with Community law.<sup>10</sup> g

Consequently, the Finnish legislature is obliged to respect the fundamental freedoms and especially the provisions on the free movement of capital.

#### A—Restriction of the free movement of capital

27. Article 56(1) EC prohibits all restrictions on the movement of capital between member states. Under Section III-A-2 of the Nomenclature in Annex I to Council Directive (EEC) 88/361 (for the implementation of art 67 of the Treaty)<sup>11</sup>, the acquisition by residents of foreign securities traded on a stock exchange is a process that falls within the scope of the free movement of capital, as the Commission has aptly stated. The Nomenclature can continue to h  
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<sup>10</sup> See the judgment in the *Schumacker* case (para 21), cited in footnote 8, above; see also *Verkooijen's* judgment (para 32), cited in footnote 2, above, and the judgment in *Heirs of Barbier v Inspecteur van de Belastingdienst Particulieren/Ondernemingen buitenland te Heerlen* Case C-364/01 [2004] 1 CMLR 40 (para 56).

<sup>11</sup> OJ L178 1988 p 5.

a be relied upon even after the introduction of arts 73b to 73d of the EC Treaty (now arts 56 to 58 EC) by the Maastricht Treaty<sup>12</sup>.

28. Any measure that makes the cross-border transfer of capital more difficult or less attractive and is thus liable to deter the investor constitutes a restriction on the free movement of capital<sup>13</sup>. In this respect the concept of a restriction of capital movements corresponds to the concept of a restriction b that the court has developed with regard to the other fundamental freedoms, especially the freedom of movement of goods<sup>14</sup>.

29. The contested national provisions do not, it is true, relate directly to the acquisition of shares but to the tax treatment of the income deriving from the investment. However, as the objective of the investment is mostly to earn c net income, regulations relating to the tax treatment of the income also affect the attractiveness of the capital investment itself.

30. The Finnish legislation treats dividends from foreign and domestic companies differently. A shareholder receiving a dividend from a domestic company is granted a corporation tax credit, which, when set against tax, effectively reduces the income tax to zero. Tax must be paid at a rate of 29% on d dividends from abroad, without it being possible to offset the corporation tax paid by the foreign company. Consequently, in the case of an investment abroad the undertaking's profits are subject to double taxation—albeit not by the same tax authorities—whereas this outcome is avoided by the granting of a corporation tax credit in the case of purely domestic investments.

31. It is true that the withholding tax already levied abroad is offset. This does e not, however, reduce the tax burden on the recipient of the dividend, who must continue to pay a total of 29% tax, partly in the form of a deduction at source in the country in which the company paying the dividend is established and the remaining part in the form of income tax in Finland.

32. The worse tax treatment of an investment in the shares of companies f established abroad makes such investment less attractive for the investor than the acquisition of the shares of domestic companies and thus impedes the movement of capital.

33. As it is disadvantageous from the tax point of view for individuals to acquire the shares of foreign companies, the raising of capital on the Finnish market is also hampered for foreign companies. This constitutes a further g restriction on the free movement of capital to the detriment of foreign share companies.

### B—Justification for the restriction

#### 1—Interpretation of art 58 EC

h 34. Article 58(1)(a) EC<sup>15</sup> permits the member states—

12 The Commission cites the opinion of Advocate General Tesouro in *Criminal proceedings against Sanz de Lera* Joined cases C-163/94, C-165/94 and C-250/94 [1995] ECR I-4821 (paras 9, 10).

13 To this effect, see the judgment in *Proceedings brought by Trummer* Case C-222/97 [1999] ECR I-1661 (para 26).

14 See the ground-laying judgments in *Procureur du Roi v Dassonville* Case 8/74 [1974] ECR 837 (para 5), *Säger v Dennemeyer & Co Ltd* Case C-76/90 [1991] ECR I-4221 (para 12) and *Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* Case C-55/94 [1996] All ER (EC) 189, [1995] ECR I-4165 (para 37).

i 15 Pursuant to Declaration No 7 to the Maastricht Treaty, this provision applies only to national tax regulations in existence at the end of 1993. In the case of Finland the relevant date is therefore the date of accession. The applicable version of the Law on Corporation Tax Credits appears to date from 1998. From the observations submitted by the Finnish government at the proceedings, however, it transpires that the system of corporation tax credits was introduced as early as 1990.



‘to apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to their place of residence or with regard to the place where their capital is invested.’ a

35. The contested tax provisions treat taxpayers who have invested in domestic undertakings differently from taxpayers with equivalent investments in another member state. There is therefore differentiation according to the place where their capital is invested, which member states are in principle entitled to apply under art 58(1)(a) EC within the framework of their tax law. b

36. It may be true that the member states introduced art 73d(1)(a) of the EC Treaty (now art 58 EC) by means of the Maastricht Treaty in order to permit some member states to maintain their set-off schemes that differentiated according to the place of investment, as the United Kingdom government submitted in the oral procedure<sup>16</sup>. Since *Verkooijen*’s judgment, however, it has been firmly established that this provision does not give the member states carte blanche to apply every form of different treatment of taxpayers according to the place of investment under their national tax law. c

37. Rather, art 58(1)(a) EC must, as a derogation from the fundamental principle of free movement of capital, be interpreted strictly<sup>17</sup>. In addition, this provision must be read in conjunction with art 58(3) EC, which lays down that the measures and procedures referred to in para 1 may not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital<sup>18</sup>. d

38. In *Verkooijen*’s judgment<sup>19</sup> the court also pointed out that the derogations from the free movement of capital provided for in art 58 EC had previously already been recognised in case law. The court has therefore treated art 58 EC as almost a codification of its previous case law<sup>20</sup>. Hence, the provision must also be interpreted in the light of the case law preceding its introduction<sup>21</sup>. e

39. Consequently, it must be held that restrictions on the free movement of capital in accordance with art 58(1)(a) EC are in turn limited by the principles laid down in art 58(3) EC and developed in case law. f

## 2—Comparability between the situation of domestic investment and that of investment abroad (*Schumacker* case law)

40. For different tax treatment of dividends according to the place of investment to be permissible, pursuant to art 58(3) EC, it must not constitute arbitrary discrimination or a disguised restriction. g

41. Arbitrary discrimination can be ruled out, because the different treatments relate to different situations. In the *Schumacker* judgment the court recognised that differences in treatment according to whether the taxpayer is h

16 See Terra and Wattel *European Tax Law* (3rd edn, 2001) p 19.

17 See the judgment in *Association Église de Scientologie de Paris v Prime Minister* Case C-54/99 [2000] ECR I-1335 (para 17).

18 See *Verkooijen*’s judgment (para 44), cited in footnote 2, above; opinion of Advocate General Tizzano in *Schmid*’s case (para 44), cited in footnote 2, above. i

19 See *Verkooijen*’s judgment (para 43), cited in footnote 2, above.

20 See my opinion in *Ministre des Finances v Weidert* Case C-242/03 (2004) Transcript (opinion) 12 February (para 27).

21 Advocate General Tizzano expressed the same view in his opinion in *Schmid*’s case (para 44), cited in footnote 2, above.

a resident in the state in question or in another member state do not constitute prohibited discrimination to the extent that residents and non-residents are not in a comparable situation<sup>22</sup>.

42. The principle of territoriality cited by the French government is ultimately linked with this finding. As expounded by the court in the *Futura Participations* judgment<sup>23</sup>, this principle states that where the taxation of non-residents is concerned only income and expenses arising in the taxing state are to be taken into account, whereas in the case of domestic taxpayers their worldwide income and expenses constitute the basis of assessment to tax. As the present case relates to an individual fully liable to tax, it cannot be deduced from the principle of territoriality that the offsetting of corporation tax paid abroad is precluded.

43. By analogy with the *Schumacker* case law, the governments involved contend that the situation differs according to whether a dividend is paid by a domestic company or by a foreign company.

44. It must be stated in this regard that there is no difference between the two situations at the outset. There is a risk of double taxation of an undertaking's profits, irrespective of whether the undertaking distributing the dividend has its seat in a different member state to that of the recipient of the dividend or in the same member state. In both cases the earnings are subject first to corporation tax and then, if distributed as a dividend, to income tax.

45. The only difference is that in one case the double taxation stems from taxation by one and the same state, whereas in the case of the cross-border payment of dividends tax is levied by two states. This difference is of no consequence, however, from the point of view of the investor or the undertaking.

46. The fact that taxpayers are resident in different states and that tax jurisdiction is therefore divided between two states only acquires particular significance if there is a wish to introduce schemes to avoid double taxation. The objective of such systems is to ensure that corporate profits are taxed once and only once. To achieve that end, the taxation of the two taxpayers must be co-ordinated. Since no Community harmonisation has taken place in the field of direct taxation and there is no double taxation agreement between Finland and Sweden to cater for this situation, such co-ordination is possible only if both taxpayers live in the same member state.

47. At this interim stage, it can be stated that as regards the avoidance of the double taxation of corporate earnings the situation differs according to whether a company liable to corporation tax and an individual liable to income tax because he receives dividends from that company reside in the same state or in different states.

48. It does not follow, however, that differences in treatment of all kinds would be permissible, for different situations may be treated differently only to the extent that is unavoidable because of the differences<sup>24</sup>.

<sup>22</sup> See the *Schumacker* judgment (para 31 et seq), cited in footnote 8, above.

<sup>23</sup> See the *Futura Participations* judgment (paras 20–22), cited in footnote 9, above.

<sup>24</sup> See the judgment in *Gerritse v Finanzamt Neukölln-Nord* Case C-234/01 [2004] STC 1307, [2003] ECR I-5933. In this ruling the court recognised that in the case of a partially taxable person, taxation at a uniform rate that takes no account of the person's level of income is permissible, because the situation of a non-resident (partially taxable) person differs from that of a resident taxpayer. However, it regarded the different treatment of business expenses as an infringement of Community law.

### 3—Cohesion of the tax system and the principle of proportionality

49. Moreover, for differences in tax treatment between purely domestic situations and cross-border situations that impede capital movements not to constitute arbitrary discrimination or a disguised restriction within the meaning of art 58(3) EC, they must be necessary on overriding grounds of the public interest. The scheme must comply with the principle of proportionality; in other words it must be appropriate for attaining an objective compatible with the EC Treaty, and be necessary and proportionate in the narrow sense of the term<sup>25</sup>.

#### (a) The concept of cohesion of the tax system

50. The Finnish and other governments consider that the regulations on corporation tax credits are justified by the need to ensure cohesion of the tax system.

51. This rather diffuse concept has become firmly established in case law and in the literature since the judgments in *Bachmann's case*<sup>26</sup> and *EC Commission v Belgium*<sup>27</sup>. In those decisions the court recognised in principle that maintenance of the cohesion of the tax system is an objective approved by Community law, on which the member states can rely to justify restrictions on the fundamental freedoms<sup>28</sup>. The concept generally means no more than avoiding double taxation<sup>29</sup> or ensuring that income is actually taxed, but only once<sup>30</sup> (the principle of only-once taxation). The aim of the Belgian scheme at issue at that time was to ensure that the income invested by a taxpayer in a pension policy was not subject to income tax first as earned income and later again upon payment of the pension.

52. An essential aspect is that the avoidance of double taxation also contributes to the neutrality of the tax system from the point of view of competition. One of the Finnish legislature's motives for introducing the law on corporation tax credits was to put the raising of own funds on an equal tax footing with financing by means of bank loans. Loan interest is also taxed only once, as revenue of the bank. The borrower, on the other hand, can offset the cost of taking out the loan against tax as a business expense.

53. In the wake of *Bachmann's* judgment, the cohesion of the tax system has been cited repeatedly as justification for restrictions on various fundamental freedoms. In an attempt to take account of the exceptional nature of this

25 See the judgments in *European Commission v Belgium* Case C-478/98 [2000] STC 830, [2000] ECR I-7587 (para 41) and in *Sanz de Lera's case* (para 23), cited in footnote 12, above. See also the opinion of Advocate General Mischo in *X v Riksskatteverket* Case C-436/00 [2004] STC 1271, [2002] ECR I-10829 (para 80) and the opinion of Advocate General Tizzano in *Schmid's case* (para 44), cited in footnote 2, above.

26 Cited in footnote 5, above.

27 Cited in footnote 6, above.

28 The Community legislature itself also pursues this objective (see the second recital of Council Directive (EC) 2003/123 (amending Council Directive (EEC) 90/435 on the common system of taxation applicable in the case of parent companies and subsidiaries of different member states) (OJ L7 2004 p 41): '... to exempt dividends and other profit distributions paid by subsidiary companies to their parent companies from withholding taxes and to eliminate double taxation of such income at the level of the parent company').

29 This consideration is also likely to have been the basis of the national regulations that were the subject of the judgments in *Proceedings brought by Danner* Case C-136/00 [2002] STC 1283, [2002] ECR I-8147 and *Försäkringsaktiebolaget Skandia (publ) v Riksskatteverket* Case C-422/01 [2003] All ER (EC) 831, [2003] ECR I-6817.

30 See the judgment in *X's case*, cited in footnote 25, above; the purpose of the Swedish scheme under examination in that case was to ensure that capital gains were actually taxed once.



a justification, the court narrowly limited the concept of tax cohesion in subsequent judgments. In consistent case law it has required that there be a direct link between the grant of a tax advantage and the offsetting of that advantage by a fiscal levy, both of which relate to the same tax<sup>31</sup>.

54. In the *Bosal* judgment the court then continues:

b 'Where there is no such direct link, because, for example, one is dealing with different taxes or the tax treatment of different taxpayers, the argument based on the coherence of the tax system cannot be relied upon.'<sup>32</sup>

55. It is unclear whether the criteria 'one and the same taxpayer' and 'the same tax' are binding and must both be met, or whether they are only indicators—albeit strong ones—of the existence of a direct link between a tax advantage and disadvantage.

56. If the first interpretation were preferred, it would not be possible for Finland to argue from start to finish on the basis of the cohesion of the tax system. It is true that corporation tax and income tax could be seen as essentially similar taxes, as they are both levied on current income, in contrast to wealth tax, for example<sup>33</sup>. The criterion of the same taxpayer is not met, however. As the court has already made clear in *Verkooijen's* judgment, the levying of corporation tax on the company on the one hand and income tax on the recipient of dividends on the other are separate taxation exercises involving different taxpayers<sup>34</sup>.

e 57. The merit of this narrow understanding of the concept of tax cohesion is that it is particularly suited to the objective of a restrictive authorisation of exceptions to the free movement of capital. On the other hand, strict adherence to the criterion of the same taxpayer may have arbitrary consequences in some circumstances, as is evident in a situation such as the present.

f 58. In principle, the double taxation of corporate profits can be avoided in a number of ways. The corporation tax can be fully offset when taxing the dividend (as with the Finnish model for domestic dividends) or the dividend can be exempted from income tax. In that case the one and only taxation occurs entirely at company level. However, the opposite is also conceivable, namely that only the undertaking's retained profits are subjected to corporation tax. Then the shareholder receives his dividend from untaxed income; it is taxed for the first time when he is assessed for income tax<sup>35</sup>.

59. Finally, taxes can be levied partly on the undertaking and partly on the recipient of the dividend, as under the half income tax method or what the

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31 See *Verkooijen's* judgment (para 57), cited in footnote 2, above, and the judgment in *Bosal Holding BV v Staatssecretaris van Financiën* Case C-168/01 [2003] All ER (EC) 959, [2003] ECR I-9409 (para 29).

32 The *Bosal* judgment (para 30), which refers to the judgment in *Baars v Inspecteur der Belastingdienst Particulieren/Ondernemingen Gorinchem* Case C-251/98 (2000) 2 ITLR 660, [2000] ECR I-2787 (para 40).

i 33 In the *Baars* judgment one of the reasons for rejecting justification on the grounds of tax cohesion was that two different types of tax were involved, namely wealth tax and corporation tax.

34 See *Verkooijen's* judgment (para 58), cited in footnote 2, above.

35 With this model, however, the state will levy a withholding tax to ensure that dividends going abroad do not escape taxation. A system of this kind exists (or existed) in Greece (see *Terra and Wattel*, cited in footnote 16, above, 4.2.3.2, p 166 et seq).

Commission terms *schedular systems*<sup>36</sup>. In the dispute in the main proceedings, in fact, only part of Mr Manninen's dividend is taxed in Finland; the other part consists of withholding tax retained by the undertaking in Sweden at the time of distribution. a

60. These examples show that it is relatively unimportant who is ultimately credited with the once-only tax payment—the undertaking or the shareholder—at least as long as the same tax rates are applied at both levels. In the case of the Finnish set-off model, one could also take the view, as does the referring court, that the undertaking ultimately pays a kind of advance dividend tax on behalf of the shareholder, in so far as it deducts corporation tax on corporate earnings that are subsequently distributed as dividends. b

61. These considerations suggest that, exceptionally, a link justifying the tax cohesion argument may exist if a charge on one taxpayer is offset by a relief for another. The preconditions for this are that: c

—the tax is levied, if not on the same taxpayer then at least on the same income or the same economic process, and

—the legal configuration of the system ensures that the advantage accrues to the one taxpayer only if the disadvantage to the other is real and in the same amount. d

62. The application of these criteria is just as effective as the criterion of the same taxpayer in ensuring that justification on the grounds of cohesion of the tax system does not run out of control. For example, it would also have been impossible to regard the national schemes at issue in *Verkooijen's case*<sup>37</sup> and *Svensson's case*<sup>38</sup> as coherent systems on the basis of the above-mentioned conditions. e

63. In *Verkooijen's case* there was no guarantee that the dividend would be exempt from income tax only if the undertaking distributing it actually paid corporation tax in the same amount. Under the Luxembourg scheme, to which the *Svensson* judgment related, the criterion of the same economic relationship or the same income would not have been met. Under these schemes taxpayers in Luxembourg received an interest rate subsidy for home loans obtained from domestic banks. The limitation to domestic banks was explained by the fact that only such banks were liable to taxation in Luxembourg. f

64. The contested Finnish legislation meets the conditions set out in para 61, above. They relate to the same income—namely the income of the company, which in essence is passed to the person liable to income tax in the form of a dividend—and ensure that the advantage (the setting-off of corporation tax against the tax liability) is granted only if the disadvantage (the payment of corporation tax) has actually occurred. The provisions regarding the additional tax also ensure that the amount of the corporation tax credit matches that of the tax deducted by the company. g

65. Hence, the argument based on cohesion of the tax system does not fail by reason of the fact that the present case relates to two taxpayers: the company and the recipient of the dividend. h

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<sup>36</sup> See Communication COM(2003) 810 final, cited in footnote 2, above, para 2.2.2. According to the Commission's information, this is now the approach adopted in most member states, subject to certain variations; see para 2.4 of the Communication.

<sup>37</sup> Cited in footnote 2, above.

<sup>38</sup> Judgment in *Svensson v Ministre du Logement et de l'Urbanisme* Case C-484/93 [1995] ECR I-3955. i

- a (b) The cohesion of the tax system as a legitimate objective in the context of justification for the unequal treatment of domestic and foreign situations

66. It is debatable how far the cohesion of the tax system can be relied upon in real terms as an objective compatible with the EC Treaty if the system treats domestic and cross-border situations differently. If the EC Treaty required that cohesion may not be established solely at national level and that cross-border situations must also be catered for as far as possible, the objective of the Finnish regulations would not comply with Community law.

- b 67. The disputed Finnish provisions on corporation tax credits are not applied if the company distributing the dividend is established abroad. Hence the scheme merely precludes the double taxation of purely domestic income but accepts the same effects on investments abroad.

- c 68. In addition, the Commission objects that a foreign recipient of dividends from a Finnish company also receives no corporation tax credit. In the oral procedure, however, the Finnish government rightly stated that it does not lie in the power of the Finnish tax authorities to ensure the offsetting of corporation tax when a recipient of dividends is taxed abroad.

- d 69. It is true that Community law does not prescribe how the member states should design their systems to avoid economic double taxation, but, as stated at the outset, when adopting tax legislation the national legislature must in any event ensure that the fundamental freedoms, in this case the free movement of capital, are respected in the internal market, even though at present the Community has no jurisdiction of its own in the field of direct taxes<sup>39</sup>.

- e Moreover, the member states may in principle treat purely domestic and cross-border situations differently. However, if different treatment also entails the restriction of a fundamental freedom, the differentiation may not go beyond what is unavoidable on account of the differences in situation<sup>40</sup>.

- f 70. This is the starting point for the line of argument of the governments involved. They essentially advance two arguments. First, they point out that the corporation tax paid abroad—in this case in Sweden—does not benefit the Finnish tax authorities and can therefore not be offset against tax on the dividend in Finland. Secondly, they maintain that the Finnish tax authorities would not be able to guarantee a complete match between the corporation tax paid in Sweden and the corresponding tax credit to be recognised in Finland because they cannot levy additional tax on the Swedish company.

- g 71. With regard to the first argument, it is settled case law that a loss of tax revenue cannot be relied upon to justify a measure that is in principle contrary to a fundamental freedom<sup>41</sup>. Consequently, Finland must accept that when taxing domestic recipients of dividends it loses tax revenue as a result of the offsetting of the corporation tax received by the Swedish tax authorities. Hence the tax revenues ultimately remain in the state in which entrepreneurial activity is undertaken to generate profits.

- h 72. As to the governments' second argument, the fact that it is far easier to carry out offsetting if both of the taxpayers involved are subject to the same tax jurisdiction cannot be dismissed out of hand. This cannot, however, justify

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39 See para 26, above.

40 See para 47 et seq. above.

41 See the judgments in *Imperial Chemical Industries plc v Colmer (Inspector of Taxes)* Case C-264/96 [1998] All ER (EC) 585, [1998] ECR I-4695 (para 28), *de Groot v Staatssecretaris van Financiën* Case C-385/00 [2004] STC 1346, [2002] ECR I-11819 (para 103) and the *Verkooijen* judgment, cited in footnote 2, above (para 59).



taking no account of corporation tax deducted abroad in any circumstance and thereby impeding the free movement of capital. a

73. Instead, a recipient of dividends who is taxable in Finland must at least be afforded the opportunity to furnish proof of the actual amount of corporation tax paid, for example by presenting certificates to that effect from the company. However, the requirements as to proof may not be excessively onerous, so as to render virtually impossible or excessively difficult the exercise of rights conferred by Community law.<sup>42</sup> b

74. Moreover, offsetting need not lead to dividends received from Sweden being completely exempt from income tax in Finland. Rather, the prohibition on discrimination in applying once-only taxation requires only that the amount of corporation tax actually paid be taken fully into account. As the Finnish tax authorities cannot call upon the foreign undertaking to make up any difference between the corporation tax paid and the income tax due, it would be permissible for the adjustment to be made by levying correspondingly higher income tax on the domestic taxpayer. c

75. Under this arrangement a recipient of dividends from an investment abroad would, it is true, be treated worse than a recipient of dividends from a domestic company. First, in individual cases he may have to accept somewhat higher taxation, and secondly he would have to complete additional formalities in order to obtain a corporation tax credit, whereas offsetting would be automatic in the case of domestic investments. These inequalities of treatment are unavoidable, however, in view of the differences in situation.<sup>43</sup> d

76. In the wake of these arguments, the court asked the parties what practical difficulties would prevent the corporation tax paid abroad from being offset when taxing dividends in Finland. e

77. During the oral procedure the Finnish and United Kingdom governments pointed out in particular that in the context of the taxation of dividends it was difficult for the taxpayer or the tax administration, as the case may be, to obtain the necessary information on the corporation tax paid by the company in another member state. The Finnish government added that it was not only the rate of corporation tax applicable abroad that had to be taken into account for the purposes of offsetting, as the basis of assessment could differ from one state to another. The United Kingdom government pointed to the particular difficulties that could result from the fact that the free movement of capital also applied in relation to third states. f  
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78. These difficulties cannot, however, justify the complete exclusion of the offsetting of corporation tax paid abroad. In order to take account of differences in tax rates and in the basis of assessment, the amount of corporation tax actually paid per share could be offset. The company involved should be able to state this figure, for example on the basis of its accounts for the financial year for which the dividend was distributed. If it were not in a position to do so, the cost of this failure would ultimately fall on the shareholder, who would not be able to produce adequate proof of the tax to be offset against the tax on his dividend. In that case he might choose another investment. h  
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42 With regard to the principle of effectiveness, see in particular the judgments in *Rewe-Zentralfinanz eG v Landwirtschaftskammer für das Saarland* Case 33/76 [1976] ECR 1989 (para 5), and *Grundig Italiana SpA v Ministero delle Finanze* Case C-255/00 [2003] All ER (EC) 176, [2002] ECR I-8003 (para 33).

43 See para 48, above.

a 79. Particular problems may arise where third countries are involved. The principle of the free movement of capital between member states and third countries set out in art 56(1) EC does not, however, lay down a binding requirement that corporation tax paid in third countries be offset in the same way as in situations involving two member states. Here too, the rule is that equal treatment is required only if the situations are comparable. In view of the facts in the dispute in the main proceedings, however, it is not necessary to decide to what extent the principles developed here can be transposed to cases involving third countries.

b 80. In conclusion, it must be held that a scheme providing for corporation tax to be offset against the tax on dividends cannot be justified by arguments based on the coherence of the tax system if the scheme prohibits offsetting in the case of investments abroad even though such offsetting would in principle be possible.

#### VI—CONCLUSION

d 81. In the light of the foregoing considerations, I propose that the reply to the questions from the Korkein Hallinto-Oikeus be as follows:

e Article 56(1) EC and paras (1)(a) and (3) of art 58 EC preclude provisions of a member state under which the tax on a dividend received by an individual who is fully taxable in his country of residence from a share company established in the same country is calculated to take account of the corporation tax paid by the company, whereas corporation tax is not offset in the same manner if the dividend is distributed by a company established abroad.

7 September 2004. **The COURT OF JUSTICE (Grand Chamber)** delivered the following judgment.

f 1. The reference for a preliminary ruling concerns arts 56 and 58 EC (formerly arts 73b and 73d of the EC Treaty).

2. The reference has been submitted in the context of proceedings brought before the Korkein hallinto-oikeus (Supreme Administrative Court) by Mr Manninen, who is challenging the compatibility with Community law of Finnish legislation on the taxation of dividends (the Finnish tax legislation).

#### g LEGAL BACKGROUND

##### *Community law*

3. Article 56(1) EC provides:

h ‘Within the framework of the provisions set out in this Chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited.’

4. Article 58(1) EC provides:

i ‘The provisions of Article 56 shall be without prejudice to the right of Member States—

(a) to apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to their place of residence or with regard to the place where their capital is invested;

(b) to take all requisite measures to prevent infringements of national law and regulations, in particular in the field of taxation ...’

5. Article 58(3) EC provides:

'The measures and procedures referred to in paragraphs 1 and 2 shall not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments as defined in Article 56.'

*Finnish law*

6. In accordance with art 32 of tuloverolaki (Income Tax Law) (1535/1992), dividends received by a person fully taxable in Finland from a Finnish or foreign quoted company are taxable as revenue from capital.

7. Under art 124 of the tuloverolaki (as amended by Law No 1459/2001), revenue from capital is taxed at the rate of 29%.

8. Companies established in Finland pay a tax on their profits which is also at the rate of 29%. In order to avoid double taxation of such revenue on the distribution of dividends, art 4(1) of the laki yhtiöveron hyvityksestä (Law on Corporation Tax Credits) (1232/1988), as amended by Law No 1224/1999, allows shareholders a tax credit equal to 29/71ths of the amount of the dividends they received during the relevant tax year.

9. In accordance with art 4(2) of the Law on Corporation Tax Credits, as amended by Law No 1224/1999, the dividend and the tax credit constitute taxable revenue in the hands of the shareholder. The effect of granting the tax credit is that the total tax on profits distributed by a quoted company amounts to 29%.

10. Under art 1 of the Law on Corporation Tax Credits, the tax credit applies only to dividends distributed by Finnish companies to persons fully taxable in Finland.

11. Should the tax paid by a Finnish company by way of corporation tax turn out to be less than 29/71ths of the amount of dividends which it has been decided to distribute during the tax year in question, then, in accordance with art 9 of the Law on Corporation Tax Credits, as amended by Law No 1542/1992, the difference is charged to that company by means of an additional tax.

THE DISPUTE IN THE MAIN PROCEEDINGS AND THE QUESTIONS REFERRED

12. Mr Manninen is fully taxable in Finland. He holds shares in a Swedish company quoted on the Stockholm (Sweden) Stock Exchange.

13. The profits distributed by that Swedish company in the form of dividends to Mr Manninen have already borne corporation tax in Sweden. The dividends also bear a tax in Sweden on revenue from capital by means of deduction at source. Since dividends distributed by foreign companies to Finnish taxpayers confer no entitlement to a tax credit in Finland, they are subject in that member state to income tax on revenue from capital at the rate of 29%. However, in accordance with Convention 26/1997 concluded between member states of the Nordic Council for the avoidance of double taxation in the matter of income tax and wealth tax, the tax deducted at source in Sweden, the rate of which cannot exceed 15% by virtue of art 10 of that convention, is deductible from the tax due by way of income tax on revenue from capital from the fully taxable shareholder in Finland.

14. On 23 November 2000, Mr Manninen applied to the keskusverolautakunta (Central Tax Commission) for a determination whether, having regard to arts 56 and 58 EC, dividends which he received from a Swedish company were taxable in Finland.



a 15. In its preliminary decision of 7 February 2001, the keskusverolautakunta held that Mr Manninen was not entitled to the tax credit in respect of dividends paid to him by a Swedish company.

16. Mr Manninen appealed against that decision to the Korkein hallinto-oikeus.

b 17. It is in those circumstances that the Korkein hallinto-oikeus decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

c '(1) Is Article 56 of the Treaty establishing the European Community to be interpreted as precluding a corporation tax credit system like the Finnish one described [in paras 6 to 11 of this judgment], in which the recipient of a dividend who is generally liable to tax in Finland is granted a corporation tax credit in respect of a dividend paid by a domestic share company, but not in respect of dividend income he receives from a share company registered in Sweden?

d (2) If the answer to the above question is in the affirmative, may Article 58 EC be interpreted as meaning that the provisions of Article 56 are without prejudice to Finland's right to apply the relevant provisions of the Law on Corporation Tax Credits, since it is a condition for obtaining a corporation tax credit in Finland that the company distributing the dividend has paid the corresponding tax or supplementary tax in Finland, which does not take place with respect to a dividend paid from abroad, in

e

#### THE QUESTIONS REFERRED

f 18. In its questions, which may be examined together, the national court is asking in essence whether arts 56 and 58 EC preclude legislation, such as that at issue in the main proceedings, whereby the right of a fully taxable person in a member state to the benefit of a tax credit on dividends paid to him by limited companies is excluded where those companies are not established in that state.

g 19. The first point to be made is that, although direct taxation falls within their competence, the member states must none the less exercise that competence consistently with Community law (see *Wielockx v Inspecteur der Directe Belastingen* Case C-80/94 [1995] All ER (EC) 769, [1995] ECR I-2493 (para 16), *Imperial Chemical Industries plc v Colmer (Inspector of Taxes)* Case C-264/96 [1998] All ER (EC) 585, [1998] ECR I-4695 (para 19) and *Royal Bank of Scotland plc v Greek State* Case C-311/97 [2000] STC 733, [1999] ECR I-2651 (para 19)).

h 20. As for whether tax legislation such as that at issue in the main proceedings involves a restriction on the free movement of capital within the meaning of art 56 EC, it should be noted that the tax credit under Finnish tax legislation is designed to prevent the double taxation of company profits distributed to shareholders by setting off the corporation tax due from the company distributing dividends against the tax due from the shareholder by way of income tax on revenue from capital. The end result of such a system is

i that dividends are no longer taxed in the hands of the shareholder. Since the tax credit applies solely in favour of dividends paid by companies established in Finland, that legislation disadvantages fully taxable persons in Finland who receive dividends from companies established in other member states, who, for their part, are taxed at the rate of 29% by way of income tax on revenue from capital.

21. It is undisputed that the tax convention concluded between the states of the Nordic Council for the prevention of double taxation is not capable of eliminating that unfavourable treatment. That convention does not provide for any system for setting off corporation tax against income tax due on revenue from capital. It merely seeks to attenuate the effects of double taxation in the hands of the shareholder in relation to that latter tax. a

22. It follows that the Finnish tax legislation has the effect of deterring fully taxable persons in Finland from investing their capital in companies established in another member state. b

23. Such a provision also has a restrictive effect as regards companies established in other member states, in that it constitutes an obstacle to their raising capital in Finland. Since revenue from capital of non-Finnish origin receives less favourable tax treatment than dividends distributed by companies established in Finland, the shares of companies established in other member states are less attractive to investors residing in Finland than shares in companies which have their seat in that member state (see *Staatssecretaris van Financiën v Verkooijen* Case C-35/98 [2002] STC 654, [2000] ECR I-4071 (para 35), *European Commission v France* Case C-334/02 (2004) 6 ITLR 642 (para 24)). c

24. It follows from the above that legislation such as that at issue in the main proceedings constitutes a restriction on the free movement of capital which is, in principle, prohibited by art 56 EC. d

25. It must, however, be examined whether that restriction on the free movement of capital is capable of being justified having regard to the provisions of the EC Treaty. e

26. It should be recalled in that respect that, in accordance with art 58(1)(a) EC—

‘Article 56 shall be without prejudice to the right of Member States ... to apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to ... the place where their capital is invested.’ f

27. According to the Finnish, French and United Kingdom governments, that provision clearly shows that member states are entitled to reserve the benefit of the tax credit for dividends paid by companies established in their territory. g

28. In that respect, it should be noted that art 58(1)(a) EC of the Treaty, which, as a derogation from the fundamental principle of the free movement of capital, must be interpreted strictly, cannot be interpreted as meaning that any tax legislation making a distinction between taxpayers by reference to the place where they invest their capital is automatically compatible with the Treaty. The derogation in art 58(1)(a) EC is itself limited by art 58(3) EC, which provides that the national provisions referred to in art 58(1) EC ‘shall not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments as defined in Article 56’. h

29. A distinction must therefore be made between unequal treatment which is permitted under art 58(1)(a) EC and arbitrary discrimination which is prohibited by art 58(3) EC. In that respect, the case law shows that, for national tax legislation like that at issue, which, in relation to a fully taxable person in the member state concerned makes a distinction between revenue from national dividends and that from foreign dividends, to be capable of being regarded as compatible with the Treaty provisions on the free movement of capital, the difference in treatment must concern situations which are not i

a objectively comparable or be justified by overriding reasons in the general interest, such as the need to safeguard the cohesion of the tax system (see *Verkooijen's* case (para 43)). In order to be justified, moreover, the difference in treatment between different categories of dividends must not go beyond what is necessary in order to attain the objective of the legislation.

b 30. The Finnish, French and United Kingdom governments begin by arguing that the dividends paid are fundamentally different in character according to whether they come from Finnish or non-Finnish companies. Unlike profits distributed by non-Finnish companies, those paid in the form of dividends by companies established in Finland are subject to corporation tax in that member state, conferring entitlement on the part of a shareholder who is fully taxable in Finland to the tax credit. The difference in treatment between dividends paid c by companies established in that state and those paid by companies which do not satisfy that condition is therefore justified, they argue, in the light of art 58(1)(a) EC.

d 31. The French government further argues that the Finnish tax legislation conforms to the principle of territoriality and cannot therefore be regarded as contrary to the Treaty provisions on the free movement of capital (see *Futura Participations SA v Administrations des Contributions* Case C-250/95 [1997] STC 1301, [1997] ECR I-2471 (paras 18–22)).

e 32. In that regard, it needs to be examined whether, in accordance with art 58(1)(a) EC, the difference in treatment of a shareholder fully taxable in Finland according to whether he receives dividends from companies established in that member state or from companies established in other member states relates to situations which are not objectively comparable.

f 33. It should be noted that the Finnish tax legislation is designed to prevent double taxation of company profits by granting to a shareholder who receives dividends a tax advantage linked to the taking into account of the corporation tax due from the company distributing the dividends.

g 34. It is true that, in relation to such legislation, the situation of persons fully taxable in Finland might differ according to the place where they invested their capital. That would be the case in particular where the tax legislation of the member state in which the investments were made already eliminated the risk of double taxation of company profits distributed in the form of dividends, by, for example, subjecting to corporation tax only such profits by the company h concerned as were not distributed.

35. That is not the case here, however. As the order for reference shows, both dividends distributed by a company established in Finland and those paid by a company established in Sweden are, apart from the tax credit, capable of being subjected to double taxation. In both cases, the revenue is first subject to corporation tax and then—in so far as it is distributed in the form of dividends—to income tax in the hands of the beneficiaries.

i 36. Where a person fully taxable in Finland invests capital in a company established in Sweden, there is thus no way of escaping double taxation of the profits distributed by the company in which the investment is made. In the face of a tax rule which takes account of the corporation tax owed by a company in order to prevent double taxation of the profits distributed, shareholders who are fully taxable in Finland find themselves in a comparable situation, whether they receive dividends from a company established in that member state or from a company established in Sweden.

37. It follows that the Finnish tax legislation makes the grant of the tax credit subject to the condition that the dividends be distributed by companies



established in Finland, while shareholders fully taxable in Finland find themselves in a comparable situation, whether they receive dividends from companies established in that member state or from companies established in other member states (see, to that effect, *Asscher v Staatssecretaris van Financiën* Case C-107/94 [1996] All ER (EC) 757, [1996] ECR I-3089 (paras 41–49) and *Gerritse v Finanzamt Neukölln-Nord* Case C-234/01 [2004] STC 1307, [2003] ECR I-5933 (paras 47–54)).

38. Moreover, unlike the legislation at issue in the *Futura Participations* case, the Finnish tax legislation cannot be regarded as an emanation of the principle of territoriality. As Advocate General Kokott has pointed out in para 42 of her opinion, that principle does not preclude the granting of a tax credit to a person fully taxable in Finland in respect of dividends paid by companies established in other member states (see the *Futura Participations* case (paras 18–22)).

39. In any event, having regard to art 58(1)(a) EC, the principle of territoriality cannot justify different treatment of dividends distributed by companies established in Finland and those paid by companies established in other member states, if the categories of dividends concerned by that difference in treatment share the same objective situation.

40. Secondly, the Finnish, French and United Kingdom governments maintain that the Finnish tax legislation is objectively justified by the need to ensure the cohesion of the national tax system (see *Bachmann v Belgian State* Case C-204/90 [1994] STC 855, [1992] ECR I-249, *EC Commission v Belgium* Case C-300/90 [1992] ECR I-305). In particular, they argue that, unlike in the case of the tax system examined in *Verkooijen's* case, there is in this case a direct link between the taxation of the company's profits and the tax credit granted to the shareholder receiving the dividends. They point out that the tax credit is granted to the latter only on condition that that company has actually paid the tax on its profits. If that tax does not cover the minimum tax on the dividends to be distributed, that company is required to pay an additional tax.

41. The Finnish government adds that, if a tax credit were to be granted to the recipients of dividends paid by a Swedish company to shareholders who were fully taxable in Finland, the authorities of that member state would be obliged to grant a tax advantage in relation to corporation tax that was not levied by that state, thereby threatening the cohesion of the national tax system.

42. In that respect, it should be noted that, in paras 28 and 21 respectively of the judgments in *Bachmann's* case and *EC Commission v Belgium*, the Court of Justice acknowledged that the need to preserve the cohesion of a tax system might justify a restriction on the exercise of the fundamental freedoms guaranteed by the Treaty. However, for an argument based on such justification to succeed, a direct link had to be established between the tax advantage concerned and the offsetting of that advantage by a particular tax deduction (see, to that effect, *Svensson v Ministre du Logement et de l'Urbanisme* Case C-484/93 [1995] ECR I-3955 (para 18), *Asscher's* case (para 58), the *ICI* case (para 29), *Skatteministeriet v Vestergaard* Case C-55/98 [1999] ECR I-7641 (para 24), *X v Riksskatteverket* Case C-436/00 [2004] STC 1271, [2002] ECR I-10829 (para 52)). As is shown by paras 21–23 of the judgment in *Bachmann's* case and paras 14–16 of the judgment in *EC Commission v Belgium*, those judgments are based on the finding that, in Belgian law, there was a direct link, in relation to the same taxpayer liable to income tax, between the

a ability to deduct insurance contributions from taxable income and the subsequent taxation of sums paid by the insurers.

43. The case law further shows that an argument based on the need to safeguard the cohesion of a tax system must be examined in the light of the objective pursued by the tax legislation in question (see *de Lasteyrie du Saillant v Ministère de l'Économie, des Finances et de l'Industrie* Case C-9/02 (2004) 6 ITLR 666 (para 67)).

b 44. As has already been noted in para 33 of this judgment, the Finnish tax legislation is designed to prevent double taxation of company profits distributed to shareholders. The objective pursued is achieved by granting the taxpayer a tax credit calculated by reference to the rate of taxation of company profits by way of corporation tax (see para 8 of this judgment). Having regard  
c to the identical rate of tax on company profits and on revenue from capital, namely 29%, that tax system finally results in taxing, solely in the hands of companies established in Finland, the profits distributed by them to taxpayers who are fully taxable in Finland, the latter being simply exonerated from tax on the dividends received. Should the tax paid by a Finnish company which pays  
d dividends turn out to be less than the amount of the tax credit, the difference is charged to that company by means of an additional tax.

45. Even if that tax legislation is thus based on a link between the tax advantage and the offsetting tax deduction, in providing that the tax credit granted to the shareholder fully taxable in Finland is to be calculated by reference to the corporation tax due from the company established in that  
e member state on the profits which it distributes, such legislation does not appear to be necessary in order to preserve the cohesion of the Finnish tax system.

46. Having regard to the objective pursued by the Finnish tax legislation, the cohesion of that tax system is assured as long as the correlation between the tax advantage granted in favour of the shareholder and the tax due by way  
f of corporation tax is maintained. Therefore, in a case such as that at issue in the main proceedings, the granting to a shareholder who is fully taxable in Finland and who holds shares in a company established in Sweden of a tax credit calculated by reference to the corporation tax owed by that company in Sweden would not threaten the cohesion of the Finnish tax system and would constitute a measure less restrictive of the free movement of capital than that  
g laid down by the Finnish tax legislation.

47. It should be noted furthermore that, in *Bachmann's* case and *EC Commission v Belgium*, the purpose of the tax provisions in question was also to avoid double taxation. The possibility which Belgian legislation gave to physical persons to deduct payments made under life assurance contracts from their  
h taxable income—with the end result of not taxing the income used to pay those contributions—was based on the justification that the capital constituted by means of those contributions would subsequently be taxed in the hands of its holders. In such a system, double taxation was avoided by postponing the sole taxation due until the time when the capital constituted by means of the exonerated contributions was paid. Cohesion of the tax system necessarily  
i required that, if the Belgian tax authorities were to allow the deductibility of life assurance contributions from taxable income, they had to be certain that the capital paid by the assurance company at the expiry of the contract would in fact subsequently be taxed. It is in that precise context that the Court of Justice then took the view that there were no less restrictive measures than

those forming the subject matter of *Bachmann's* case and *EC Commission v Belgium*, which were capable of safeguarding the cohesion of the tax system in question. a

48. In the case at issue in the main proceedings here, however, the factual context is different. At the time when the shareholder fully taxable in Finland receives dividends, the profits thus distributed have already been subject to taxation by way of corporation tax, irrespective of whether those dividends come from Finnish or from Swedish companies. The objective pursued by the Finnish tax legislation, which is to eliminate the double taxation of profits distributed in the form of dividends, may be achieved by also granting the tax credit in favour of profits distributed in that way by Swedish companies to persons fully taxable in Finland. b

49. Whilst, for the Republic of Finland, granting a tax credit in relation to corporation tax due in another member state would entail a reduction in its tax receipts in relation to dividends paid by companies in other member states, it has been consistently held in the case law that reduction in tax revenue cannot be regarded as an overriding reason in the public interest which may be relied on to justify a measure which is in principle contrary to a fundamental freedom (see *Verkooijen's* case (para 59), *Proceedings brought by Danner* Case C-136/00 [2002] STC 1283, [2002] ECR I-8147 and *X's* case (para 50)). c

50. At the hearing, the Finnish and United Kingdom governments referred to various practical obstacles which, in their submission, preclude a shareholder fully taxable in Finland from being granted a tax credit corresponding to the corporation tax due from a company established in another member state. They argued that the Treaty rules on the free movement of capital apply not only to movements of capital between member states but also to movements of capital between member states and non-member countries. According to those governments, bearing in mind the diversity of the tax systems in force, it is impossible in practice to determine exactly the amount of tax, by way of corporation tax, which has affected dividends paid by a company established in another member state or in a non-member country. They argue that such impossibility is due in particular to the fact that the basis of assessment for corporation tax varies from one country to another and that rates of tax may vary from one year to the next. They further argue that dividends paid by a company do not necessarily arise from the profits of a given accounting year. d

51. In that respect, it should first be noted that the case in the main proceedings does not in any way concern the free movement of capital between member states and non-member countries. This case concerns the refusal by the tax authorities of a member state to grant a tax advantage to a person fully taxable in that state where that person has received dividends from a company established in another member state. e

52. Moreover, the order for reference shows that, in Finland, the tax credit allowed to the shareholder is equal to 29/71ths of the dividends paid by the company established in that member state. For the purposes of calculating the tax credit, the numerator of the fraction to be applied is thus equal to the rate of taxation of company profits by way of corporation tax, and the denominator is equal to the result obtained by deducting that same rate of taxation from the base of 100. f

53. Finally, it should also be noted that in Finnish law the tax credit always corresponds to the amount of the tax actually paid by way of corporation tax by the company which distributes the dividends. Should the tax paid by way of g



*a* corporation tax turn out to be less than the amount of the tax credit, the difference is charged to the company making the distribution by means of an additional tax.

*b* 54. In those circumstances, the calculation of a tax credit granted to a shareholder fully taxable in Finland, who has received dividends from a company established in Sweden, must take account of the tax actually paid by the company established in that other member state, as such tax arises from the general rules on calculating the basis of assessment and from the rate of corporation tax in that latter member state. Possible difficulties in determining the tax actually paid cannot, in any event, justify an obstacle to the free movement of capital such as that which arises from the legislation at issue in the main proceedings (see *EC Commission v France* (para 29)).

*c* 55. In the light of the above considerations, the answer to the questions referred must be that arts 56 and 58 EC preclude legislation whereby the entitlement of a person fully taxable in one member state to a tax credit in relation to dividends paid to him by limited companies is excluded where those companies are not established in that state.

*d* COSTS

56. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court. The costs incurred in submitting observations to the court, other than those of the said parties, are not recoverable.

*e* On those grounds, the Court of Justice (Grand Chamber) hereby rules:

Articles 56 and 58 EC preclude legislation whereby the entitlement of a person fully taxable in one member state to a tax credit in relation to dividends paid to him by limited companies is excluded where those companies are not established in that state.

# Alabaster v Woolwich plc and another

(Case C-147/02)

COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

JUDGES SKOURIS (PRESIDENT), JANN, TIMMERMANS, GULMANN, CUNHA RODRIGUES, ROSAS (PRESIDENTS OF CHAMBERS), LA PERGOLA, PUISOCHET, SCHINTGEN (RAPPORTEUR), MACKEN AND COLNERIC  
ADVOCATE GENERAL LÉGER

24 JUNE, 30 SEPTEMBER 2003, 30 MARCH 2004

*European Community – Equality of treatment of men and women – Equal pay for equal work – Maternity leave benefit – Award of pay rise after conclusion of reference period for the calculation of maternity pay but before commencement of maternity leave – Pay rise not included in statutory maternity pay – Whether pay rise should be taken into account for purpose of calculating maternity pay – EC Treaty, art 119 (now art 141 EC) – Council Directive (EEC) 92/85.*

The claimant had been an employee of the defendant company for a number of years prior to the commencement of her maternity leave. A few weeks before she was to begin her maternity leave she received a pay increase. However, that increase was not included in her maternity pay as it had been awarded after the conclusion of the reference period from which her maternity pay had been calculated. Council Directive (EEC) 92/85 (on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding) (tenth individual directive within the meaning of art 16(1)<sup>a</sup> of Council Directive (EEC) 89/391) provided, *inter alia*, for the entitlement to maternity leave and maternity pay and/or allowances. The claimant brought a complaint against the defendant before the employment tribunal, contending that the failure to reflect the salary increase in the calculation of the statutory maternity pay constituted discrimination against her on the grounds of sex. The tribunal held, applying the judgment of the Court of Justice of the European Communities in *Gillespie v Northern Health and Social Services Board* Case C-342/93 [1996] All ER (EC) 284, that the failure to take account of the claimant's pay increase in determining her statutory maternity pay amounted to a breach of art 119<sup>b</sup> of the EC Treaty (now arts 136–143 EC). The Employment Appeal Tribunal upheld the tribunal's decision. The defendant appealed to the Court of Appeal which stayed the proceedings and referred three questions to the Court of Justice for a preliminary ruling which related to the interpretation of art 119 and the judgment in *Gillespie's* case.

**Held** — (1) Article 119 had to be interpreted as requiring that, in so far as the pay received by the worker during her maternity leave was determined at least in part on the basis of the pay she earned before her maternity leave began, any

<sup>a</sup> Article 16(1) provides: 'The Council, acting on a proposal from the Commission based on Article 118a of the Treaty, shall adopt individual Directives, *inter alia*, in the areas listed in the Annex.'

<sup>b</sup> Article 119, so far as material, is set out at judgment para 3, below

- a pay rise awarded between the beginning of the period covered by the reference pay and the end of the maternity leave had to be included in the elements of pay taken into account in calculating the amount of such pay. That requirement was not limited to cases where the pay rise was backdated to the period covered by the reference pay. The principle of non-discrimination required that a woman who was still linked to her employer by a contract of
- b employment or by an employment relationship during maternity leave should, like any other worker, benefit from any pay rise, even if backdated, which was awarded between the beginning of the period covered by reference pay and the end of maternity leave. To deny such an increase to a woman on maternity leave would discriminate against her since, had she not been pregnant, she would have received the pay rise (see judgment paras 47, 50, below); *Gillespie v Northern Health and Social Services Board* Case C-342/93 [1996] All ER (EC) 284 considered.
- c (2) Absent any Community legislation in the sphere, it was for the competent national authorities to determine how, in compliance with all the provisions of Community law, and in particular Directive 92/85, any pay rise awarded before
- d or during maternity leave should be included in the elements of pay used to calculate the pay due to a worker during maternity leave. As the manner in which the requirement to include any pay rise in the elements of pay taken into account in calculating the amount of pay for the purposes of maternity leave was not the subject of Community legislation, it was within the discretion of the competent authorities of the member state concerned;
- e provided that they complied with that requirement and with all provisions of Community law, in particular those stemming from Directive 92/85 (see judgment paras 53, 56, below).

### Notes

- f For the meaning of 'pay' in European law, see 13 *Halsbury's Laws* (4th edn reissue) para 380.
- For the EC Treaty, art 141 EC (formerly art 119), see 50 *Halsbury's Statutes* (4th edn) Current Statutes Service (issue 88) 405.

### g Cases cited

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- Arbeiterwohlfahrt der Stadt Berlin v Bötzel eV Case C-360/90 [1992] IRLR 423, [1992] ECR I-3589, ECJ.
- Boyle v Equal Opportunities Commission Case C-411/96 [1998] All ER (EC) 879, [1999] ICR 360, [1998] ECR I-6401, ECJ.
- h Brown v Rentokil Ltd Case C-394/96 [1998] All ER (EC) 791, [1998] ICR 790, [1998] ECR I-4185, ECJ.
- Busch v Klinikum Neustadt GmbH & Co Betriebs-KG Case C-320/01 [2003] All ER (EC) 985, [2003] ECR I-2041, ECJ.
- i Caisse Nationale d'Assurance Vieillesse des Travailleurs Salariés v Thibault Case C-136/95 [1998] All ER (EC) 385, [1999] ICR 160, [1998] ECR I-2011, ECJ.
- Canal Satélite Digital SL v Administración General del Estado Case C-390/99 [2002] ECR I-607, ECJ.
- Cura Anlagen GmbH v Auto Service Leasing GmbH (ASL) Case C-451/99 [2002] ECR I-3193, ECJ.



- Dekker v Stichting Vormingscentrum voor Jonge Volwassenen (VJV-Centrum) Plus* Case C-177/88 [1991] IRLR 27, [1992] ICR 325, [1990] ECR I-3941, ECJ.
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- Garland v British Rail Engineering Ltd* Case 12/81 [1982] 2 All ER 402, [1983] 2 AC 751, [1982] 2 WLR 918, [1982] ECR 359, ECJ.
- Gillespie v Northern Health and Social Services Board* Case C-342/93 [1996] All ER (EC) 284, [1996] ICR 498, [1996] ECR I-475, ECJ.
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- Handels- og Kontorfunktionærernes Forbund i Danmark (acting on behalf Larsson) v Dansk Handel & Service (acting on behalf of Føtex Supermarked A/S)* Case C-400/95 [1997] IRLR 643, [1997] ECR I-2757, ECJ.
- Høj Pedersen v Kvickly Skive* Case C-66/96 [1999] All ER (EC) 138, sub nom *Handels- og Kontorfunktionærernes Forbund i Danmark (acting on behalf Høj Pedersen) v Faellesforeningen for Danmark Brugsforeninger (acting on behalf of Kvickly Skive)* [1998] ECR I-7327, ECJ.
- ICAP v Beneventi* Case 222/78 [1979] ECR 1163, ECJ.
- Lewen v Denda* Case C-333/97 [2000] All ER (EC) 261, [2000] ICR 648, [1999] ECR I-7243, ECJ.
- Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel BV* Case C-342/97 [1999] All ER (EC) 587, [1999] ECR I-3819, ECJ.
- Mahlburg v Land Mecklenburg-Vorpommern* Case C-207/98 [2000] IRLR 276, [2001] ICR 1032, [2000] ECR I-549, ECJ.
- Preston v Wolverhampton Healthcare NHS Trust, Fletcher v Midland Bank plc* Case C-78/98 [2000] All ER (EC) 714, [2001] 2 AC 415, [2001] 2 WLR 408, [2000] ECR I-3201, ECJ.
- PreussenElektra AG v Schleswag AG (Windpark Reußenköge III GmbH, intervening)* Case C-379/98 [2001] All ER (EC) 330, [2001] ECR I-2099, ECJ.
- Schilling v Finanzamt Nürnberg-Süd* Case C-209/01 [2003] STI 2121, ECJ.
- Tele Danmark A/S v Handels-og Kontorfunktionærernes Forbund i Danmark (acting on behalf of Brandt-Nielsen)* Case C-109/00 [2001] All ER (EC) 941, [2001] ECR I-6993, ECJ.
- Union Royale Belge des Sociétés de Football Association ASBL v Bosman, Royal Club Liégeois SA v Bosman, Union des Associations Européennes de Football v Bosman* Case C-415/93 [1996] All ER (EC) 97, [1995] ECR I-4921, ECJ.
- Webb v EMO Air Cargo (UK) Ltd* Case C-32/93 [1994] 4 All ER 115, [1994] QB 718, [1994] 1 WLR 941, [1994] ECR I-3567, ECJ.
- Wouters v Algemene Raad van de Nederlandse Orde van Advocaten (Raad van de Balies van de Europese Gemeenschap intervening)* Case C-309/99 [2002] All ER (EC) 193, [2002] ECR I-1577, ECJ.

## Reference

By order of 27 March 2002, the Court of Appeal (Civil Division) (England and Wales) referred to the Court of Justice of the European Communities for a preliminary ruling under art 234 EC (formerly art 177 of the EC Treaty) three questions (as set out in judgment para 32, below) on the interpretation of

- a* art 119 of the EC Treaty (now art 141 EC) and the judgment in *Gillespie v Northern Health and Social Services Board* Case C-342/93 [1996] All ER (EC) 284. Those questions were raised in proceedings between Michelle K Alabaster and Woolwich plc and the Secretary of State for Social Security relating to a request to have a pay rise taken into account in calculating statutory maternity pay. Written observations were submitted on behalf of: Mrs Alabaster, by L Cox QC and K Monaghan, Barristers; Woolwich plc, by M Griffiths, Barrister, instructed by C McIntyre, Solicitor; the United Kingdom government, by P Ormond, acting as agent, C Vajda QC and R Haynes, Barristers; the Commission of the European Communities, by M-J Jarczy and N Yerrell, acting as agents. Oral observations were made on behalf of: Mrs Alabaster, represented by K Monaghan and by A Reindorf, Barristers; the United Kingdom government, represented by C Jackson, acting as agent, and C Vajda; and the Commission, represented by J Jarczy and N Yerrell. The language of the case was English. The facts are set out in the opinion of the Advocate General.
- b*
- c*

30 September 2003. **The Advocate General (P Léger)** delivered the following opinion<sup>1</sup>.

- d* 1. This case provides an opportunity for the Court of Justice of the European Communities to clarify, or indeed reconsider, the case of *Gillespie v Northern Health and Social Services Board*<sup>2</sup>. That case related to the principle of equal pay for men and women and, more particularly, women's pay during their maternity leave.
- e* 2. In this case the Court of Appeal (Civil Division) (England and Wales)<sup>3</sup>, is asking whether art 119 of the EC Treaty (arts 117 to 120 of the EC Treaty have been replaced by arts 136 to 143 EC) must be interpreted as meaning that, where statutory maternity pay is calculated on the basis of the woman's average earnings during a specified period, such pay must include any pay rises awarded before or during the period of maternity leave but outside the reference period laid down by national law (see [2002] EWCA Civ 211, [2002] IRLR 420).
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#### I—LEGAL BACKGROUND

##### A—Community law

- g* 3. Article 119 of the EC Treaty (now art 141 EC) establishes the principle of equal pay for men and women<sup>4</sup>. It provides as follows:

'Each Member State shall during the first stage ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work.'

- h* For the purpose of this Article, "pay" means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives, directly or indirectly, in respect of his employment from his employer.'

4. According to art 1 of Council Directive (EEC) 75/117<sup>5</sup>, the principle of equal pay is intended to eliminate, for the same work or for work to which

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1 Original language: French.

2 Case C-342/93 [1996] All ER (EC) 284, [1996] ECR I-475 (the *Gillespie* judgment).

3 Also referred to herein as the Court of Appeal.

4 Also referred to as the principle of equal pay.

5 On the approximation of the laws of the member states relating to the application of the principle of equal pay for men and women (OJ 1975 L45 p 19).

equal value is attributed, all discrimination on grounds of sex with regard to all aspects and conditions of remuneration. a

5. Council Directive (EEC) 76/207<sup>6</sup> establishes the principle of equal treatment of men and women for the purposes of access to employment and working conditions<sup>7</sup>. That principle is intended to remove any discrimination on grounds of sex, either directly or indirectly, by reference in particular to marital or family status<sup>8</sup>. b

6. Article 2(3) of Directive 76/207 provides that the directive is without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity.

7. On 19 October 1992, the Council of the European Union adopted Council Directive (EEC) 92/85 (on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding) (tenth individual directive within the meaning of art 16(1) of Council Directive (EEC) 89/391<sup>9</sup>). That directive is based on art 118a of the EC Treaty (arts 117 to 120 of the EC Treaty have been replaced by arts 136 to 143 EC) and was to be transposed by 19 October 1994<sup>10</sup>. c

8. Article 8 of Directive 92/85 relates to maternity leave. It provides as follows: d

‘1. Member States shall take the necessary measures to ensure that workers within the meaning of Article 2 are entitled to a continuous period of maternity leave of at least 14 weeks allocated before and/or after confinement in accordance with national legislation and/or practice. e

2. The maternity leave stipulated in paragraph 1 must include compulsory maternity leave of at least two weeks allocated before and/or after confinement in accordance with national legislation and/or practice.’

9. Article 11 of Directive 92/85 concerns employment rights. It provides as follows: f

‘In order to guarantee workers within the meaning of Article 2 the exercise of their health and safety protection rights as recognized in this Article, it shall be provided that ...

2. in the case referred to in Article 8 [maternity leave], the following must be ensured: g

(a) the rights connected with the employment contract of workers within the meaning of Article 2, other than those referred to in point (b) below;

(b) maintenance of a payment to, and/or entitlement to an adequate allowance for, workers within the meaning of Article 2;

3. The allowance referred to in point 2(b) shall be deemed adequate if it guarantees income at least equivalent to that which the worker concerned would receive in the event of a break in her activities on grounds connected with her state of health, subject to any ceiling laid down under national legislation ...’ h

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6 On the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ 1976 L39 p 40). i

7 Also referred to as the principle of equal treatment or the principle of non-discrimination.

8 See art 2(1).

9 OJ 1992 L348 p 1.

10 Pursuant to art 14(1).



a B—National law

10. The national provisions on statutory maternity pay are found in Pt XII of the Social Security Contributions and Benefits Act 1992.

b 11. Under s 164 of the Act, an employee is entitled to statutory maternity pay if she has been employed for a continuous period of at least 26 weeks with the same employer by the fifteenth week before the expected week of confinement, her normal weekly earnings are over a certain level, she has given the employer the appropriate notice and the baby is due within 11 weeks.

12. Under s 165(1) of the Act, statutory maternity pay is payable for a maximum of 18 weeks.

c 13. Section 166(1) of the Act provides that there are two rates of pay, the 'higher rate' and the 'lower rate'.

14. Section 166(2) of the Act prescribes that the higher rate is a rate equivalent to 90% of the woman's normal weekly earnings for a period of eight weeks immediately preceding the fourteenth week before the expected week of confinement or the lower rate, whichever is the higher. The lower rate is a flat-rate weekly payment.

d 15. Under s 166(1) and (4) of the Act, where an employee is entitled to higher rate statutory maternity pay, she is entitled to the higher rate for six weeks and to the lower rate for 12 weeks.

16. Section 171(4) of the Act provides that a woman's normal weekly earnings are to be taken to be the average weekly earnings which in the relevant period have been paid to her.

e 17. The Statutory Maternity Pay (General) Regulations 1986, SI 1986/1960, as amended with effect from 12 June 1996 by SI 1996/1335 (the regulations), lay down certain conditions for applying the Act with regard to statutory maternity pay.

f 18. Regulation 21(2) of the regulations defines the appropriate date as the first date of the fourteenth week before the expected week of confinement, or the first day in the week in which the woman is confined, whichever is earlier.

19. Regulation 21(3) of the regulations provides that the relevant period for the purposes of s 171(4) of the Act is the period between:

'(a) the last normal pay day before the appropriate date; and

(b) the last normal pay day to fall at least 8 weeks earlier than the normal

g pay day mentioned in sub-paragraph (a),

including the normal pay day mentioned in sub-paragraph (a) but excluding that first mentioned in sub-paragraph (b).'

20. Regulation 21(7) of the regulations was inserted by SI 1996/1335 to take account of the *Gillespie* judgment. It provides as follows:

h 'In any case where a woman receives a back-dated pay increase which includes a sum in respect of a relevant period, normal weekly earnings shall be calculated as if such a sum was paid in that relevant period even though received after that period.'

II—THE MAIN PROCEEDINGS

i 21. Mrs Michelle K Alabaster was an employee of Woolwich plc (the Woolwich) in the United Kingdom from 7 December 1987 to 23 August 1996. 22. In May 1995 she became pregnant.

23. She commenced maternity leave on 8 January 1996. Her expected week of confinement was 11 February 1996 although she gave birth on 2 February 1996.

24. Mrs Alabaster received statutory maternity pay from the week of 8 January 1996. She was paid statutory maternity pay at the higher rate not just for the statutory six-week period but for an additional four weeks under her contract of employment. She then received statutory maternity pay at the lower rate for eight weeks. a

25. On 12 December 1995 Mrs Alabaster received a salary increase with effect from 1 December. However, this salary increase was not reflected in her statutory maternity pay calculation because it came after the relevant period for calculating normal earnings. b

26. Pursuant to reg 21(3) of the regulations, the relevant period in Mrs Alabaster's case began on 1 September 1995 and ended on 31 October 1995.

27. Regulation 21(7) of the regulations was not applicable in Mrs Alabaster's case since it only entered into force on 12 June 1996. In any event, the provision would not have applied because her pay increase was not backdated in respect of the relevant period. c

28. On 21 January 1997 Mrs Alabaster brought a complaint against the Woolwich in the employment tribunal in the United Kingdom. She contended that the failure to reflect the salary increase in her statutory maternity pay calculation constituted discrimination against her on grounds of sex contrary to art 119 of the Treaty. d

29. The Secretary of State for Social Security was joined in the proceedings by an order of the employment tribunal dated 30 May 1997.

30. By a decision of 10 March 1999 the employment tribunal held, applying the *Gillespie* judgment, that the failure to take account of Mrs Alabaster's pay increase in determining her statutory maternity pay amounted to a breach of art 119 of the Treaty. e

31. The Woolwich and the Secretary of State for Social Security appealed on this issue to the Employment Appeal Tribunal, which dismissed the appeal by a decision of 7 April 2000, also applying *Gillespie's* case (see [2000] IRLR 754, [2000] ICR 1037). f

### III—THE QUESTIONS REFERRED FOR A PRELIMINARY RULING

32. The respondents in the main proceedings appealed to the Court of Appeal, which decided to stay proceedings and to refer the following three questions to the Court of Justice for a preliminary ruling: g

'[25] ... In a situation where:

(a) the earnings-related element of a woman's statutory maternity pay (SMP) is calculated by reference to her normal weekly earnings for an eight-week period ending in the 15th week before the expected week of confinement (the relevant period), and h

(b) the employer grants a pay rise, which is not back-dated to the relevant period, at any time after the end of the relevant period used for calculating that woman's earnings-related element of SMP and before the end of her maternity leave:

#### [26] Question 1 i

Are [art 119 of the Treaty] and the judgment in [*Gillespie's* case] to be interpreted as meaning that the woman is entitled to have that pay rise taken into consideration in calculating or recalculating the earnings-related element of her SMP?

#### [27] Question 2

- a Is the answer to Question 1 affected by whether the effective date of the pay rise commences:
- (i) prior to the beginning of the woman's maternity leave;
  - (ii) prior to the ending of the earnings-related period of her SMP; or
  - (iii) on some other date and, if so, on what date?
- b [28] **Question 3**
- If the answer to Question 1 is in the affirmative:
- (i) How should the calculation or recalculation of the normal weekly earnings in the relevant period take into account the pay rise?
  - (ii) Should the relevant period be changed?
  - (iii) What allowance, if any, should be made for other factors occurring within the period to which the pay rise relates, such as the numbers of hours worked and the reason for the pay increase?
- c (iv) Does it follow that, if there is a reduction in pay after the end of the relevant period but before the end of the woman's period of maternity leave, her SMP should be calculated or recalculated to take account of the reduction in pay, and, if so, how should this be done?

d IV—FIRST QUESTION

33. The first question relates to the interpretation of art 119 of the Treaty and the *Gillespie* judgment.

e 34. The Court of Appeal is asking whether, in the light of that law, a statutory maternity benefit calculated on the basis of the woman's average earnings during a specified period should include pay rises awarded before or during her maternity leave, but outside the relevant period prescribed by national law.

f 35. The answer to that question depends on the scope to be given to the *Gillespie* judgment. I shall therefore begin by considering the scope of that judgment (section A below). But I shall also set out the difficulties which the *Gillespie* judgment raises (in section B) and look at how the court's case law on the subject has evolved in this area (section C). Those two matters will lead to a consideration of whether a woman's right to have a pay rise taken account of in her maternity pay ought not to be based on Directive 92/85 rather than on the principle of equal treatment (section D).

g A—The scope of the *Gillespie* judgment

36. The facts giving rise to the dispute in *Gillespie*'s case were analogous to those in this case.

h 37. Ms Gillespie and 16 other workers took maternity leave during 1988. In November 1988 they had obtained backdated pay increases which took effect on 1 April 1988. However those pay increases had not been included in their maternity benefit as a result of the calculation method provided for by the relevant national rules.

i 38. The Court of Appeal in Northern Ireland ([1997] NI 190, [1997] IRLR 410), which was seised of the dispute, referred four questions to the Court of Justice for a preliminary ruling. It asked, in essence, whether the principle of equal pay required that the plaintiffs continue to receive full pay while on maternity leave or, if applicable, that they receive a pay rise awarded before or during their maternity leave.

39. The court replied to those questions as follows:

'12. The definition in the second paragraph of art 119 provides that the concept of pay used in the above-mentioned provisions includes all



consideration which workers receive directly or indirectly from their employers in respect of their employment. The legal nature of such consideration is not important for the purpose of the application of art 119 provided that it is granted in respect of employment ... a

13. Consideration classified as pay includes, inter alia, consideration paid by the employer by virtue of legislative provisions and under a contract of employment whose purpose is to ensure that workers receive income even where, in certain cases specified by the legislature, they are not performing any work provided for in their contracts of employment ... b

14. It follows that, since the benefit paid by an employer under legislation or collective agreements to a woman on maternity leave is based on the employment relationship, it constitutes pay within the meaning of art 119 of the Treaty and Directive 75/117. c

15. Article 119 of the Treaty and art 1 of Directive 75/117 therefore preclude regulations which permit men and women to be paid at different rates for the same work or for work of equal value.

16. It is well settled that discrimination involves the application of different rules to comparable situations or the application of the same rule to different situations (see, in particular, *Finanzamt Köln-Altstadt v Schumacker* Case C-279/93 [1995] All ER (EC) 319 at 339, [1995] ECR I-225 at 259 (para 30)). d

17. The present case is concerned with women taking maternity leave provided for by national legislation. They are in a special position which requires them to be afforded special protection, but which is not comparable either with that of a man or with that of a woman actually at work. e

18. As to whether Community law requires women on maternity leave to continue to receive full pay or lays down specific criteria determining the amount of benefit payable during maternity leave, (Council Directive 92/85) ... provides for various measures to protect inter alia the safety and health of female workers, especially before and after giving birth. Those measures include ... rights connected with contracts of employment ... and maintenance of a payment ... and/or entitlement to an adequate allowance ... f

19. However, that directive does not apply *ratione temporis* to the facts of the present case. It was therefore for the national legislature to set the amount of the benefit to be paid during maternity leave ... g

20. That being so, it follows that at the material time neither art 119 of the Treaty nor art 1 of Directive 75/117 required that women should continue to receive full pay during maternity leave. Nor did those provisions lay down any specific criteria for determining the amount of benefit to be paid to them during that period ... h

21. As to the question whether a woman on maternity leave should receive a pay rise awarded before or during that period, the answer must be Yes.

22. The benefit paid during maternity leave is equivalent to a weekly payment calculated on the basis of the average pay received by the worker at the time when she was actually working and which was paid to her week by week, just like any other worker. The principle of non-discrimination therefore requires that a woman who is still linked to her employer by a contract of employment or by an employment relationship during maternity leave must, like any other worker, benefit i

- a from any pay rise, even if backdated, which is awarded between the beginning of the period covered by reference pay and the end of maternity leave. To deny such an increase to a woman on maternity leave would discriminate against her purely in her capacity as a worker since, had she not been pregnant, she would have received the pay rise.'
- b 40. The court therefore held that the principle of equal pay laid down in art 119 of the Treaty did not require that women should continue to receive full pay during maternity leave nor did it lay down specific criteria for determining the amount of maternity benefit payable to them. On the other hand, it found that the principle of non-discrimination does require that the maternity benefit must include pay rises awarded between the beginning of
- c the relevant period and the end of maternity leave.
41. The parties in this case hold differing views on the scope of the *Gillespie* judgment.
42. The United Kingdom says the judgment must be limited to the circumstances of that case, in other words to situations where a pay increase is backdated to the relevant period.
- d 43. The United Kingdom submits that although the pay increases in *Gillespie's* case were decided on before or during the plaintiffs' maternity leave, they were backdated to the relevant period. In its judgment therefore the court simply found that a pay increase of that kind must be reflected in the amount of maternity benefit. The court did not, however, establish a principle that any
- e pay rise awarded before or during the period of maternity leave but outside the relevant period must be reflected in the maternity benefit. In the United Kingdom's view, such an interpretation of *Gillespie's* case would create considerable legal uncertainty as well as a whole host of practical difficulties.
44. Mrs Alabaster challenges that reading of *Gillespie's* case. She submits that there is nothing in the judgment to support the claim that the pay rises were
- f backdated to the relevant period. In any event she considers that the wording of the *Gillespie* judgment is clear: the principle of non-discrimination requires that any pay rise awarded before or during maternity leave must be taken into account, even if it was awarded outside the relevant period. Mrs Alabaster adds that the practical difficulties raised by the United Kingdom cannot call that conclusion in question.
- g 45. The Commission of the European Communities agrees with Mrs Alabaster's analysis. It contends that if a member state opts for a system of maternity pay based on a woman's earnings, that system must comply with art 119 of the Treaty. This means, following *Gillespie's* case, that maternity pay must reflect any pay rises awarded before or during the woman's maternity leave.
- h 46. I believe that the scope of the *Gillespie* judgment is clear. In my view the court established a principle under which maternity pay calculated on the basis of a woman's earnings during a specified period must reflect any pay rise awarded between the beginning of the relevant period and the end of maternity leave.
- i 47. As Mrs Alabaster said, there is nothing to support the contention that the pay rises in issue in *Gillespie's* case were backdated to the relevant period.
48. The *Gillespie* judgment merely states that '[d]uring 1988 the plaintiffs took maternity leave'<sup>11</sup>; that 'in November 1988, negotiations ... resulted in pay

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11 See para 3.

increases backdated to 1 April 1988'<sup>12</sup>; and that 'the plaintiffs in the main proceedings were unable to receive that increase'<sup>13</sup>. a

49. Indeed, certain aspects of the *Gillespie* judgment even suggest that the contested pay rises were backdated to a point in time outside the relevant period.

50. In para 6 of the judgment the court stated the reasons why the plaintiffs' pay rises had not been reflected in their maternity benefit to be as follows: b

'According to the decision of the industrial tribunal, referred to in the order for reference, the cash benefit payable during maternity leave is determined on the basis of average weekly pay calculated ... from the last two pay cheques received by the women concerned for the two months preceding the reference week (reference pay). The reference week is defined as the 15th week before the beginning of the expected week of confinement. *No provision was made for an increase in reference pay in the event of a subsequent pay rise.*'<sup>14</sup> c

51. That last sentence therefore appears to suggest that the reason why the plaintiffs did not receive their pay rise was that it was awarded outside the reference period laid down by the relevant national rules. d

52. I therefore do not think it has been established that the plaintiffs' pay rises in *Gillespie's* case were backdated to the relevant period.

53. In any event, the wording of the *Gillespie* judgment does not to my mind support the view that the court's findings are confined to situations where that is the case. e

54. Paragraphs 21 and 22 of the judgment are expressed in terms that are clear and general. Paragraph 21 states: 'As to the question whether a woman on maternity leave should receive a pay rise awarded before or during that period, the answer must be Yes.' Similarly, para 22 states that 'a woman ... must ... benefit from any pay rise ... which is awarded between the beginning of the period covered by reference pay and the end of maternity leave'. Finally the operative part of the *Gillespie* judgment states in clear and general terms as follows: f

'... to the extent that it is calculated on the basis of pay received by a woman before ... maternity leave, the amount of benefit must include pay rises awarded between the beginning of the period covered by reference pay and the end of maternity leave, as from the date on which they take effect.' g

55. It follows that there is nothing to suggest that the principle established in *Gillespie's* case is confined to situations where the pay rise is backdated to the relevant period only. h

56. On the basis of those considerations, the answer to the first question referred for a preliminary ruling must be Yes. The court may therefore decide that, under the *Gillespie* judgment, statutory maternity benefit calculated on the basis of a woman's average earnings during a specified period must include pay rises which are awarded before or during her maternity leave, but outside the relevant period laid down by national law. i

<sup>12</sup> See para 6.

<sup>13</sup> As above. Nor, it may be added, does my opinion in *Gillespie's* case contain any indication as to the dates of the relevant periods pertaining to the plaintiffs in the main proceedings.

<sup>14</sup> My emphasis.



a 57. However, like the United Kingdom, I think that *Gillespie's* case raises a number of difficulties. In view of those difficulties, and the way in which the case law has developed, I propose to invite the court not to uphold the judgment in *Gillespie's* case. As we shall see, as Community law currently stands, it is on Directive 92/85, rather than on the principle of equal pay, that a woman's right to have her pay rise taken into account ought to be founded.

b *B—The difficulties raised by the Gillespie judgment*

c 58. It is well settled that the principle of non-discrimination requires that a woman should not be the subject of unfavourable treatment by reason of her pregnancy or because she is on maternity leave<sup>15</sup>. This means that a woman who continues to be bound to her employer during her maternity leave must be able to continue to benefit from all working conditions which apply to both men and women<sup>16</sup>.

d 59. In *Gillespie's* case<sup>17</sup>, the court inferred from that principle that a woman who is on maternity leave must, like any other worker who is actually working, benefit at once from any pay rise, even if it is awarded outside the relevant period or during her maternity leave. This requirement means that the pay rise must be reflected in the amount of salary or benefit paid to the woman during her maternity leave.

e 60. However, the particular feature of the *Gillespie* judgment is the fact that, in so doing, the court applied the principle of non-discrimination to a woman on maternity leave and, more particularly, to the pay she receives during that time.

61. It seems to me that this particular application of the principle of equal treatment raises two sets of difficulties.

62. First, there is to my mind something of a contradiction between the principle established in *Gillespie's* case<sup>18</sup> and paras 16–20 of the judgment.

f 63. The court held in paras 16–20 of the *Gillespie* judgment that art 119 of the Treaty does not apply to women on maternity leave. The reason for that exclusion is that the prohibition laid down by art 119 of the Treaty only applies in cases involving discrimination between men and women, whereas the court takes the view that a woman on maternity leave is in a special situation requiring that she be afforded special protection, but which is not comparable with any other situation. The court thus concluded that art 119 of the Treaty does not require that women continue to receive full pay while on maternity leave, nor does it lay down any criterion for determining the amount of maternity benefit.

g 64. Yet at the same time the court held in paras 21 and 22 that the principle of non-discrimination requires that maternity benefit calculated on the basis of the pay received by the woman must take account of any pay rise awarded before or during her maternity leave. The reason for that requirement is that to do otherwise would be to discriminate against the woman because she is pregnant or on maternity leave.

i 15 See, inter alia, *Caisse Nationale d'Assurance Vieillesse des Travailleurs Salariés v Thibault* Case C-136/95 [1998] All ER (EC) 385, [1998] ECR I-2011 (para 26).

16 See footnote above (para 29).

17 Paragraphs 21, 22.

18 It is perhaps useful to point out that by 'the principle established in *Gillespie's* case' I mean the court's finding that the principle of non-discrimination requires that statutory maternity pay based on the woman's earnings during a specified period must include pay rises awarded before or during her maternity leave (see para 22 of the *Gillespie* judgment).

65. It has to be said that those two principles would seem to be somewhat contradictory. It is difficult to see how the principle of non-discrimination, which does not apply during maternity leave and therefore does not posit any criterion for calculating maternity benefit, can at the same time impose an obligation to take account of certain pay rises when calculating maternity benefit. In other words, it is difficult to comprehend how the principle of non-discrimination, which is not applicable during maternity leave, can affect the amount of benefit paid to a woman when she is on maternity leave. a

66. Ultimately, the *Gillespie* judgment seems to fall part way between two approaches, which should have been taken to their logical conclusion. The first is to exclude application of the principle of non-discrimination during maternity leave. However in that case the principle cannot entail an obligation to take account of a pay rise when calculating maternity benefit. The second is to apply the principle of non-discrimination to a woman on maternity leave. However in that case art 119 of the Treaty requires that the woman receive her full salary during the whole period of her maternity leave. b

67. Secondly, I believe that the principle laid down in *Gillespie*'s case could have a detrimental effect on women. c

68. As the Court of Appeal<sup>19</sup> and the United Kingdom<sup>20</sup> pointed out, to apply the principle of non-discrimination to a woman on maternity leave could affect the protection which she enjoys during that period. d

69. Under *Gillespie*'s case, a worker on maternity leave must not be treated any differently from a worker who is actually working<sup>21</sup>. As we have seen, the effect of this is that if the woman is awarded a pay increase before or during her maternity leave, that increase must be reflected in the amount of her maternity benefit immediately. e

70. But if the principle of non-discrimination is to be applied correctly, account must also be taken of any *adverse* matters arising before or during maternity leave. Therefore, if the woman were to suffer a reduction in or loss of earnings before or during her maternity leave, the principle of non-discrimination would demand that such reduction or loss too be reflected in the amount of her maternity benefit. To do otherwise would be to apply the principle of non-discrimination inconsistently, which would be incompatible with the requirements of the principle of legal certainty. f

71. It follows that application of the principle established in *Gillespie*'s case could have the effect of reducing the amount of benefit paid to women during their maternity leave. g

72. That would be all the more regrettable given that the purpose of the relevant period in the United Kingdom appears to be to protect women against any adverse events that occur before or during their maternity leave. The United Kingdom explained that this period was chosen so that the woman's average earnings would be calculated during a period in her pregnancy (between the fourth and sixth months) in which as a rule she is subject to few pregnancy-related health problems. h

73. However, as the United Kingdom emphasised, by requiring that all matters that arise prior to maternity leave be taken into account, the *Gillespie* i

19 See order of the national court of 26 February 2002 ([2002] IRLR 420 at [16], [17]) and question 3(iii) and (iv) referred for a preliminary ruling.

20 See, *inter alia*, the written observations of the United Kingdom (paras 26, 27).

21 See the *Gillespie* judgment (para 22).

*a* judgment in effect moves the relevant period to the end of the pregnancy, which is the time when women are statistically less able to work normally.

74. Consequently, it is not impossible that the effect of the *Gillespie* judgment might be to reduce the amount of benefit paid to women during maternity leave<sup>22</sup>.

*b* C—Evolution of the court's case law

75. Furthermore the principle established in *Gillespie*'s case appears no longer to be in step with the case law as it now stands on the protection of rights associated with pregnancy and maternity.

*c* 76. Under the current case law, the court applies the principles of equal pay and equal treatment outside the period of maternity leave only.

*d* 77. Thus the court has held that the principle of non-discrimination precludes refusing to enter into a contract of employment with a female worker on account of her pregnancy<sup>23</sup>; dismissal of a female worker for the same reason<sup>24</sup>; dismissal of a female worker for absences due to incapacity for work caused by illness resulting from her pregnancy<sup>25</sup>; an employer's refusal to allow a woman to return to work on the ground that she failed to inform her employer that she was pregnant before signing the contract of employment<sup>26</sup>;

*e* 22 The United Kingdom noted a further negative consequence of the *Gillespie* judgment. It pointed out that under Directive 92/85, the member states are free, with regard to women's earnings during their maternity leave, to choose between paying a proportion of the woman's earnings and paying a flat-rate benefit (such as €50 per week). It also explained that in the United Kingdom it is the employer who has the responsibility for calculating the amount of maternity benefit and that more than 70% of employers are small- or medium-sized enterprises, so that it is unlikely that they have the necessary resources to make frequent, complex calculations. In view of those factors, the United Kingdom indicated that the principle established in *Gillespie*'s case created an 'administrative nightmare for employers' since it requires them to take account of all increases in pay awarded before or during maternity leave regardless of the amount. The United Kingdom therefore explained that the *Gillespie* judgment could cause certain member states to abandon an earnings-related regime in favour of a flat-rate benefit one. I believe that the risk of provoking such change is real given the pressure which employers are one way or another able to exert on the competent authorities. Furthermore, a change of this order would be detrimental to women because the flat-rate regime is in most cases more unjust than the earnings-related one. However to my mind, it is not certain that member states are entitled to make such a change. Article 1(3) of Directive 92/85 states expressly:

*f* 'This Directive may not have the effect of reducing the level of protection afforded to pregnant workers, workers who have recently given birth or who are breastfeeding as compared with the situation which exists in each Member State on the date on which this Directive is adopted.' The provision could therefore preclude the member states invoking the freedom accorded by Directive 92/85 to justify a change of regime entailing a reduction in the protection which women enjoy during their maternity leave in the member state concerned.

*h* 23 See *Dekker v Stichting Vormingscentrum voor Jonge Volwassenen (JVJ-Centrum) Plus* Case C-177/88 [1991] IRLR 27, [1990] ECR I-3941 (para 14) and *Mahlburg v Land Mecklenburg-Vorpommern* Case C-207/98 [2000] IRLR 276, [2000] ECR I-549 (para 30).

24 See *Handels- og Kontorfunktionærernes Forbund i Danmark (acting for Hertz) v Dansk Arbejdsgiverforening (acting for Aldi Marker K/S)* Case C-179/88 [1991] IRLR 31, [1990] ECR I-3979 (para 13), *Habermann-Beltermann v Arbeiterwohlfahrt, Bezirksverband Ndb/Opf-eV* Case C-421/92 [1994] IRLR 364, [1994] ECR I-1657 (para 26), *Webb v EMO Air Cargo (UK) Ltd* Case C-32/93 [1994] 4 All ER 115, [1994] ECR I-3567 (para 29) and *Tele Danmark A/S v Handels-og Kontorfunktionærernes Forbund i Danmark (acting on behalf of Brandt-Nielsen)* Case C-109/00 [2001] All ER (EC) 941, [2001] ECR I-6993 (para 34).

*i* 25 See *Brown v Rentokil Ltd* Case C-394/96 [1998] All ER (EC) 791, [1998] ECR I-4185 (para 28). By that judgment the court reversed its earlier case law in *Hertz's* case (para 19) and *Handels- og Kontorfunktionærernes Forbund i Danmark (acting on behalf Larsson) v Dansk Handel & Service (acting on behalf of Føtex Supermarket A/S)* Case C-400/95 [1997] IRLR 643, [1997] ECR I-2757 (para 26).

26 See *Busch v Klinikum Neustadt GmbH & Co Betriebs-KG* Case C-320/01 [2003] All ER (EC) 985, [2003] ECR I-2041 (para 47).



and a rule that deprives a woman of the right to an assessment of her performance because she was absent from the undertaking on account of maternity leave<sup>27</sup>. a

78. Similarly, the court has found that the principle of equal pay precludes an employer, when granting a Christmas bonus, from taking a woman's absence on maternity leave into account so as to reduce the amount thereof<sup>28</sup>. The court also takes the view that the principle of equal pay demands that a woman continue to receive full pay where she is unfit for work before her maternity leave by reason of her pregnancy, if men who are unfit for work have that right<sup>29</sup>. b

79. It is clear that these various different events—recruitment, dismissal, return to work, assessment, bonus payments, sick leave—occur outside the period covered by maternity leave. c

80. However where the woman is on maternity leave the court no longer applies either the principle of equal pay or the principle of equal treatment. It seems on the contrary that it considers the position in the light of the provisions of Directive 92/85 alone.

81. Thus the case of *Boyle v Equal Opportunities Commission*<sup>30</sup> related to a clause in an employment contract which made the payment during the period of maternity leave of pay higher than the statutory payment conditional on the worker's undertaking to return to work after the birth of her child for at least one month, failing which she was required to repay the difference between the amount of the pay she received and the amount of the statutory payments. The court (at para 40) took the view that art 119 of the Treaty did not preclude the application of such a clause on the ground that— d  
e

‘pregnant workers and workers who have recently given birth or who are breastfeeding are in an especially vulnerable situation which makes it necessary for the right to maternity leave to be granted to them but which, particularly during that leave, cannot be compared to that of a man or a woman on sick leave.’<sup>31</sup> f

82. The court therefore considered (at paras 29–36) the clause in issue purely in the light of the provisions of Directive 92/85<sup>32</sup>.

83. Similarly, the case of *Høj Pedersen* concerned a national rule which provided that a pregnant woman who was unfit for work by reason of a pathological condition connected with her pregnancy was not entitled to receive full pay from her employer during the time that she was unfit. It was however established that a man who was unfit for work was entitled to receive full pay. The defendants in the main proceedings contended by way of justification for that difference that art 11 of Directive 92/85 authorises the member states to establish a ceiling for the allowances which women may claim in the event of pregnancy<sup>33</sup>. g  
h

84. The court rejected that argument on the ground that art 11 of Directive 92/85 only applies to pay or benefits received by workers in the context of

27 See *Thibault's case* (para 33).

28 See *Lewen v Denda* Case C-333/97 [2000] All ER (EC) 261, [1999] ECR I-7243 (para 51).

29 See *Høj Pedersen v Kvickly Skive* Case C-66/96 [1999] All ER (EC) 138, [1998] ECR I-7327 (para 41).

30 Case C-411/96 [1998] All ER (EC) 879, [1998] ECR I-6401.

31 See footnote above.

32 See footnote 30, above.

33 Paragraph 38. i

a maternity leave<sup>34</sup>. Since the dispute in that case concerned incapacity for work before maternity leave, the court held that art 119 of the Treaty required that a woman too continue to receive full pay if she is unfit for work<sup>35</sup>.

b 85. Finally, in *Lewen's* case<sup>36</sup> the court held that a Christmas bonus paid voluntarily by the employer as an incentive for future work cannot constitute pay within the meaning of art 11(2)(b) of Directive 92/85 in so far as it is not intended to ensure that, during her maternity leave, the worker receives an adequate level of income.

c 86. It follows from those judgments that, since the entry into force of Directive 92/85, the court has drawn a distinction between two separate periods. The first covers pregnancy up to the beginning of maternity leave, and the second covers the period of maternity leave. The court applies art 119 of the Treaty and the principle of equal treatment during the first period only. When the woman is on maternity leave, however, her position is considered in the light of the provisions of Directive 92/85 alone. That means that if the woman suffers unfavourable treatment during her maternity leave, such treatment is only prohibited if it is contrary to the provisions of Directive d 92/85<sup>37</sup>.

87. On that basis, it seems to me that the principle established in *Gillespie's* case no longer accords with current case law. As I have said, in that case the court applied the principle of non-discrimination to the second period referred to above and, more particularly, to the woman's pay during maternity leave.

e 88. Having regard to the difficulties set out above and the way in which the case law has evolved, I would suggest that the court ought not to uphold the principle established in *Gillespie's* case. A woman's entitlement to benefit from a pay rise ought to my mind now to be founded on Directive 92/85.

#### D—The basis of the woman's right

f 89. As we have seen, Directive 92/85 was adopted on the basis of art 118a of the Treaty to confer special protection on workers during pregnancy and maternity leave. The Community legislature took the view that pregnant workers, workers who have recently given birth and workers who are breastfeeding are in many respects a specific risk group and that measures ought to be taken to ensure their safety and health<sup>38</sup>. It thus adopted a range of g protective measures, such as the prohibition on dismissing women during pregnancy and maternity leave, and time off for antenatal appointments.

90. As part of those measures, Directive 92/85 provides that women must be entitled to a continuous period of maternity leave of at least 14 weeks, including compulsory maternity leave of at least two weeks. In addition h art 11(2) of Directive 92/85 provides that during maternity leave the following must be ensured:

(a) the rights connected with the employment contract of workers ... other than those referred to in point (b) below;

34 Paragraph 39.

j 35 Paragraphs 35, 37.

36 Paragraphs 22–24.

37 See also to that effect D Ghailani 'La protection des droits liés à la grossesse et à la maternité dans l'ordre juridique communautaire' (2002) *Revue belge de sécurité sociale* p 367 et seq (pp 383, 386) and K Berthou and Masselot 'Égalité de traitement et maternité. Jurisprudence récente de la CJCE' (1999) *Droit social* pp 942–947 (p 946).

38 Directive 92/85 (eighth recital).

(b) maintenance of a payment ... and/or entitlement to an adequate allowance ...' a

91. It seems to me that sub-para (a) could be interpreted as covering pay rises awarded before or during maternity leave. A worker's entitlement to benefit immediately from a pay rise awarded to her may be regarded as a 'right connected with [her] employment contract'<sup>39</sup>. b

92. That interpretation would enable the difficulties identified above to be avoided. b

93. First, it would be consistent with the principle that women on maternity leave are in a special position which requires them to be afforded special protection but which is not comparable with any other situation<sup>40</sup>. The proposed interpretation would involve applying to a woman on maternity leave the measures adopted specifically to ensure that she is protected. It would further guarantee that any pay rises are included in her maternity pay without having to compare her situation with that of a woman who is actually working<sup>41</sup>. c

94. Furthermore it seems to me that the application of Directive 92/85 would enable certain adverse events that occur during maternity leave to be excluded<sup>42</sup>. d

95. It will be recalled that the purpose of Directive 92/85 is to ensure that women are afforded special protection during their maternity leave. In addition, art 1(3) of the directive contains the idea that application of the directive may not have the effect of reducing the level of protection afforded to pregnant workers, workers who have recently given birth or who are breastfeeding. It could be argued on the basis of those two elements that a woman could not, while she is on maternity leave, suffer any reduction in or loss of earnings. e

96. That view is supported by the wording of art 11(2)(a) of Directive 92/85. Whilst immediate entitlement to the benefit of a pay rise awarded while a woman is on maternity leave can amount to a 'right' connected with her contract of employment, it is difficult to argue that an obligation to reflect any reduction in or loss of earnings in the amount of maternity benefit constitutes such a 'right'. In other words the concept of 'rights connected with the employment contract' would require that account be taken of pay rises awarded before or during maternity leave, but not of reductions in or losses of earnings suffered during maternity leave. Such reductions or losses could occur only after the end of the woman's maternity leave. f

97. Finally, the interpretation I have proposed is consistent with the current case law on the protection of rights arising in connection with pregnancy and maternity<sup>43</sup>. It entails applying only the provisions of Directive 92/85 to women on maternity leave and in particular to their pay while on maternity leave. g  
h

<sup>39</sup> However it seems harder to found the woman's rights on art 11(2)(b) of Directive 92/85. The purpose of those provisions is to ensure an 'adequate' level of income for women on maternity leave (see on this point *Boyle's case* (paras 33, 34) and *Lewen's case* (paras 22, 23)). Therefore if the authorities or persons concerned are paying adequate remuneration and/or benefits, they are implementing art 11(2)(b) of Directive 92/85 correctly. That provision does not require that in addition they reflect any pay rises awarded to the woman in her maternity pay. i

<sup>40</sup> See paras 62–66, above.

<sup>41</sup> See *Gillespie's case* (para 22).

<sup>42</sup> See paras 67–74, above.

<sup>43</sup> See paras 75–87, above.



a 98. Consequently I am of the view that the law on female workers may henceforth be founded on the provisions of art 11(2)(a) of Directive 92/85.

b 99. I therefore propose that the court reply to the first question referred for a preliminary ruling that art 119 of the Treaty and the principle of non-discrimination do not require that statutory maternity pay calculated on the basis of a woman's average earnings during a specified period take account of pay rises awarded before or during maternity leave, but outside the reference period. Rather, the obligation to reflect such pay rises in the amount of maternity pay arises under art 11(2)(a) of Directive 92/85.

#### V—SECOND QUESTION

c 100. By its second question the Court of Appeal is asking whether the fact that a pay rise takes effect before the beginning of maternity leave, before the end of the period of payment of the earnings-related element of maternity pay or, if appropriate, on some other date, has any effect on the reply to the first question.

d 101. The considerations set out in the analysis of the first question enable a reply to be given to the national court. It is clear that, regardless of the legal basis used, the amount of the earnings-related element of the woman's statutory maternity pay must take account of any pay rise awarded between the start of the relevant period and the end of maternity leave.

#### VI—THIRD QUESTION

e 102. The last question to be referred for a preliminary ruling divides into four parts which I shall consider in turn.

f 103. The first two parts relate to the detailed rules for applying the principle established in *Gillespie's* case. The national court is asking how a pay rise is to be taken into account in calculating the woman's normal earnings during the relevant period. It also wishes to know whether the relevant period prescribed by national law ought to be changed.

g 104. Those questions are clearly of fundamental significance to employers in the United Kingdom. Following the judgment in this case they will have to calculate or review maternity pay in relation to all women awarded a pay rise before or during their maternity leave. Having regard to the large number of possible scenarios and difficulties, the national court and the defendant in the main proceedings<sup>44</sup> seek detailed guidance on how to do this.

h 105. However it seems to me that those questions can only be dealt with applying the principle of procedural autonomy<sup>45</sup>. In the absence of any Community legislation in this area, it is for the legal system of each member state to lay down the detailed rules for applying the judgment delivered in this case, including any immediate implementing measures.

i 106. The second two parts of the question relate to the possible consequences of *Gillespie's* case in the event that the judgment requires that maternity pay take account of pay rises awarded before or during maternity leave but outside the relevant period. The Court of Appeal is asking whether art 119 of the Treaty requires that, if it does, other factors occurring before or during maternity leave must be taken into account, in particular any loss of or reduction in earnings.

44 See written observations submitted by the Woolwich (para 8).

45 On this principle see in particular my opinion in *Preston v Wolverhampton Healthcare NHS Trust, Fletcher v Midland Bank plc* Case C-78/98 [2000] All ER (EC) 714, [2000] ECR I-3201 (paras 38 et seq)).

107. As we have seen, this question, though merely theoretical in the present case, is most apposite. Logical application of the principle established in *Gillespie's* case demands that statutory maternity pay include not only pay rises awarded before or during maternity leave but also reductions in and losses of earnings suffered during that period<sup>46</sup>. We have, however, seen how some of those adverse consequences may be obviated by using Directive 92/85<sup>47</sup>.

## CONCLUSION

108. On the basis of the foregoing considerations I therefore propose that the court reply to the questions referred to the Court of Justice for a preliminary ruling by the Court of Appeal (Civil Division) (England and Wales) as follows:

(1) Article 119 of the EC Treaty (arts 117 to 120 of the EC Treaty have been replaced by arts 136 to 143 EC) on the principle of non-discrimination must be interpreted as meaning that, where statutory maternity benefit is calculated on the basis of a worker's average earnings during a specified period, that benefit need not include any pay rises awarded before or during the worker's period of maternity leave, but outside the relevant period laid down by national law.

(2) However, art 11(2)(a) of Council Directive (EEC) 92/85 (on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding) (tenth individual directive within the meaning of art 16(1) of Council Directive (EEC) 89/391) requires that where statutory maternity benefit is calculated on the basis of the worker's average earnings during a specified period, that benefit must include any pay rises awarded before or during the worker's period of maternity leave.

(3) In the absence of any Community legislation in this sphere it is for each member state to determine the detailed rules according to which the pay rises referred to in para 2 are to be taken into account in the amount of the woman's statutory maternity pay.

30 March 2004. **THE COURT OF JUSTICE** delivered the following judgment.

1. By order of 27 March 2002, received at the Court of Justice of the European Communities on 22 April 2002, the Court of Appeal (Civil Division) (England and Wales) referred to the Court of Justice for a preliminary ruling under art 234 EC (formerly art 177 of the EC Treaty) three questions on the interpretation of art 119 of the EC Treaty (arts 117 to 120 of the EC Treaty have been replaced by arts 136 to 143 EC) and the judgment in *Gillespie v Northern Health and Social Services Board* Case C-342/93 [1996] All ER (EC) 284, [1996] ECR I-475.

2. Those questions were raised in proceedings between Mrs Alabaster and Woolwich plc (hereinafter the Woolwich) and the Secretary of State for Social Security relating to a request to have a pay rise taken into account in calculating statutory maternity pay.

## LEGAL BACKGROUND

### Community legislation

3. The first two paragraphs of art 119 of the Treaty (now art 141 EC), as applicable at the time of the facts in the main proceedings, provide:

<sup>46</sup> See paras 67–74, above.

<sup>47</sup> See paras 94–96, above.

a 'Each Member State shall during the first stage ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work.

b For the purpose of this Article, "pay" means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives, directly or indirectly, in respect of his employment from his employer.'

c 4. According to the first paragraph of art 1 of Council Directive (EEC) 75/117 (on the approximation of the laws of the member states relating to the application of the principle of equal pay for men and women) (OJ 1975 L45 p 19), the principle of equal pay is intended to eliminate, for the same work or for work to which equal value is attributed, all discrimination on grounds of sex with regard to all aspects and conditions of remuneration.

d 5. Council Directive (EEC) 92/85 (on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding) (tenth individual directive within the meaning of art 16(1) of Council Directive (EEC) 89/391) (OJ 1992 L348 p 1) was adopted on the basis of art 118a of the EC Treaty.

6. Article 14(1) provided that the directive was to be transposed by 19 October 1994 at the latest.

e 7. Article 8 of Directive 92/85, on maternity leave, provides as follows:

'1. Member States shall take the necessary measures to ensure that workers within the meaning of Article 2 are entitled to a continuous period of maternity leave of at least 14 weeks allocated before and/or after confinement in accordance with national legislation and/or practice.

f 2. The maternity leave stipulated in paragraph 1 must include compulsory maternity leave of at least two weeks allocated before and/or after confinement in accordance with national legislation and/or practice.'

8. With regard to employment rights, art 11 of Directive 92/85 provides as follows:

g 'In order to guarantee workers within the meaning of Article 2 the exercise of their health and safety protection rights as recognised in this Article, it shall be provided that ...

2. in the case referred to in Article 8, the following must be ensured:

h (a) the rights connected with the employment contract of workers within the meaning of Article 2, other than those referred to in point (b) below;

(b) maintenance of a payment to, and/or entitlement to an adequate allowance for, workers within the meaning of Article 2;

i 3. The allowance referred to in point 2(b) shall be deemed adequate if it guarantees income at least equivalent to that which the worker concerned would receive in the event of a break in her activities on grounds connected with her state of health, subject to any ceiling laid down under national legislation.

4. Member States may make entitlement to pay or the allowance referred to in points 1 and 2(b) conditional upon the worker concerned fulfilling the conditions of eligibility for such benefits laid down under national legislation.



These conditions may under no circumstances provide for periods of previous employment in excess of 12 months immediately prior to the presumed date of confinement.' a

### National law

#### *The Social Security Contributions and Benefits Act 1992* b

9. The national provisions on statutory maternity pay are to be found in Pt XII of the Social Security Contributions and Benefits Act 1992.

10. Under s 164 of the Act, an employee is entitled to statutory maternity pay if she has been employed for a continuous period of at least 26 weeks with the same employer by the fifteenth week before the expected week of confinement, her normal weekly earnings are over a certain level, she has given the employer the appropriate notice and the baby is due within 11 weeks. c

11. Under s 165(1) of the Act, statutory maternity pay is payable for a maximum of 18 weeks.

12. Section 166(1) of the Act provides that there are two rates of pay, the 'higher rate' and the 'lower rate'. d

13. Section 166(2) of the Act states that the higher rate is a rate equivalent to nine-tenths of the woman's normal weekly earnings for a period of eight weeks immediately preceding the fourteenth week before the expected week of confinement or the lower rate, whichever is the higher. The lower rate is a flat-rate weekly payment.

14. Under s 166(1) and (4) of the Act, where an employee is entitled to higher rate statutory maternity pay, she is entitled to the higher rate for six weeks and to the lower rate for 12 weeks. e

15. Section 171(4) of the Act provides that a woman's normal weekly earnings are to be taken to be the average weekly earnings which in the relevant period have been paid to her. f

#### *The Statutory Maternity Pay (General) Regulations 1986*

16. The Statutory Maternity Pay (General) Regulations 1986, SI 1986/1960 as amended with effect from 12 June 1996 by SI 1996/1335 (the regulations), lay down certain conditions for applying the Act with regard to statutory maternity pay. g

17. Regulation 20 of the regulations defines 'earnings' for the purpose of calculating statutory maternity pay.

18. Regulation 21 determines how normal weekly earnings are to be calculated.

19. Regulation 21(2) defines 'the appropriate date' as the first day of the fourteenth week before the expected week of confinement, or the first day in the week in which the woman is confined, whichever is the earlier. h

20. Regulation 21(3) provides that the relevant period for the purposes of s 171(4) of the Act is the period between:

- (a) the last normal pay day before the appropriate date; and
- (b) the last normal pay day to fall at least 8 weeks earlier than the normal pay day mentioned in sub-paragraph (a), i  
including the normal pay day mentioned in sub-paragraph (a) but excluding that first mentioned in sub-paragraph (b).'

21. Regulation 21(7) provides as follows:

- a* 'In any case where a woman receives a back-dated pay increase which includes a sum in respect of a relevant period, normal weekly earnings shall be calculated as if such a sum was paid in that relevant period even though received after that period.'
- b* THE MAIN PROCEEDINGS AND THE QUESTIONS REFERRED
22. Mrs Alabaster was an employee of the Woolwich in the United Kingdom from 7 December 1987 to 23 August 1996.
23. She commenced maternity leave on 8 January 1996, her expected week of confinement being 11 February 1996.
24. Mrs Alabaster received statutory maternity pay from the week of
- c* 7 January 1996. It was paid at the higher rate not just for the statutory six-week period but for an additional four weeks under her contract of employment. She then received it at the lower rate for eight weeks.
25. On 12 December 1995 Mrs Alabaster received a pay increase with effect from 1 December. However, this increase was not reflected in the calculation of her statutory maternity pay because it came after the relevant period for
- d* calculating normal earnings.
26. Pursuant to reg 21(3) of the regulations, the relevant period for calculating normal earnings in Mrs Alabaster's case began on 1 September 1995 and ended on 31 October 1995.
27. Regulation 21(7) of the regulations was thus not applicable since it only
- e* entered into force on 12 June 1996. In any event, the provision would not have applied in Mrs Alabaster's case because her pay increase was not backdated in respect of the relevant period.
28. On 21 January 1997 Mrs Alabaster brought a complaint against the Woolwich in the employment tribunal, arguing that the failure to reflect the salary increase in the calculation of the statutory maternity pay she
- f* received constituted discrimination against her on grounds of sex, contrary to art 119 of the Treaty.
29. The Secretary of State for Social Security was joined in the proceedings by an order of the employment tribunal dated 30 May 1997.
30. By a decision of 10 March 1999 the employment tribunal held, applying the *Gillespie* judgment, that the failure to take account of Mrs Alabaster's pay
- g* increase in determining her statutory maternity pay amounted to a breach of art 119 of the Treaty.
31. The Woolwich and the Secretary of State for Social Security appealed on this issue to the Employment Appeal Tribunal, which dismissed the appeal by a decision of 7 April 2000, also applying *Gillespie's* case (see [2000] IRLR 754, [2000] ICR 1037).
- h* 32. The respondents in the main proceedings appealed to the Court of Appeal (Civil Division) (England and Wales), which, taking the view that the resolution of the dispute depended on the interpretation of Community law, decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling (see [2002] EWCA Civ 211, [2002] IRLR 420):
- i*
- '[25] ... In a situation where:
- (a) the earnings-related element of a woman's statutory maternity pay (SMP) is calculated by reference to her normal weekly earnings for an eight-week period ending in the 15th week before the expected week of confinement (the relevant period), and

(b) the employer grants a pay rise, which is not back-dated to the relevant period, at any time after the end of the relevant period used for calculating that woman's earnings-related element of SMP and before the end of her maternity leave:

[26] **Question 1**

Are [art 119 of the Treaty] and the judgment in [*Gillespie's case*] to be interpreted as meaning that the woman is entitled to have that pay rise taken into consideration in calculating or recalculating the earnings-related element of her SMP?

[27] **Question 2**

Is the answer to Question 1 affected by whether the effective date of the pay rise commences:

- (i) prior to the beginning of the woman's maternity leave;
- (ii) prior to the ending of the earnings-related period of her SMP; or
- (iii) on some other date and, if so, on what date?

[28] **Question 3**

If the answer to Question 1 is in the affirmative:

(i) How should the calculation or recalculation of the normal weekly earnings in the relevant period take into account the pay rise?

(ii) Should the relevant period be changed?

(iii) What allowance, if any, should be made for other factors occurring within the period to which the pay rise relates, such as the numbers of hours worked and the reason for the pay increase?

(iv) Does it follow that, if there is a reduction in pay after the end of the relevant period but before the end of the woman's period of maternity leave, her SMP should be calculated or recalculated to take account of the reduction in pay, and, if so, how should this be done?

REQUEST FOR REOPENING OF THE ORAL PROCEDURE

33. By document lodged at the Court Registry on 18 November 2003, the United Kingdom government requested the court to order the reopening of the oral procedure pursuant to art 61 of the Rules of Procedure.

34. In support of that request, it claims that in his opinion Advocate General Léger gave his views on a question which had not been expressly referred by the national court.

35. The court may of its own motion, or on a proposal from the Advocate General, or at the request of the parties reopen the oral procedure, in accordance with art 61 of its Rules of Procedure, if it considers that it lacks sufficient information, or that the case must be dealt with on the basis of an argument which has not been debated between the parties (see the order in *Emesa Sugar (Free Zone) NV v Aruba* Case C-17/98 [2000] ECR I-675 (para 18), the judgment in *Wouters v Algemene Raad van de Nederlandse Orde van Advocaten (Raad van de Balies van de Europese Gemeenschap interveniend)* Case C-309/99 [2002] All ER (EC) 193, [2002] ECR I-1577 (para 42), and the judgment of 13 November 2003 in *Schilling v Finanzamt Nürnberg-Süd* Case C-209/01 [2003] STI 2121 (para 19)).

36. In the circumstances of this case, however, the court, after hearing Advocate General Léger, considers that it has all the details necessary for it to answer the questions referred and that those matters were addressed in the arguments presented to it at the hearing. The request for reopening the oral procedure must therefore be refused.



a THE QUESTIONS REFERRED

*First and second questions*

37. By the first question the national court asks whether art 119 of the Treaty and the judgment in *Gillespie's* case are to be interpreted as meaning that a woman is entitled to have a pay rise which was awarded to her after the relevant period and was not backdated to that period taken into consideration in the calculation of the earnings-related element of the statutory maternity pay. By the second question it asks whether the fact that the effective date of the pay rise commences prior to the beginning of the maternity leave, or prior to the end of the earnings-related period of her statutory maternity pay, or on some other date has any effect on the answer to the first question. As those questions are closely related it is necessary to consider them together.

38. It must be observed at the outset that whilst Directive 92/85, which was to be transposed by the member states by 19 October 1994, was not applicable at the time of the facts of the main proceedings in *Gillespie's* case, it does apply *ratione temporis* to this case.

39. However, whilst the directive provides in art 11(2) and (3) that some of the rights connected with the employment contract of persons such as the applicant in the main proceedings must be ensured, it is not sufficient to provide a useful reply to the first two questions raised by the national court.

40. In those circumstances it is necessary to determine whether it is possible to deduce the answer to those questions from other provisions or principles of Community law.

41. It must be observed in this connection that under art 1 of Directive 75/117 the principle of equal pay for men and women for equal work enshrined in art 119 of the Treaty, which was applicable at the time of the facts in the main proceedings, means that for the same work or for work to which equal value is attributed all discrimination on grounds of sex with regard to all aspects and conditions of remuneration must be eliminated.

42. Regarding first the concept of pay in the aforementioned provisions, according to the definition in the second paragraph of art 119 of the Treaty it includes all consideration which workers receive directly or indirectly from their employers in respect of their employment. The legal nature of such consideration is not important for the purposes of the application of that article, provided that it is granted in respect of employment (see *Garland v British Rail Engineering Ltd* Case 12/81 [1982] 2 All ER 402, [1982] ECR 359 (para 10) and *Gillespie's* case (para 12)).

43. Consideration classified as pay includes, *inter alia*, consideration paid by the employer by virtue of legislative provisions and under a contract of employment whose purpose is to ensure that workers receive income even where, in certain cases specified by the legislature, they are not performing any work provided for in their contracts of employment (see *Arbeiterwohlfahrt der Stadt Berlin v Bötzel eV* Case C-360/90 [1992] IRLR 423, [1992] ECR I-3589 (paras 14, 15), and *Gillespie's* case (para 13) and the cases cited therein).

44. It follows that, since the benefit paid by an employer under legislation or collective agreements to a woman on maternity leave is based on the employment relationship, it constitutes pay within the meaning of art 119 of the Treaty and Directive 75/117 (see *Gillespie's* case (para 14), and *Boyle v Equal Opportunities Commission* Case C-411/96 [1998] All ER (EC) 879, [1998] ECR I-6401 (para 38)).

45. Secondly, the court has consistently held that discrimination involves the application of different rules to comparable situations or the application of the same rule to different situations (see, in particular, *Finanzamt Köln-Altstadt v Schumacker* Case C-279/93 [1995] All ER (EC) 319, [1995] ECR I-225 (para 30), and *Gillespie's* case (para 16)). a

46. In that connection women taking maternity leave provided for by national legislation are in a special position which requires them to be afforded special protection, but which is not comparable, in particular, either with that of a man or with that of a woman actually at work (*Gillespie's* case (para 17)). Therefore they cannot usefully rely on the provisions of art 119 of the Treaty to argue that they should continue to receive full pay while on maternity leave as though they were actually working, like other workers (*Gillespie's* case (para 20)). b

47. However the court found, thirdly, at para 22 of *Gillespie's* case, that benefit paid during maternity leave is equivalent to a weekly payment calculated on the basis of the average pay received by the worker at the time when she was actually working and which was paid to her week by week, just like any other worker. The principle of non-discrimination therefore requires that a woman who is still linked to her employer by a contract of employment or by an employment relationship during maternity leave must, like any other worker, benefit from any pay rise, even if backdated, which is awarded between the beginning of the period covered by reference pay and the end of maternity leave. To deny such an increase to a woman on maternity leave would discriminate against her since, had she not been pregnant, she would have received the pay rise. c

48. It follows that in a case such as that in the main proceedings where the income guaranteed by national law to the worker is calculated partially on the pay received by her before her maternity leave, art 119 of the Treaty entitles her to have a pay rise which was awarded to her after the beginning of the period covered by the reference pay and before the end of maternity leave taken into account in determining the elements of her pay used to calculate the consideration paid by her employer. d

49. The requirement recalled in para 22 of the judgment in *Gillespie's* case means that any pay rise awarded after the beginning of the period covered by her reference pay must be included in the elements of pay used to determine the amount of pay owed to the worker during her maternity leave, and, contrary to the contention of the United Kingdom government, should not be limited to cases where the pay is backdated to that period. e

50. In the light of the foregoing, the reply to the first and second questions must be that art 119 of the Treaty must be interpreted as requiring that, in so far as the pay received by the worker during her maternity leave is determined, at least in part, on the basis of the pay she earned before her maternity leave began, any pay rise awarded between the beginning of the period covered by the reference pay and the end of the maternity leave must be included in the elements of pay taken into account in calculating the amount of such pay. This requirement is not limited to cases where the pay rise is backdated to the period covered by the reference pay. f

### Third question

51. By the third question the referring court asks essentially, in the event that the Court of Justice finds that there is a right to have a pay rise taken into account in circumstances such as those in the main proceedings, how the pay g

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a rise should be taken account of in calculating the pay due to the worker during her maternity leave and whether account should also be taken of any decrease in the woman's pay during the period following that covered by the reference pay and during her maternity leave.

b 52. As regards the first point it should be borne in mind that art 234 EC is based on a clear division of functions between the national courts and the Court of Justice, so that the Court of Justice may rule on the interpretation or validity of Community provisions only on the basis of the facts which the national court puts before it (see *AC-ATEL Electronics Vertriebs GmbH v Hauptzollamt München-Mitte* Case C-30/93 [1994] ECR I-2305 (para 16)). It follows that, within the framework of the procedure under art 234 EC, it is not for the Court of Justice but for the national court to apply the Community rules which it has interpreted to national measures or situations (see *ICAP v Beneventi* Case 222/78 [1979] ECR 1163 (para 10), and *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel BV* Case C-342/97 [1999] All ER (EC) 587, [1999] ECR I-3819 (para 11)).

c 53. Furthermore, as the manner in which the requirement referred to at para 50 of this judgment is to be implemented is not the subject of Community legislation, it is within the discretion of the competent authorities of the member state concerned, provided that they comply with that requirement and with all provisions of Community law, in particular those stemming from Directive 92/85. It is not therefore for the court to rule on the manner in which the pay rise is to be taken into account when determining the reference pay, or on whether the period covered by that pay should be altered or whether, where the information on file is in any event not sufficient, other factors that may affect the determination of that pay should be taken into account.

d 54. As to the question of whether decreases in pay ought to be taken into account, the court has held that in the context of art 234 EC proceedings it must, in order to determine whether it has jurisdiction, examine the conditions in which the case has been referred to it by the national court. The spirit of co-operation which must prevail in the preliminary ruling procedure requires the national court to have regard to the function entrusted to the Court of Justice, which is to assist in the administration of justice in the member states and not to deliver advisory opinions on general or hypothetical questions (see *Union Royale Belge des Sociétés de Football Association ASBL v Bosman, Royal Club Liègeois SA v Bosman, Union des Associations Européens de Football v Bosman* Case C-415/93 [1996] All ER (EC) 97, [1995] ECR I-4921 (para 59), *PreussenElektra AG v Schlesweg AG (Windpark Reußenköge III GmbH, intervening)* Case C-379/98 [2001] All ER (EC) 330, [2001] ECR I-2099 (para 38), *Canal Satélite Digital SL v Administración General del Estado* Case C-390/99 [2002] ECR I-607 (para 18), and *Cura Anlagen GmbH v Auto Service Leasing GmbH (ASL)* Case C-451/99 [2002] ECR I-3193 (para 16)).

e 55. In this case the hypothetical nature of the issue on which the court is asked to rule is confirmed by the fact that the main proceedings, as set out in the order for reference, relate exclusively to the refusal to take account of a pay rise, there being no question of any pay decrease. In those circumstances the reply to the second part of the third question referred by the national court cannot have any bearing on the main proceedings and that part of the question is therefore inadmissible.

f 56. In the light of the foregoing considerations, the reply to the third question must be that, absent any Community legislation in this sphere, it is for



the competent national authorities to determine how, in compliance with all the provisions of Community law, and in particular Directive 92/85, any pay rise awarded before or during maternity leave must be included in the elements of pay used to calculate the pay due to a worker during maternity leave. a

#### COSTS

57. The costs incurred by the United Kingdom government and by the Commission of the European Communities, which have submitted observations to the Court of Justice, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. b

On those grounds, the Court of Justice, in answer to the questions referred to it by the Court of Appeal (Civil Division) (England and Wales) by order of 27 March 2002, hereby rules: c

(1) Article 119 of the EC Treaty (arts 117 to 120 of the Treaty have been replaced by arts 136 to 143 EC) must be interpreted as requiring that, in so far as the pay received by the worker during her maternity leave is determined at least in part on the basis of the pay she earned before her maternity leave began, any pay rise awarded between the beginning of the period covered by the reference pay and the end of the maternity leave must be included in the elements of pay taken into account in calculating the amount of such pay. This requirement is not limited to cases where the pay rise is backdated to the period covered by the reference pay. d  
e

(2) Absent any Community legislation in this sphere, it is for the competent national authorities to determine how, in compliance with all the provisions of Community law, and in particular Council Directive (EEC) 92/85 (on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding) (tenth individual directive within the meaning of art 16(1) of Council Directive (EEC) 89/391), any pay rise awarded before or during maternity leave must be included in the elements of pay used to calculate the pay due to a worker during maternity leave. f

a **Erich Gasser GmbH v MISAT Srl**  
(Case C-116/02)

b COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

JUDGES SKOURIS (PRESIDENT), JANN, TIMMERMANS, GULMANN, CUNHA RODRIGUES AND ROSAS (PRESIDENTS OF CHAMBERS), EDWARD, LA PERGOLA, PUISSOCHET, SCHINTGEN (RAPPORTEUR), MACKEN, COLNERIC AND VON BAHR  
ADVOCATE GENERAL LÉGER

c 13 MAY, 9 SEPTEMBER, 9 DECEMBER 2003

*Conflict of laws – Jurisdiction – Challenge to jurisdiction – Lis pendens – Proceedings involving same cause of action and between same parties – Proceedings issued in Italy and subsequently in Austria – Whether court second seised able to seek interpretation of the Brussels Convention without assessing merits of parties' contentions – Whether court second seised able to give judgment without waiting for a declaration of court first seised that it had no jurisdiction – Whether derogation possible where the duration of proceedings before courts of the contracting state where the court first seised established excessively long – Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968, art 21.*

e G GmbH, which was incorporated under Austrian law, had sold children's clothing to M Srl, a company incorporated under Italian law, for a number of years. M Srl issued proceedings in Italy seeking a ruling that the contract between the parties had terminated ipso jure, or, alternatively, that it had terminated following a disagreement between them. A few months later  
f G GmbH brought an action in Austria against M Srl to obtain payment of outstanding invoices. G GmbH contended, inter alia, that the Regional Court, Feldkirch, had been designated by a choice of court clause which had appeared on all its invoices. G GmbH argued that M Srl's failure to raise any objection to that clause showed that in accordance with their practice, and the usage prevailing in trade between Austria and Italy, the parties had concluded an  
g agreement conferring jurisdiction within the meaning of art 17<sup>a</sup> of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968 (the Brussels Convention). M Srl, inter alia, contested the existence of any such agreement. Of its own motion, the Regional Court decided to stay proceedings pursuant to art 21<sup>b</sup> of the Brussels Convention until the jurisdiction of the Italian court had been established.  
h However, it did not rule on the existence of any agreement conferring jurisdiction. G GmbH appealed that decision to the Higher Regional Court, Innsbruck, contending that the Regional Court should be declared to have jurisdiction and that the proceedings should not have been stayed. Considering that the instant case was one of lis pendens within the meaning of art 21 of the convention, the Higher Regional Court stayed the proceedings and referred a  
i number of questions relating to the interpretation of art 21 to the Court of Justice of the European Communities for a preliminary ruling.

a Article 17, so far as material, is set out at judgment para 6, below

b Article 21 is set out at judgment para 8, below

**Held** — (1) A national court could, under the Protocol of 3 June 1971 on the interpretation by the Court of Justice of the Brussels Convention, refer to the Court of Justice a request for interpretation of the convention, even where it relied on the submissions of a party to the main proceedings of which it had not yet examined the merits, provided that it considered, having regard to the particular circumstances of the case, that a preliminary ruling was necessary to enable it to give judgment and that the questions on which it sought a ruling from the court were relevant. It was incumbent on the national court to provide the Court of Justice with factual and legal information enabling it to give a useful interpretation of the convention and to explain why it considered that a reply to its questions was necessary to enable it to give judgment (see judgment paras 23, 24, 27, below). a

(2) Article 21 of the Brussels Convention had to be interpreted as meaning that a court second seised whose jurisdiction had been claimed under an agreement conferring jurisdiction should nevertheless stay proceedings until the court first seised had declared that it had no jurisdiction. In the instant case, the claim that the court second seised had jurisdiction under art 17 did not call into question the application of the procedural rule contained in art 21 which was based clearly and solely on the chronological order in which the courts involved were seised. Moreover, the court second seised was never in a better position than the court first seised to determine whether the latter had jurisdiction as jurisdiction was determined directly by the convention rules which were common to both courts and could be interpreted and applied with the same authority by each of them. In view of the disputes which could arise as to the very existence of a genuine agreement between the parties, expressed in accordance with the strict formal conditions laid down in art 17, it was conducive to the legal certainty sought by the convention that, in cases of *lis pendens*, it should be determined clearly and precisely which of the two national courts was to establish whether it had jurisdiction under the convention rules. It was clear from the wording of art 21 that it was for the court first seised to pronounce as to its jurisdiction, in the instant case in the light of a jurisdiction clause relied on before it, which had to be regarded as an independent concept to be appraised solely in relation to the requirements of art 17 (see judgment paras 47, 48, 51, 54, below). b

(3) Article 21 of the Brussels Convention had to be interpreted as meaning that it could not be derogated from where, in general, the duration of proceedings before the courts of the contracting state in which the court first seised was established was excessively long. An interpretation of art 21 of the convention whereby the application of that article could be set aside where the court first seised belonged to a member state in whose courts there were, in general, excessive delays in dealing with cases would be manifestly contrary both to the letter and spirit and to the aim of the convention. Firstly, the convention contained no provision under which its articles, in particular art 21, ceased to apply because of the length of proceedings before the courts of the contracting state concerned. Secondly, the convention was necessarily based on the trust which the contracting states accorded to each other's legal systems and judicial institutions. That mutual trust had enabled the establishment of a compulsory system of jurisdiction which the courts within the purview of the convention were required to respect and, as a corollary, waive the right to apply internal rules on the recognition and enforcement of foreign judgments in favour of a simplified mechanism (see judgment paras 70–73, below). c



**a Notes**

For the Brussels Convention and *lis pendens*, see 1(1) *Halsbury's Laws* (4th edn 2001 reissue) para 362.

**Cases cited**

- b** *Arkkitehtuuritoimisto Riitta Korhonen Oy v Varkauden Taitotalo Oy* Case C-18/01 [2003] ECR I-5321, ECJ.  
*Association Basco-Béarnaise des Opticiens Indépendants v Prefet des Pyrénées-Atlantiques* Case C-109/99 [2000] ECR I-7247, ECJ.  
*Benincasa v Dentalkit Srl* Case C-269/95 [1998] All ER (EC) 135, [1997] ECR I-3767, ECJ.
- c** *Bertini v Regione Lazio* Joined cases 98/85, 162/85 and 258/85 [1986] ECR 1885, ECJ.  
*Campus Oil Ltd v Minister for Industry and Energy* Case 72/83 [1984] ECR 2727, ECJ.  
*Coreck Maritime GmbH v Handelsveem BV* Case C-387/98 [2000] ECR I-9337, ECJ.  
*Der Weduwe (Criminal proceedings against)* Case C-153/00 [2002] ECR I-11319, ECJ.
- d** *Dias v Director da Alfândega do Porto* Case C-343/90 [1992] ECR I-4673, ECJ.  
*Effer SpA v Kantner* Case 38/81 [1982] ECR 825, ECJ.  
*Elefanten Schuh GmbH v Jacqmain* Case 150/80 [1981] ECR 1671, ECJ.  
*Enderby v Frenchay Health Authority* Case C-127/92 [1994] 1 All ER 495, [1993] ECR I-5535, ECJ.
- e** *Estasis Salotti di Colzani Aimo e Gianmario Colzani v RüWA Polstereimaschinen GmbH* Case 24/76 [1976] ECR 1831, ECJ.  
*Farrell v Long* Case C-295/95 [1997] All ER (EC) 449, [1997] QB 842, [1997] 3 WLR 613, [1997] ECR I-1683, ECJ.  
*Foglia v Novello* Case 104/79 [1980] ECR 745, ECJ.
- f** *Foglia v Novello* Case 244/80 [1981] ECR 3045, ECJ.  
*Galleries Segoura SPRL v Bonakdarian* Case 25/76 [1976] ECR 1851, ECJ.  
*Gantner Electronic GmbH v Basch Exploitatie Maatschappij BV* Case C-111/01 [2003] ECR I-4207, ECJ.  
*Gubisch Maschinenfabrik KG v Palumbo* Case 144/86 [1987] ECR 4861, ECJ.  
*Høj Pedersen v Kvickly Skive* Case C-66/96 [1999] All ER (EC) 138, sub nom
- g** *Handels- og Kontorfunktionærernes Forbund i Danmark (acting on behalf Høj Pedersen) v Faellesforeningen for Danmark Brugsforeninger (acting on behalf of Kvickly Skive)* [1998] ECR I-7327, ECJ.  
*Irish Creamery Milk Suppliers Association v Ireland, Doyle v An Taoiseach* Joined cases 36/80 and 71/80 [1981] ECR 735, ECJ.
- h** *Jämställdhetsombudsmannen v örebro Läns Landsting* Case C-236/98 [2000] IRLR 421, [2001] ICR 249, [2000] ECR I-2189, ECJ.  
*Kleinwort Benson Ltd v Glasgow City Council* Case C-346/93 [1995] All ER (EC) 514, [1996] QB 57, [1995] 3 WLR 866, [1995] ECR I-615, ECJ.  
*Maciej Rataj, The, Tatry (cargo owners) v Maciej Rataj (owners)* Case C-406/92 [1995] All ER (EC) 229, [1999] QB 515, [1999] 2 WLR 181, [1994] ECR I-5439, ECJ.
- i** *Main Schiffahrts-Genossenschaft eG (MSG) v Les Gravières Rhénanes SARL* Case C-106/95 [1997] All ER (EC) 385, [1997] QB 731, [1997] 3 WLR 179, [1997] ECR I-911, ECJ.  
*Meeth v Glacetal SARL* Case 23/78 [1978] ECR 2133, ECJ.  
*Meilicke v ADV/ORGAG AG* Case C-83/91 [1992] ECR I-4871, ECJ.

- Mulox IBC Ltd v Geels* Case C-125/92 [1994] IRLR 422, [1993] ECR I-4075, ECJ. **a**
- Overseas Union Insurance Ltd v New Hampshire Insurance Co* Case C-351/89 [1992] 2 All ER 138, [1992] QB 434, [1992] 2 WLR 586, [1991] ECR I-3317, ECJ.
- Pharmacia & Upjohn SA (formerly Upjohn SA) v Paranova A/S* Case C-379/97 [1999] All ER (EC) 880, [2000] Ch 571, [2000] 3 WLR 303, [1999] ECR I-6927, ECJ. **b**
- Pigs Marketing Board v Redmond* Case 83/78 [1978] ECR 2347, ECJ.
- Powell Duffryn plc v Petereit* Case C-214/89 [1992] ECR I-1745, ECJ.
- Pretore di Salò v Persons Unknown* Case 14/86 [1987] ECR 2545, ECJ.
- R v Medicines Control Agency, ex p Smith & Nephew Pharmaceuticals Ltd* Case C-201/94 (1996) 34 BMLR 141, [1996] ECR I-5819, ECJ. **c**
- Robards v Insurance Officer* Case 149/82 [1983] ECR 171, ECJ.
- Telemarsicabruzzo SpA v Circostel* Joined cases C-320/90 to C-322/90 [1993] ECR I-393, ECJ.
- Trasporti Castelletti Spedizioni Internazionali SpA v Hugo Trumpy SpA* Case C-159/97 [1999] ECR I-1597, ECJ. **d**
- Union Royale Belge des Sociétés de Football Association ASBL v Bosman, Royal Club Liégeois SA v Bosman, Union des Associations Européennes de Football v Bosman* Case C-415/93 [1996] All ER (EC) 97, [1995] ECR I-4921, ECJ.
- Van den Boogaard v Laumen* Case C-220/95 [1997] All ER (EC) 517, [1997] QB 759, [1997] ECR I-1147, ECJ. **e**

## Reference

By judgment of 25 March 2002, the Oberlandesgericht (Higher Regional Court) Innsbruck referred to the Court of Justice of the European Communities for a preliminary ruling under the Protocol of 3 June 1971 on the interpretation by the Court of Justice of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968, a number of questions on the interpretation of art 21 of the above-mentioned convention, as amended by the Convention on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland 1978, by the Convention on the Accession of the Hellenic Republic 1982, by the Convention on the Accession of the Kingdom of Spain and the Portuguese Republic 1989 and by the Convention on the Accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden 1996. Those questions were raised in proceedings between Erich Gasser GmbH (Gasser), a company incorporated under Austrian law, and MISAT Srl (MISAT), a company incorporated under Italian law, following a breakdown in their business relations. Written observations were submitted on behalf of: Gasser by K Schelling, Rechtsanwalt; MISAT by UC Walter, Rechtsanwältin; the Italian government by IM Braguglia, acting as agent, assisted by O Fiumara, Vice Avvocato Generale dello Stato; the United Kingdom government by K Manji, acting as agent, and by D Lloyd Jones QC; the Commission of the European Communities by A-M Rouchaud-Joët and S Grünheid, acting as agents. Oral observations were made on behalf of: Erich Gasser GmbH, the Italian government, the United Kingdom government and the Commission. The language of the case was German. The facts are set out in the opinion of the Advocate General. **f**

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**i**

a 9 September 2003. **The Advocate General (P Léger)** delivered the following opinion<sup>1</sup>.

1. This case concerns the interpretation of art 21 of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters<sup>2</sup>. That article, which deals with *lis pendens*, provides that, where  
b identical proceedings are brought before two courts in different member states, the court second seised must stay proceedings and refer the matter to the court first seised as soon as the latter has established its jurisdiction.

2. In this case, the Oberlandesgericht (Higher Regional Court) Innsbruck, Austria has asked the Court of Justice of the European Communities to give its first ruling on whether the court second seised must comply with art 21 of the  
c Brussels Convention where that court has exclusive jurisdiction to hear the case under an agreement conferring jurisdiction. It also asks whether that court may derogate from the requirements of that article where proceedings before the courts of the member state in which the court first seised is established are, in general, excessively long (see [2003] II Pr 216).

d I—LAW

3. The aim of the Brussels Convention, according to its preamble, is to facilitate the recognition and enforcement of judgments in accordance with art 293 EC (formerly art 220 of the EC Treaty), and to strengthen in the European Community the legal protection of persons therein established.  
e According to the relevant recital in that preamble, it is necessary for that purpose to determine the international jurisdiction of the courts of the contracting states.

4. The relevant provisions concern, on the one hand, jurisdiction and, on the other, the recognition in a contracting state of judgments delivered by the courts of another contracting state.

f 5. The provisions relating to jurisdiction are contained in Title II of the Brussels Convention.

6. Article 2 lays down the general rule that the courts of the state in which the defendant is domiciled are to have jurisdiction. Articles 5 and 6 provide the claimant with several options in the form of a number of special heads of jurisdiction. In particular, art 5 provides that, in matters relating to a contract,  
g the defendant may be sued in the courts for the place where the obligation which the action seeks to enforce was or should have been performed.

7. The Brussels Convention also lays down, in Sections 3 and 4 of Title II, mandatory rules of jurisdiction in matters relating to insurance and consumer contracts.

h 8. Furthermore, art 16 of the convention lays down rules governing exclusive jurisdiction. That article provides, for example, that, in proceedings which have

1 Original language: French.

i 2 (OJ 1972 L299 p 32). Convention as amended by the Convention on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Brussels Convention 1978 (OJ 1978 L304 p 1, and—amended text—p 77), by the Convention on the Accession of the Hellenic Republic to the Brussels Convention 1982 (OJ 1982 L388 p 1), by the Convention on the Accession of the Kingdom of Spain and the Portuguese Republic (OJ 1989 L285 p 1) and by the Convention on the Accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden to the Brussels Convention 1996 (OJ 1997 C15 p 1). A consolidated version of the convention, as amended by those four conventions of accession, is published in OJ 1998 C27 p 1 (hereinafter the Brussels Convention).



as their object rights in rem in immovable property, the courts of the contracting state in which the property is situated are to have exclusive jurisdiction, regardless of domicile. a

9. Articles 17 and 18 relate to prorogation of jurisdiction. Article 17 concerns agreements conferring jurisdiction. It is worded as follows:

‘(1) If the parties, one or more of whom is domiciled in a Contracting State, have agreed that a court or the courts of a Contracting State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have exclusive jurisdiction. Such an agreement conferring jurisdiction shall be either: b

(a) in writing or evidenced in writing, or c

(b) in a form which accords with practices which the parties have established between themselves, or

(c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned ... d

(3) Agreements ... conferring jurisdiction shall have no legal force if they are contrary to the provisions [laid down in matters relating to insurance and consumer contracts], or if the courts whose jurisdiction they purport to exclude have exclusive jurisdiction by virtue of Article 16 ...’ e

10. Article 18 provides:

‘Apart from jurisdiction derived from other provisions of this Convention, a court of a Contracting State before whom a defendant enters an appearance shall have jurisdiction. This rule shall not apply where appearance was entered solely to contest the jurisdiction, or where another court has exclusive jurisdiction by virtue of Article 16.’ f

11. The Brussels Convention is also intended to prevent irreconcilable judgments from being given. To that effect, art 21 is worded as follows:

‘Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Contracting States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established. g

Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court.’ h

12. The provisions concerning recognition and enforcement appear under Title III of the Brussels Convention. Article 27 provides:

‘A judgment shall not be recognised ...

(3) if the judgment is irreconcilable with a judgment given in a dispute between the same parties in the State in which recognition is sought ...’ i

13. In accordance with the first paragraph of art 28, ‘[m]oreover, a judgment shall not be recognised if it conflicts with the provisions ... [in matters relating to insurance and consumer contracts or with those referred to in art 16]’.

a II—FACTS AND PROCEDURE

14. Erich Gasser GmbH<sup>3</sup> is a company whose registered office is in Dornbirn, Austria. For several years, it sold children's clothing to MISAT Srl<sup>4</sup>, a company established in Rome, Italy. Early in the year 2000, contractual relations between the parties were broken off.

b 15. By application of 14 April 2000, MISAT brought an action against Gasser before the Tribunale civile e penale di Roma (Civil and Criminal District Court, Rome) seeking a ruling that the contract between them had terminated ipso jure. In the alternative, it sought from that court a declaration that the contract had been terminated following a disagreement, that no failure to perform the contract could be attributed to MISAT and that Gasser's conduct had been unlawful, and an order requiring Gasser to pay MISAT damages for the losses sustained and to reimburse certain costs.

c 16. By application of 4 December 2000, Gasser brought an action against MISAT before the Landesgericht (Regional Court) Feldkirch, Austria, for payment of outstanding invoices. Gasser contended that that court had jurisdiction on the ground that it was the court for the place of performance of the contract. Gasser also contended that that court had jurisdiction under an agreement conferring jurisdiction. In support of that contention, it argued that all the invoices issued to MISAT stated that the court with jurisdiction in the event of a dispute would be the court in whose jurisdiction Dornbirn is located, and that MISAT had accepted those invoices without disputing them. According to Gasser, this showed that, in accordance with their practice and the usage prevailing in trade and commerce between Austria and Italy, the parties had concluded an agreement conferring jurisdiction within the meaning of art 17 of the Brussels Convention.

d 17. MISAT pleaded that the Austrian court had no jurisdiction. It argued that the court of competent jurisdiction was that where the defendant was established, under the general rule laid down in art 2 of the Brussels Convention. It disputed the existence of an agreement conferring jurisdiction and stated that it had previously brought an action before the Tribunale civile e penale di Roma on the basis of the same business relationship.

e 18. The Landesgericht Feldkirch decided to stay proceedings, pursuant to art 21 of the Brussels Convention, until such time as the jurisdiction of the Tribunale civile e penale di Roma, the court first seised, had been established. It confirmed its own jurisdiction as the court for the place of performance of the contract, but it did not rule on the existence of an agreement conferring jurisdiction.

f 19. Gasser appealed against that decision to the Oberlandesgericht Innsbruck, contending that the Landesgericht Feldkirch should be declared to have jurisdiction and that the proceedings should not be stayed.

g 20. The Oberlandesgericht Innsbruck stated, first, that the proceedings before the Landesgericht Feldkirch and the Tribunale civile e penale di Roma had been brought by the same parties and must be regarded as having the same cause of action within the meaning of the court's case law, with the result that this was indeed a case of *lis pendens*.

i 21. It stated, next, that while the Landesgericht Feldkirch had pointed out that the invoices issued by Gasser to MISAT designated it as the court of

3 Hereinafter Gasser.

4 Hereinafter MISAT.

competent jurisdiction, it had not ruled on the other evidence put forward by Gasser as proof of the existence of an agreement conferring jurisdiction. a

22. In that regard, the Oberlandesgericht Innsbruck noted that, under sub-para (a), (b), and (c) of the first paragraph of art 17 of the Brussels Convention, an agreement conferring jurisdiction must be either in writing or evidenced in writing, or in a form which accords with the practices between the parties, or, in international trade or commerce, in a form which accords with a usage of which the parties were or ought to have been aware and which is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned. It took the view that the first two formal conditions relating to an agreement conferring jurisdiction were not fulfilled. It stated that the question none the less arose whether the conditions laid down in sub-para (c) of the first paragraph of art 17 were satisfied. It pointed out that, in its judgment in *Mainschiffahrts-Genossenschaft eG (MSG) v Les Gravières Rhénanes SARL*<sup>5</sup>, the court held that the fact that one of the parties repeatedly paid without objection invoices issued by the other party containing a jurisdiction clause may be deemed to constitute agreement to that clause, provided that such conduct is consistent with a practice in force in the area of international trade or commerce in which the parties in question are operating and the parties are or ought to have been aware of that practice. b

23. It stated that, if the existence of such an agreement were established, the Landesgericht Feldkirch would have exclusive jurisdiction to deal with the dispute under art 17 of the Brussels Convention. The question would then arise whether that court may review the jurisdiction of the Tribunale civile e penale di Roma. c

24. Lastly, the Oberlandesgericht Innsbruck noted Gasser's contention that its rights had been adversely affected by the excessive length of proceedings in Latin countries. d

### III—THE QUESTIONS REFERRED TO THE COURT OF JUSTICE e

25. It was in those circumstances that the Oberlandesgericht Innsbruck decided to refer the following questions to the Court of Justice for a preliminary ruling (see [2003] IL Pr 216 at 231–232): f

(1) May a court which refers questions to the Court of Justice for a preliminary ruling do so purely on the basis of a party's (unrefuted) submissions, whether they have been contested or not contested (on good grounds), or is it first required to clarify those questions as regards the facts by the taking of appropriate evidence (and if so, to what extent)? g

(2) May a court other than the court first seised, within the meaning of the first paragraph of Art. 21 of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters ["the Brussels Convention"] review the jurisdiction of the court first seised if the second court has exclusive jurisdiction pursuant to an agreement conferring jurisdiction under Art. 17 of the Brussels Convention, or must the agreed second court proceed in accordance with Art. 21 of the Brussels Convention notwithstanding the agreement conferring jurisdiction? h

(3) Can the fact that court proceedings in a contracting state take an unjustifiably long time (for reasons largely unconnected with the conduct of the parties) so that material detriment may be caused to one party, have i

<sup>5</sup> Case C-106/95 [1997] All ER (EC) 385, [1997] ECR I-911.



a the consequence that the court other than the court first seised, within the meaning of the first paragraph of Art. 21, is not allowed to proceed in accordance with that provision?

b (4) Do the legal proceedings provided for by Italian Law No. 89 of March 24, 2001 justify the application of Art. 21 of the Brussels Convention even if a party is at risk of detriment as a consequence of the possible excessive length of proceedings before the Italian court and therefore, as suggested in Question 3, it would not actually be appropriate to proceed in accordance with Art. 21?

(5) Under what conditions must the court other than the court first seised refrain from applying Art. 21 of the Brussels Convention?

c (6) What course of action must the court follow if, in the circumstances described in Question 3, it is not allowed to apply Art. 21 of the Brussels Convention?

d Should it be necessary in any event, even in the circumstances described in Question 3, to proceed in accordance with Art. 21 of the Brussels Convention, there is no need to answer Questions 4, 5 and 6.'

#### IV—ANALYSIS

##### A—*The first question*

e 26. By its first question, the referring court seeks to ascertain whether a national court may ask the Court of Justice to interpret the Brussels Convention on the basis of the submissions of a party the merits of which that national court has not assessed. The national court is thus referring to the fact that the second question is based on the premiss that the court in whose jurisdiction Dornbirn is located has jurisdiction to give judgment in the main proceedings under an agreement conferring jurisdiction within the meaning of art 17 of the Brussels Convention, even though the existence of such an agreement conferring jurisdiction has not been confirmed by the court hearing the substance of the case.

f 27. I consider that the answer to the first question referred can be inferred from the court's case law on the admissibility of questions referred for a preliminary ruling both under the Protocol of 3 June 1971 concerning the interpretation by the Court of Justice<sup>6</sup> of the Brussels Convention (the Protocol), and under art 234 EC (formerly art 177 of the EC Treaty).

g 28. Article 3 of the Protocol provides that, where a question relating to the interpretation of the convention is raised in a case pending, the court seised may or must request the Court of Justice to give a ruling on that question if it considers that a decision on the matter is necessary to enable it to give judgment. Article 3 of the Protocol therefore follows the same logic as art 234 EC. In both cases, the reference for a preliminary ruling is intended to enable the Court of Justice to provide the national court with the interpretation it needs to give a judgment applying the provision whose interpretation is sought<sup>7</sup>. The court, logically, inferred from this that its case law concerning its jurisdiction to give preliminary rulings under art 234 EC can be transposed to requests for interpretation of the Brussels Convention<sup>8</sup>.

6 OJ 1975 L204 p 28, as amended by the conventions on accession.

7 See the opinion of Advocate General Tesouro in *Kleinwort Benson Ltd v Glasgow City Council* Case C-346/93 [1995] All ER (EC) 514, [1995] ECR I-615 (para 17).

8 See *Van den Boogaard v Laumen* Case C-220/95 [1997] All ER (EC) 517, [1997] ECR I-1147 (para 16), *Farrell v Long* Case C-295/95 [1997] All ER (EC) 449, [1997] ECR I-1683 (para 11), *Trasporti Castelletti*

29. According to settled case law, the procedure laid down in art 234 EC constitutes an instrument of co-operation between the Court of Justice and the national courts. Within the context of this co-operation, it is for the national court before which the dispute has been brought, and which must assume the responsibility for the subsequent judicial decision, to determine both the need for a preliminary ruling and the relevance of the questions which it submits to the Court of Justice. Consequently, since the questions referred concern the interpretation of Community law, the court is, in principle, obliged to give a ruling<sup>9</sup>.

30. The Court of Justice has consistently inferred from the fact that jurisdiction lies in principle with the national court that it is for that court, which alone has a direct knowledge of the facts of the main proceedings and of the arguments of the parties, to decide, in the light of considerations of procedural economy and expediency, at what stage in the proceedings it is necessary to submit a question to the Court of Justice for a preliminary ruling<sup>10</sup>.

31. However, the determinations made by the national court in exercising that jurisdiction may be subject to review by the Court of Justice. The latter has thus held that, in exceptional circumstances, it should examine the conditions in which the case was referred to it by the national court in order to determine whether it has jurisdiction<sup>11</sup>. It has held that the spirit of co-operation which must prevail in the preliminary ruling procedure requires the national court, for its part, to have regard to the function entrusted to the Court of Justice, which is to assist in the administration of justice in the member states and not to deliver advisory opinions on general and hypothetical questions<sup>12</sup>.

32. In this respect, it has pointed out that, in order to enable it to provide the national court with an interpretation of Community law which will be of use to it in giving judgment in the main proceedings, the national court must define the legal context in which the interpretation requested should be placed. With that in mind, the court has taken the view that it might be convenient, depending on the circumstances and without calling into question the principle that the referring court has exclusive jurisdiction to determine at what stage of the proceedings the reference for a preliminary ruling should be made, for the facts in the case to be established and for questions of purely national law to be

*Spedizioni Internazionali SpA v Hugo Trumpy SpA* Case C-159/97 [1999] ECR I-1597 (para 14) and *Gantner Electronic GmbH v Basch Exploitation Maatschappij BV* Case C-111/01 [2003] ECR I-4207 (para 38).

<sup>9</sup> See, in particular, *Pigs Marketing Board v Redmond* Case 83/78 [1978] ECR 2347 (para 25), *Union Royale Belge des Sociétés de Football Association ASBL v Bosman*, *Royal Club Liégeois SA v Bosman*, *Union des Associations Européennes de Football v Bosman* Case C-415/93 [1996] All ER (EC) 97, [1995] ECR I-4921 (para 59) and *Arkkitehtuuritoimisto Riitta Korhonen Oy v Varkauden Taitotalo Oy* Case C-18/01 [2003] ECR I-5321 (para 19). See also, with regard to the Brussels Convention, the *Castelletti* case (para 14).

<sup>10</sup> See *Irish Creamery Milk Suppliers Association v Ireland*, *Doyle v An Taoiseach* Joined cases 36/80 and 71/80 [1981] ECR 735 (para 7), *Campus Oil Ltd v Minister for Industry and Energy* Case 72/83 [1984] ECR 2727 (para 10), *Pretore di Salò v Persons Unknown* Case 14/86 [1987] ECR 2545 (para 11), *Høj Pedersen v Kvickly Skive* Case C-66/96 [1999] All ER (EC) 138, [1998] ECR I-7327 (para 46) and *Jämställthetsombudsmannen v örebro Läns Landsting* Case C-236/98 [2000] IRLR 421, [2000] ECR I-2189 (para 32).

<sup>11</sup> See *Bosman's* case (para 60) and the *Gantner Electronic* case (para 35).

<sup>12</sup> See *Foglia v Novello* Case 104/79 [1980] ECR 745 (para 11), *Foglia v Novello* Case 244/80 [1981] ECR 3045 (para 18), *Robards v Insurance Officer* Case 149/82 [1983] ECR 171 (para 19), *Meilicke v ADV/ORG AG* Case C-83/91 [1992] ECR I-4871 (para 25) and *Criminal Proceedings against der Weduwe Case* C-153/00 [2002] ECR I-11319 (paras 32, 33).

a settled at the time the reference is made to the Court of Justice, so as to enable the latter to take cognisance of all the features of fact and of law which may be relevant to the interpretation which it is called upon to give<sup>13</sup>. Furthermore, it is essential for the national court to explain why it considers that an answer to its questions is necessary<sup>14</sup>.

b 33. The court has already had occasion to determine whether the above-mentioned conditions are satisfied and to consider itself to have jurisdiction in the case of a question referred to it for a preliminary ruling on the basis of a premiss the well-foundedness of which is a precondition for applying the provision whose interpretation has been sought, for the purpose of giving judgment in the main proceedings.

c 34. Thus, in *Enderby v Frenchay Health Authority*<sup>15</sup>, the Court of Appeal (England and Wales) asked the Court of Justice whether the principle of equal pay for male and female workers for equal work or work of equal value, laid down in art 141 EC (formerly art 119 of the EC Treaty), required an employer to justify objectively a difference in pay between the job of principal speech therapist and that of principal pharmacist. The Court of Appeal had proceeded d on the premiss that those two different jobs were of equal value.

35. In its observations to the court, the German government submitted that the court could not rule on the question referred to it without first determining whether the two jobs at issue were equivalent. Since, in its view, they were not, there could be no infringement of art 141 EC.

e 36. The court rejected that argument. It stated that the Court of Appeal had decided in accordance with the British legislation and with the agreement of the parties to examine the question of the objective justification of the difference in pay before that of the equivalence of the jobs in issue, which might require more complex investigation. It was for that reason that the questions referred were based on the assumption that those jobs were of equal value<sup>16</sup>. It went on to say (at para 12) that, where the court, as in that case, f receives a request for interpretation of Community law which is not manifestly unrelated to the reality or the subject matter of the main proceedings, it must reply to that request and is not required to consider the validity of a hypothesis which it is for the referring court to review subsequently if that should prove to be necessary<sup>17</sup>.

g 37. The court adopted the same position in its judgment in the *JämO* case, cited in footnote 10, above, in a similar context<sup>18</sup>. It held, in particular, that it is

h 13 See the *Irish Creamery* case (para 6), *Dias v Director da Alfândega do Porto* Case C-343/90 [1992] ECR I-4673 (para 19), and the above-mentioned judgments in *Meilicke's* case (para 26), *Høj Pedersen's* case (para 45) and the *JämO* case (para 31). According to what is now settled case law, 'the need to provide an interpretation of Community law which will be of use to the national court makes it necessary that the national court define the factual and legislative context of the questions it is asking or, at the very least, explain the factual circumstances on which those questions are based'. See, in particular, Joined Cases C-320/90 to C-322/90 *Telemarsicabruzzo SpA v Circostel* Joined cases C-320/90 to C-322/90 [1993] ECR I-393 (para 6) and *Association Basco-Béarnaise des Opticiens Indépendants v Prefet des Pyrénées-Atlantiques* Case C-109/99 [2000] ECR I-7247 (para 42).

14 See *Bertini v Regione Lazio* Joined cases 98/85, 162/85 and 258/85 [1986] ECR 1885 (para 6) and *Dias'* case, cited above (para 19).

j 15 Case C-127/92 [1994] 1 All ER 495, [1993] ECR I-5535.

16 See *Enderby's* case (para 11).

17 See footnote above.

18 In that case, the Arbetsdomstolen (Labour Court) referred to the court for a preliminary ruling several questions intended to enable it to determine whether an employer had paid midwives less than a clinical technician, without adopting a position as to whether the work of those two categories of employee was equivalent.



for the national court, which alone has a direct knowledge of the facts of the case and of the arguments of the parties and which must assume responsibility for giving judgment in the case, to decide at what stage in the proceedings it requires a preliminary ruling and to determine the relevance of the questions it refers to the court<sup>19</sup>. In that case, it was also argued that determining whether the work was of equal value would require complex and costly investigations<sup>20</sup>.

38. Like the Commission of the European Communities, I consider that that case law can be transposed to the present case. First, although it is regrettable that the referring court has not provided a detailed explanation in this regard, I share the Commission's view that determining the existence in the particular trade or commerce concerned of a usage in international trade or commerce which is widely known to, and regularly observed by, parties to contracts of the type involved may indeed necessitate long and costly investigations.

39. Second, it is clear from the order for reference that the way in which the dispute in the main proceedings is dealt with by the Oberlandesgericht Innsbruck will be completely different depending on whether the court's answer to the question whether the court second seised may derogate from the requirements of art 21 of the Brussels Convention where that court has jurisdiction pursuant to an agreement conferring jurisdiction is in the affirmative or in the negative. If that question is answered in the affirmative, the referring court will have to rule on whether such an agreement exists. If the existence of that agreement is established, the Austrian court will have exclusive jurisdiction to give judgment on the dispute between the parties. Conversely, if the answer is in the negative, the examination of the existence of an agreement conferring jurisdiction will no longer be relevant and art 21 of the Brussels Convention will have to apply.

40. Last, the referring court has explained why, in the light of the judgment in the MSG case, cited in footnote 5, above, MISAT's acceptance of invoices containing a clause designating the court in whose jurisdiction Dornbirn is located as having jurisdiction to rule on any dispute between the parties must be regarded as initial evidence of the existence of an agreement conferring jurisdiction within the meaning of sub-para (c) of the first paragraph of art 17 of the Brussels Convention. The other conditions laid down in that provision, namely that the usage in the particular trade or commerce concerned must be one which is accepted in international trade or commerce and of which the parties are or ought to have been aware, are not disputed in a specific and reasoned manner by MISAT. There is therefore nothing to indicate that the premiss relating to the existence of an agreement conferring jurisdiction is manifestly erroneous.

41. The second question, which seeks to ascertain whether the existence of an agreement conferring jurisdiction permits derogation from art 21 of the Brussels Convention, is therefore highly material to the decision to be given in the main proceedings. The action taken by the referring court in asking the Court of Justice about the effects of an agreement conferring jurisdiction, before starting the investigations which might be required in the present case to establish the existence of such an agreement, cannot therefore be regarded, in my view, as a failure by that court to discharge the duty to co-operate which underpins the preliminary ruling procedure.

<sup>19</sup> See para 32.

<sup>20</sup> See para 29.

- a 42. In the light of the foregoing, I propose that the answer to the first question should be that it is for the national court to determine whether to refer a question to the Court of Justice for a preliminary ruling on the basis of a party's submissions or whether it is necessary to verify those submissions first. It is nevertheless incumbent on the national court to provide the Court of Justice with the factual and legal information enabling it to give an answer which will be of use to it in giving judgment in the main proceedings and to explain why it considers an answer to its questions to be necessary.
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B—*The second question*

- c 43. By this question, the referring court is essentially asking whether art 21 of the Brussels Convention must be interpreted as meaning that a court second seised which has exclusive jurisdiction under an agreement conferring jurisdiction may, by way of derogation from that article, give judgment in the case without waiting for a declaration from the court first seised that it has no jurisdiction. In other words, the referring court seeks to ascertain whether art 17 of the Brussels Convention constitutes a derogation from art 21 of the same convention.
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- e 44. Article 21 of the Brussels Convention is intended, in the interests of the sound administration of justice within the Community, to prevent parallel proceedings before the courts of different contracting states and to avoid conflicts between decisions which might result therefrom. Those rules are therefore designed to preclude, so far as possible and from the outset, the possibility of a situation arising such as that referred to in art 27(3) of the convention, that is to say the non-recognition of a judgment on account of its irreconcilability with a judgment given in proceedings between the same parties in the state in which recognition is sought<sup>21</sup>.

- f 45. In pursuit of the objectives set out above, art 21 provides a simple system for determining at the start of proceedings which of the courts seised will ultimately have jurisdiction to give judgment in the case. That system is based on the chronological order in which those courts are seised. It requires the court second seised to stay the proceedings until such time as the court first seised has given a decision as to its own jurisdiction. It is this effect of blocking the proceedings before the court second seised, an integral part of art 21 of the Brussels Convention, which is at the centre of these preliminary ruling proceedings.
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- h 46. In its observations on the third question, Gasser, in arguing that that article should not be applied, asks the court to reconsider its case law on the subject, which began with the judgment in *Gubisch Maschinenfabrik KG v Palumbo*<sup>22</sup>, in which the court held (at paras 15–17) that an action for the rescission or discharge of a contract involves the same cause of action as an action to enforce the same contract<sup>23</sup>. It was in the light of that case law that the referring court was able to consider that the action brought before the Landesgericht Feldkirch involved the same cause of action as the action brought previously before the Tribunale civile e penale di Roma.

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21 See *Overseas Union Insurance Ltd v New Hampshire Insurance Co* Case C-351/89 [1992] 2 All ER 138, [1991] ECR I-3317 (para 16).

22 Case 144/86 [1987] ECR 4861.

23 That case concerned an action seeking to have a machine sales contract declared void or, in the alternative, rescinded, and an action for payment for the machine at issue.

47. I take the view that there is no reason in these proceedings for the court to depart from that broad interpretation of cause of action within the meaning of art 21 of the Brussels Convention. First, although it has generally been contested by legal writers, that interpretation was implicitly confirmed in the judgment in the *Overseas Union Insurance* case, cited in footnote 21, above<sup>24</sup>. It was clearly maintained in the judgment in *The Maciej Rataj, Tetry (cargo owners) v Maciej Rataj (owners)*<sup>25</sup>, in which the court held that an action seeking to have the defendant held liable for causing loss and ordered to pay damages has the same cause of action and the same object as earlier proceedings brought by that defendant seeking a declaration that he is not liable for that loss<sup>26</sup>. It was reiterated more recently in the judgment in the *Gantner Electronic* case, cited in footnote 8, above<sup>27</sup>.

48. Furthermore, another solution to the problem raised by Gasser may be inferred from case law. In its judgment in the *Overseas Union Insurance* case, cited in footnote 21, above, the court held that the requirements of art 21 of the Brussels Convention may be derogated from where the court second seised has exclusive jurisdiction to hear the case. I consider that that case law may be extended to circumstances in which the court second seised has exclusive jurisdiction under an agreement conferring jurisdiction.

49. It is appropriate to recall the context in which the judgment in the *Overseas Union Insurance* case, cited in footnote 21, above, was delivered. In that case, the court was faced with the following situation. In 1980, New Hampshire Insurance Co<sup>28</sup>, registered in England as an overseas company, reinsured with three companies also registered in England a risk which it had covered for the benefit of the French company Nouvelles Galeries Réunies. In July 1986, the three reinsurers ceased payment of claims. By applications lodged in 1987 and in February 1988, New Hampshire brought actions against the reinsurers for enforced performance of the contract before the Tribunal de Commerce (Commercial Court), Paris. On 6 April 1988, the three reinsurers themselves brought an action against New Hampshire before the Commercial Court of the Queen's Bench Division seeking a declaration that they were no longer bound to perform any commitments which might arise from the reinsurance policies. That court decided to stay the proceedings pursuant to the second paragraph of art 21 of the Brussels Convention until such time as the French court had given a decision on the question of its own jurisdiction in the disputes pending before it.

50. The three reinsurers appealed against that decision to the Court of Appeal, which referred to the Court of Justice questions seeking to ascertain, in particular, whether art 21 must be interpreted as meaning that the court second seised may only stay proceedings where it does not decline jurisdiction, or whether that provision authorises or obliges it to examine the jurisdiction of the court first seised, and to what extent<sup>29</sup>.

24 See para 16.

25 Case C-406/92 [1995] All ER (EC) 229, [1994] ECR I-5439.

26 See para 45.

27 See para 25.

28 Hereinafter New Hampshire.

29 In order fully to understand the wording of the questions raised by the referring court, it must be remembered that art 21 of the Brussels Convention, in the version applicable in that case, read as follows: 'Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Contracting States, any court other than the court first seised shall of its own motion decline jurisdiction in favour of that court. A court which would be required to



a 51. The Court of Justice ruled that—

‘without prejudice to the case where the court second seised has exclusive jurisdiction under the [Brussels Convention] and in particular under art 16 thereof, art 21 of the Convention must be interpreted as meaning that, where the jurisdiction of the court first seised is contested, the court second seised may, if it does not decline jurisdiction, only stay proceedings and may not itself examine the jurisdiction of the court first seised.’<sup>30</sup>

c 52. It follows from the court’s answer that a court second seised which has exclusive jurisdiction to hear the case, in particular under art 16 of the Brussels Convention, is not obliged to stay proceedings until such time as the court first seised has declared that it has no jurisdiction. The court second seised may therefore continue to examine the merits of the case and give judgment in it.

d 53. In this case, that judgment has been interpreted in different ways by those who have submitted observations as to whether art 17, like art 16, may constitute a derogation from the requirements of art 21 of the Brussels Convention. The Commission, the Italian government and MISAT consider that the derogation thus accepted by the court in that judgment does not apply to art 17 of the convention.

e 54. The Commission takes the view that such a derogation is justified in the case of art 16 by the first paragraph of art 28 of the Brussels Convention, according to which decisions given by a court in breach of art 16 cannot be recognised in any other contracting state. It would therefore be absurd to require the court with exclusive jurisdiction under art 16 to stay proceedings, since a decision given by the court first seised, which would by definition have no jurisdiction, could take effect only in the state where it was given. The first paragraph of art 28 of the Brussels Convention, it submits, is not applicable where the court second seised has jurisdiction under an agreement conferring jurisdiction within the meaning of art 17.

f 55. The Commission considers that, since it cannot be completely ruled out that the court first seised might make a different assessment as to existence of an agreement conferring jurisdiction from that of the court second seised, contradictory decisions on the substance of the case might ensue if the court second seised did not stay proceedings. The parties would then find themselves in the situation envisaged in art 27(3) of the Brussels Convention, which states that a judgment given in another contracting state is not recognised if it is irreconcilable with a judgment given in a dispute between the same parties in the state in which recognition is sought, a situation that art 21 specifically seeks to avoid.

h 56. In addition, it points out that the jurisdiction conferred by art 17 is less effective than that arising from art 16 because the parties cannot refrain from applying the latter article, whereas they can always terminate an agreement

i decline jurisdiction may stay its proceedings if the jurisdiction of the other court is contested.’ The new wording of art 21, to the effect that, in the event of *lis pendens*, the court second seised must stay proceedings until such time as the jurisdiction of the court first seised is established, in no way changes the conclusions to be drawn from the judgment in the *Overseas Union Insurance* case with respect to the answer to the question referred in this case. This new wording, which derives from the 1989 accession convention, does not change the meaning or the scope of that article but seeks to ensure that the court second seised does not decline jurisdiction to hear the case before being certain that the court first seised has jurisdiction to hear it, so as to avoid any jurisdictional vacuum.

conferring jurisdiction or waive their right to rely on it. Under art 18 of the Brussels Convention, if the defendant enters an appearance before the court first seised without raising an objection as to lack of jurisdiction on the basis of an agreement conferring jurisdiction, that court may hear and determine the case. a

57. I do not share that view. Like Gasser and the United Kingdom government, I consider that art 17 of the Brussels Convention may constitute a derogation from art 21 thereof. That analysis is based on the following considerations. First, courts designated under an agreement conferring jurisdiction in accordance with art 17 have jurisdiction which may be described as exclusive. Second, the argument that the court second seised is obliged to comply with the requirements of art 21 even if it has exclusive jurisdiction under an agreement conferring jurisdiction is such as to undermine the effectiveness of art 17 and the legal certainty that attaches to it. Third, the risk of irreconcilable decisions can be significantly reduced. b  
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58. First, the most important point to bear in mind is that, in the *Overseas Union Insurance* case (para 26), the court ruled that the requirements of art 21 of the Brussels Convention might be derogated from in 'the case where the court second seised has exclusive jurisdiction under the convention and in particular under art 16 thereof'. In my view, there are two points to be made about the wording of that derogation. The first is that, by using the adverb 'in particular', the court meant to indicate that that derogation is not confined solely to the cases of exclusive jurisdiction covered by art 16. The second is that the court likewise did not refer, as it could have done, only to the cases of exclusive jurisdiction covered by the first paragraph of art 28 of the Brussels Convention, namely the heads of jurisdiction provided for in matters of insurance or consumer contracts or by art 16. There is therefore nothing in the judgment in the *Overseas Union Insurance* case to suggest that the exclusive jurisdiction referred to in art 17 is excluded from the derogation from the requirements of art 21, which was accepted by the court in that judgment. d  
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59. Next, it should be pointed out that, since the court was not asked a question on this matter, it gave no explanation of the grounds capable of justifying that derogation. I take the view that that derogation can be explained as follows. Since the court first seised can only declare that it has no jurisdiction, it is pointless, in such a situation, to oblige the court second seised to stay proceedings. In other words, where the court second seised has exclusive jurisdiction, there is no *lis pendens*, since this requires that the two courts seised of the same dispute should both have jurisdiction to hear the case<sup>31</sup>. g

60. That reasoning can be transposed to art 17 of the Brussels Convention. As the wording of that article makes clear, the court or courts designated by the parties pursuant to that article 'shall have exclusive jurisdiction'. Read in conjunction with art 18 of the Brussels Convention, art 17 means that, where the parties are bound by an agreement conferring jurisdiction under that article, any other court seised by one of the parties has no jurisdiction, otherwise than with the consent of the defendant. It follows that if, as appears to be the situation here, the defendant contests the jurisdiction of the court first seised by the other party in breach of an agreement conferring jurisdiction, that court must, on the basis of that clause, declare that it has no h  
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<sup>31</sup> See, in that regard, H Gaudemet-Tallon *Compétence et exécution des jugements en Europe* (3rd edn, 2002) pp 260–263 (paras 323, 324).

a jurisdiction. The Schlosser report<sup>32</sup> states that that court must even do so of its own motion if the defendant does not enter an appearance<sup>33</sup>.

b 61. In such circumstances, the jurisdiction of the court designated by the parties in the agreement conferring jurisdiction does indeed preclude the jurisdiction of the courts designated under the Brussels Convention by the general rule laid down in art 2 and the rules of special jurisdiction contained in arts 5 and 6<sup>34</sup>. In this respect, the effects of art 17 are therefore similar to those of art 16. It may therefore seem just as pointless to require the court second seised to stay proceedings when its jurisdiction derives from art 17 as when it is based on art 16.

c 62. Second, such an obligation would be liable to jeopardise the effectiveness of art 17 and the legal certainty which attaches to it.

d 63. For the purposes of determining the effectiveness of art 17 of the Brussels Convention, it should be borne in mind that that article is intended to leave room for the voluntary prorogation of jurisdiction. It is therefore the consensus between the parties which permits derogation from the rules of general and special jurisdiction laid down in arts 2, 5 and 6 of the Brussels Convention. Consequently, the requirement of their consent to this exceptional attribution of jurisdiction is inherent in the spirit of that article. Accordingly, in its judgments in *Estasis Salotti di Colzani Aimo e Gianmario Colzani v RüWA Polstereimaschinen GmbH*<sup>35</sup> and *Galleries Segoura SPRL v Bonakdarian*<sup>36</sup>, the court held that art 17 of the Brussels Convention requires the court seised to examine whether the clause which confers jurisdiction on it was indeed the result of consent between the parties<sup>37</sup>.

e 64. Such consent by the parties is also the basis for agreements conferring jurisdiction concluded in accordance with a usage in international trade or commerce. That reference to a usage in international trade or commerce was of course added in the 1978 accession convention to make the formal conditions originally laid down in the Brussels Convention more flexible, in other words an agreement concluded in writing or a verbal agreement evidenced subsequently in writing<sup>38</sup>. However, the court has held that, in spite of that new flexibility, real consent remains one of the objectives of art 17. That requirement of real consent is justified by the concern to protect the weaker party to the contract by preventing jurisdiction clauses, incorporated in a contract by one party, from going unnoticed<sup>39</sup>. The court has thus held that the contracting parties' consent to a jurisdiction clause is presumed to exist

h 32 Report by Professor Schlosser on the Convention on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice (OJ 1979 C59 p 71).

33 See para 22.

34 In that regard, see *Meeth v Glacetal SARL* Case 23/78 [1978] ECR 2133 (para 5).

i 35 Case 24/76 [1976] ECR 1831.

36 Case 25/76 [1976] ECR 1851.

37 See paras 7 and 6 respectively.

38 For an overview of the various versions of art 17 of the Brussels Convention, from the first one in 1968 to that resulting from the San Sebastián Convention of 26 May 1989, see my opinion in the *Castelletti* case, cited in footnote 8, above (paras 5–7).

39 See the *MSG* case (para 17) and the *Castelletti* case (para 19).



where their conduct is consistent with a usage which governs the branch of international trade or commerce in which they operate and of which they are, or ought to have been, aware<sup>40</sup>. a

65. It follows that art 17 upholds the autonomy of the consensus formed between the parties by conferring exclusive jurisdiction on the courts so designated by them, by way of derogation from the rules of jurisdiction laid down by the Brussels Convention, but subject to those contained in the fourth paragraph of that article. As the court has held, art 17 is intended to designate, clearly and precisely, a court in a contracting state which is to have exclusive jurisdiction in accordance with the consensus formed between the parties, which is to be expressed in accordance with the strict requirements as to form laid down therein<sup>41</sup>. Article 17 thus seeks to secure legal certainty by enabling the parties to determine which court will have jurisdiction. b c

66. In this way, art 17 is entirely in harmony with the objectives of the Brussels Convention. Indeed, as the court has consistently held, the convention seeks to unify the rules on jurisdiction of the contracting states' courts, so as to avoid as far as possible the multiplication of heads of jurisdiction in relation to one and the same legal relationship and to reinforce the legal protection available to persons established in the Community by, at the same time, allowing the claimant easily to identify the court before which he may bring an action and the defendant reasonably to foresee the court before which he may be sued<sup>42</sup>. d

67. If, however, under art 21 of the Brussels Convention, the court with exclusive jurisdiction is obliged to stay proceedings until such time as the court first seised declares that it has no jurisdiction, the effectiveness of art 17 and, thus, the legal certainty to which it contributes would, in my view, be seriously jeopardised. For, in such a situation, a party who, in breach of his obligations under the agreement conferring jurisdiction, commenced proceedings first and did so before a court which he knew to have no jurisdiction could unreasonably delay judgment on the substance of a case in which he knew he would be unsuccessful. A party who failed to discharge his commitments in that way, by seising a court other than the one designated in the agreement conferring jurisdiction, would therefore derive an advantage from such a failure. e f

68. That is a disturbing consequence as far as principles are concerned and runs the risk of encouraging dilatory conduct. A party seeking to delay judgment on the substance of a case might thus be encouraged to take the initiative and bring an action before a court which has no jurisdiction and which is less convenient for the other party, so as to bring to a halt any action based on the same contract until such time as that court declares that it has no jurisdiction. In that regard, I share the view of the United Kingdom government that that risk is all the more worthy of consideration since the legal systems of the contracting states generally allow proceedings to be brought for a declaration of non-liability. g h

69. Unlike the Commission, I do not consider this problem to be attributable solely to the domestic judicial systems of the member states and the speed with which national courts seised in breach of an agreement conferring jurisdiction are able to give a decision as to their jurisdiction. After all, however quickly i

40 See the *Castelletti* case (para 21).

41 See *Benincasa v Dentalkit Srl* Case C-269/95 [1998] All ER (EC) 135, [1997] ECR I-3767 (para 29).

42 See *Effer SpA v Kantner* Case 38/81 [1982] ECR 825 (para 6), *Mulox IBC Ltd v Geels* Case C-125/92 [1994] IRLR 422, [1993] ECR I-4075 (para 11) and *Benincasa's case* (para 26).

a such a decision can be given, the defendant can still avail himself of all the remedies available under national law in order to put off the moment when the decision as to that court's lack of jurisdiction becomes final. I therefore take the view that the problem lies primarily in the interpretation of the Brussels Convention.

b 70. That is why I propose that the court should adopt a solution which can ensure the effectiveness of art 17 and the legal certainty to which it contributes. Indeed, a solution of this kind seems to me to be in keeping with the case law on the interpretation of that article, according to which its interpretation must respect the consensus of the parties. Accordingly, in its judgment in *Elefanten Schuh GmbH v Jacqmain*<sup>43</sup>, the court held that the legislation of a contracting state cannot allow the validity of an agreement conferring jurisdiction to be called in question solely on the ground that the language used is not that prescribed by that legislation. More recently, in its judgment in *Benincasa's* case, cited in footnote 41, above, the court found that a court in a contracting state which is designated in a clause conferring jurisdiction validly concluded under art 17 of the Brussels Convention also has exclusive jurisdiction where the action seeks a declaration that the contract containing that clause is void. According to the court (at para 29), the—

e 'legal certainty which that provision seeks to secure could easily be jeopardised if one party to the contract could frustrate that rule of the [Brussels Convention] simply by claiming that the whole of the contract was void on grounds derived from the applicable substantive law.'<sup>44</sup>

f 71. Furthermore, that interpretation has the advantage of taking into consideration the requirements of international trade or commerce. I support the argument put forward by the United Kingdom government that the sound development of international commercial relations requires that companies be able to trust the agreements between them. That requirement also extends to agreements by which the parties determine which courts will be responsible for settling disputes arising in the performance of their reciprocal obligations. Lastly, it seems undeniable that a delay in the settlement of those disputes can result in significant losses for economic operators, particularly where they relate to the payment of invoices for small and medium-sized enterprises. In that regard, the solution I propose is also in keeping with the intentions of those who drafted the Brussels Convention, since it was precisely in order to satisfy the requirements of international trade and commerce that, in 1978, they made the formal rules contained in art 17 more flexible by adding to the original two rules a reference to usage in international trade or commerce<sup>45</sup>. If the court accepts that, where a court is the court second seised and has exclusive jurisdiction under an agreement conferring jurisdiction it may continue to examine the substance of the dispute without waiting for a declaration from the court first seised that it has no jurisdiction, it will indisputably facilitate the implementation of agreements conferring jurisdiction incorporated in contractual documents or documents issued in the context of those relations, such as invoices.

i 72. Third, I consider that the risk of irreconcilable judgments being delivered can be significantly reduced.

43 Case 150/80 [1981] ECR 1671.

44 See also *Coreck Maritime GmbH v Handelsveem BV* Case C-387/98 [2000] ECR I-9337 (para 14).

45 See the *Schlosser Report*, cited in footnote 32, above (para 179).

73. In order to counter that risk, the United Kingdom government proposes that the Court of Justice rule that a court first seised whose jurisdiction is contested in reliance on a clause conferring jurisdiction must stay proceedings until the court which is designated by that clause and is the court second seised has given a decision as to its jurisdiction. a

74. I do not indorse such a solution. In my view, it might encourage the very delaying tactics we are seeking to avoid. It would allow an unscrupulous party to contest the jurisdiction of the court before which proceedings had been brought against him under arts 2, 5 or 6 of the Brussels Convention by the artifice of alleging the existence of an agreement conferring jurisdiction and to bring an action before the court supposedly designated in order deliberately to delay judgment in the case until such time as that court had declared that it had no jurisdiction. b  
c

75. In point of fact, the risk of irreconcilable judgments being given and, consequently, the resultant difficulties associated with recognition and enforcement, are inherent in any derogation from art 21 of the Brussels Convention. Such a risk also exists in the case of art 16. Thus, the question whether the dispute falls within the scope of that article may itself be assessed differently by the two courts seised<sup>46</sup>. Also, if the court first seised declares that it has jurisdiction and gives a decision on the substance of the case which is irreconcilable with that given by the court second seised, which has exclusive jurisdiction under art 16, the decision of the latter court cannot be recognised in the contracting state of the court first seised, by virtue of art 27(3) of the Brussels Convention. d  
e

76. Consequently, the fact that determining the existence of an agreement conferring jurisdiction, in particular in the form required by sub-para (c) of the first paragraph of art 17, may sometimes necessitate complex investigations does not seem to me to justify the general exclusion of art 17 from the derogation from art 21 which has been accepted by the court. The same is true, as I see it, of the fact that art 28 of the Brussels Convention does not cover art 17, with the result that the recognition and enforcement, in other contracting states, of a decision given by a court second seised which has exclusive jurisdiction under that article might be precluded by a contrary decision of the court first seised if the latter decision was delivered first. f

77. What matters, in my opinion, is that the risk of irreconcilable judgments can be significantly reduced. I consider such a reduction to be perfectly possible given that, pursuant to the case law of the Court of Justice, the courts concerned must assess the validity of the contested agreement conferring jurisdiction in accordance with the same principles and the same conditions, provided that the court second seised refrains from complying with the requirements of art 21 only after having made absolutely sure that it has exclusive jurisdiction. g  
h

78. On the first point, the court's case law shows that an 'agreement conferring jurisdiction' must be regarded as an independent concept<sup>47</sup>. It follows that the formal and substantive conditions governing validity to which agreements conferring jurisdiction are subject must be assessed in the light of the requirements of art 17 alone. That rule has been given clear expression with regard to the assessment of formal requirements<sup>48</sup>, and, as regards the i

46 For example, the question as to whether or not there is a lease falling within the scope of art 16(1).

47 See *Powell Duffryn plc v Petereit* Case C-214/89 [1992] ECR I-1745 (para 14).

48 See the *Elefanten Schuh* case (paras 25, 26).



a rules governing substance, follows from the judgments in which the court has held that an 'agreement' requires that the parties actually give their consent<sup>49</sup>. As I see it, that rule was confirmed in the judgment in *Benincasa's* case, cited in footnote 41, above, where the court held that '[a] jurisdiction clause, which serves a procedural purpose, is governed by the provisions of the convention, whose aim is to establish uniform rules of international jurisdiction'<sup>50</sup>.

b 79. That case law has been extended to usage in international trade and commerce. The court has held that the usage to which art 17 refers cannot be frustrated by provisions of national legislation which require compliance with formal conditions additional to those permitted in the particular trade or commerce concerned<sup>51</sup>. Likewise, as the referring court points out, the Court of Justice has indicated the objective factors which the national court must take into consideration in order to determine whether a usage in the particular international trade or commerce in which the parties operate exists and whether that usage is or may be assumed to be known by the parties<sup>52</sup>.

c 80. The risk of judgments which are inconsistent as regards the validity of an agreement conferring jurisdiction will therefore be further reduced since the conditions required by art 17 of the Brussels Convention will have been clarified by the court<sup>53</sup>.

d 81. On the second point, I take the view that the court second seised should not be authorised to derogate from the requirements of art 21 of the Brussels Convention until it has made absolutely sure that it does have exclusive jurisdiction under an agreement conferring jurisdiction. It will therefore have to check whether the relevant agreement conferring jurisdiction satisfies the requirements of art 17. In addition to the conditions mentioned above, it must be satisfied that that agreement does concern 'disputes which have arisen or which may arise in connection with a particular legal relationship' as required by the first paragraph of art 17, and that it does not derogate from the rules governing exclusive jurisdiction laid down in art 16 and the provisions of the Brussels Convention which are applicable in matters of insurance and consumer contracts. Next, the court second seised will have to examine whether the agreement conferring jurisdiction does cover the dispute which has been brought before it. If there were any doubt as to the validity of the agreement conferring jurisdiction or its scope, the court second seised would have to stay proceedings pursuant to art 21.

e 82. The advantage of this solution, namely that art 17 of the Brussels Convention may constitute a derogation from art 21 only where there is no room for any doubt as to the jurisdiction of the court second seised, would be that it takes into account the requirements of international trade and commerce and at the same time makes economic operators aware of their own responsibilities by encouraging them to conclude agreements conferring jurisdiction which do not in fact leave room for any doubt as to their validity and their scope. That solution might thus prompt the representatives of the various economic operators to negotiate standard conditions which are explicit and extensively disseminated in the economic sector concerned.

i 49 See the *Estasis Salotti* case and the *Segouras* case.

50 See para 25.

51 See, in particular, the *MSG* case (para 23) and the *Castelletti* case (paras 33–39).

52 See the *MSG* case and the *Castelletti* case.

53 To date, the interpretation of that article has been the subject of around 15 references for a preliminary ruling.

83. In the light of the foregoing, I propose that the court's answer to the second question should be that art 21 of the Brussels Convention must be interpreted as meaning that a court second seised which has exclusive jurisdiction under an agreement conferring jurisdiction may, by way of derogation from that article, give judgment in the case without waiting for a declaration from the court first seised that it has no jurisdiction where there is no room for any doubt as to the jurisdiction of the court second seised.

*C—The third, fourth, fifth and sixth questions*

84. By its third question, the referring court is essentially asking whether art 21 of the Brussels Convention must be interpreted as meaning that it may be derogated from where, in general, the duration of proceedings before the courts of the contracting state in which the court first seised is established is excessively long.

85. The referring court explains that it has raised this question because of Gasser's argument to the effect that, in Latin countries such as Italy, Greece and France, the average duration of legal proceedings is excessively long, which, in Gasser's view, is contrary to the requirements of art 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) (hereinafter the ECHR).

86. The Commission raises doubts as to the admissibility of the third question and, therefore, of the questions which follow it and are related to it, on the ground that the referring court has not provided tangible evidence to show that the Tribunale civile e penale di Roma has infringed art 6 of the ECHR in the present case.

87. I do not share that point of view. I consider that, by that question, the national court did not mean to refer to the proceedings brought by MISAT before the Tribunale civile e penale di Roma. This question clearly has to do with whether, because the average duration of proceedings before the courts of the member state in which the court first seised is established is excessively long, the court second seised may disregard the requirements of art 21. In order for the Court of Justice to be able to give a useful answer to that question, which concerns a provision of the Brussels Convention and which is relevant for the decision to be given in the main proceedings, it was therefore not necessary for the referring court to provide information on the conduct of the procedure before the Tribunale civile e penale di Roma.

88. However, I support the Commission's view with regard to the answer to be given on the substance of this question. It does not really seem conceivable that it should be possible to refrain from applying art 21 of the Brussels Convention on the ground that the court first seised is established in a member state in whose courts there are, in general, excessive delays in dealing with cases. That would be tantamount to saying that the rules on *lis pendens* do not apply where the court first seised is established in one of certain member states.

89. Such an interpretation would be manifestly contrary to the scheme and the basis of the Brussels Convention. The convention does not contain any provision to the effect that its rules, in particular those of art 21, should cease to apply because of the length of proceedings before the courts in another contracting state. Moreover, it should be noted that the Brussels Convention is based on the trust which the member states accord to each other's legal

a systems and judicial institutions<sup>54</sup>. It is on the basis of that trust that the convention establishes a compulsory system of jurisdiction which all the courts within its purview are required to observe. It is also that trust which enables the contracting states to waive the right to apply their internal rules on the recognition and enforcement of foreign judgments in favour of a simplified mechanism for recognition and enforcement. It is therefore also the basis of the legal certainty which the convention seeks to ensure by allowing the parties to forese with certainty which court will have jurisdiction.

b 90. In the light of those considerations, I propose that the court's answer should be that art 21 of the Brussels Convention must be interpreted as meaning that it cannot be derogated from where the duration of proceedings before the courts of the contracting state in which the court first seised is established is, in general, excessively long.

c 91. In view of that proposed answer, there is no need to rule on the fourth, fifth and sixth questions. Those questions are based on the premiss of a positive answer to the third question. Thus, by the fourth question, the referring court seeks to ascertain whether Italian Law No 89 of 24 March 2001 concerning compensation for damage caused by the unreasonable length of proceedings would none the less justify the application of art 21 of the Brussels Convention. By the fifth and sixth questions, as I understand them, it is asking the court to indicate, in the event of a positive answer to the third question, the circumstances in which the court second seised might derogate from the requirements of that article and the manner in which it might do so.

d  
e V—CONCLUSION

92. In the light of the foregoing, I propose that the Court of Justice should answer the questions referred to it by the Oberlandesgericht Innsbruck as follows:

f '(1) It is for the national court to determine whether to refer a question to the Court of Justice for a preliminary ruling on the basis of a party's submissions or whether it is necessary to verify those submissions first. It is nevertheless incumbent on the national court to provide the Court of Justice with the factual and legal information enabling it to give an answer which will be of use to it in giving judgment in the main proceedings and to explain why it considers an answer to its questions necessary.

g (2) Article 21 of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (hereinafter the Brussels Convention) must be interpreted as meaning that a court second seised which has exclusive jurisdiction under an agreement conferring jurisdiction may, by way of derogation from that article, give judgment in the case without waiting for a declaration from the court first seised that it has no jurisdiction where there is no room for any doubt as to the jurisdiction of the court second seised.

h (3) Article 21 of the Brussels Convention must be interpreted as meaning that it cannot be derogated from where the duration of proceedings before

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54 See *R v Medicines Control Agency, ex p Smith & Nephew Pharmaceuticals Ltd* Case C-201/94 (1996) 34 BMLR 141, [1996] ECR I-5819 relating to Council Directive (EEC) 65/65 (on the approximation of provisions laid down by law, regulation or administrative action relating to proprietary medicinal products) (OJ English Sp Edn 1965-1966 p 20), as amended by Council Directive (EEC) 87/21 (OJ 1987 L15 p 36) and *Pharmacia & Upjohn SA (formerly Upjohn SA) v Paranova A/S* Case C-379/97 [1999] All ER (EC) 880, [1999] ECR I-6927 relating to trade mark rights in the medicinal products sector.



the courts of the contracting state in which the court first seised is established is, in general, excessively long.’ a

9 December 2003. **The COURT OF JUSTICE** delivered the following judgment.

1. By judgment of 25 March 2002, received at the Court of Justice of the European Communities on 2 April 2002, the Oberlandesgericht (Higher Regional Court) Innsbruck referred to the Court of Justice for a preliminary ruling under the Protocol of 3 June 1971 on the interpretation by the Court of Justice of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968 (OJ 1978 L304 p 36) (the Protocol), a number of questions on the interpretation of art 21 of the above-mentioned convention, as amended by the Convention on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland 1978 (OJ 1978 L304 p 1 and—amended text—p 77), by the Convention on the Accession of the Hellenic Republic 1982 (OJ 1982 L388 p 1), by the Convention on the Accession of the Kingdom of Spain and the Portuguese Republic 1989 (OJ 1989 L285 p 1) and by the Convention on the Accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden 1996 (OJ 1997 C15 p 1) (the Brussels Convention or the convention). b  
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2. Those questions were raised in proceedings between Erich Gasser GmbH (Gasser), a company incorporated under Austrian law, and MISAT Srl (MISAT), a company incorporated under Italian law, following a breakdown in their business relations. e

#### LEGAL BACKGROUND

3. The aim of the convention, according to its preamble, is to facilitate the reciprocal recognition and enforcement of judgments in accordance with art 293 EC (formerly art 220 of the EC Treaty) and to strengthen the legal protection of persons established in the Community. The preamble also states that it is necessary for that purpose to determine the international jurisdiction of the courts of the contracting states. f

4. The provisions on jurisdiction are contained in Title II of the Brussels Convention. Article 2 of the convention lays down the general rule that the courts in the state in which the defendant is domiciled are to have jurisdiction. Article 5 of the convention provides, however, that in matters relating to a contract the defendant may be sued in the courts for the place where the obligation which the action seeks to enforce was or should have been performed. g

5. Article 16 of the convention lays down rules governing exclusive jurisdiction. In particular, pursuant to art 16(1)(a), in proceedings which have as their object rights in rem in immovable property or tenancies of immovable property, the courts of the contracting state in which the property is situated are to have exclusive jurisdiction. h

6. Articles 17 and 18 of the convention deal with the attribution of jurisdiction. i

Article 17 is worded as follows:

‘(1) If the parties, one or more of whom is domiciled in a Contracting State, have agreed that a court or the courts of a Contracting State are to have jurisdiction to settle any disputes which have arisen or which may

a arise in connection with a particular legal relationship, that court or those courts shall have exclusive jurisdiction. Such an agreement conferring jurisdiction shall be either:

(a) in writing or evidenced in writing, or

(b) in a form which accords with practices which the parties have established between themselves, or

b (c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned ...

c (3) Agreements ... conferring jurisdiction shall have no legal force if they are contrary to the provisions of Article 12 or 15 [insurance and consumer contracts], or if the courts whose jurisdiction they purport to exclude have exclusive jurisdiction by virtue of Article 16 ...'

7. Article 18 provides:

d 'Apart from jurisdiction derived from other provisions of this Convention, a court of a Contracting State before whom a defendant enters an appearance shall have jurisdiction. This rule shall not apply where appearance was entered solely to contest the jurisdiction, or where another court has exclusive jurisdiction by virtue of Article 16.'

e 8. The Brussels Convention also seeks to obviate conflicting decisions. Thus, under art 21, concerning *lis pendens*:

'Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Contracting States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.'

f Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court.'

9. Finally, in relation to recognition, art 27 of the convention provides:

g 'A judgment shall not be recognised ...

(3) if the judgment is irreconcilable with a judgment given in a dispute between the same parties in the State in which recognition is sought ...'

h 10. According to the first paragraph of art 28 of the convention, '[m]oreover, a judgment shall not be recognised if it conflicts with the provisions [concerning insurance and consumer contracts and the matters referred to in art 16]'

#### THE MAIN PROCEEDINGS AND THE QUESTIONS REFERRED TO THE COURT

i 11. The registered office of Gasser is in Dornbirn, Austria. For several years it sold children's clothing to MISAT, of Rome, Italy.

12. On 19 April 2000 MISAT brought proceedings against Gasser before the Tribunale Civile e Penale (Civil and Criminal District Court) di Roma seeking a ruling that the contract between them had terminated *ipso jure* or, in the alternative, that the contract had been terminated following a disagreement between the two companies. MISAT also asked the court to find that it had not

failed to perform the contract and to order Gasser to pay it damages for failure to fulfil the obligations of fairness, diligence and good faith and to reimburse certain costs. a

13. On 4 December 2000 Gasser brought an action against MISAT before the Landesgericht (Regional Court) Feldkirch, Austria, to obtain payment of outstanding invoices. In support of the jurisdiction of that court, the claimant submitted that it was not only the court for the place of performance of the contract, within the meaning of art 5(1) of the convention but was also the court designated by a choice-of-court clause which had appeared on all invoices sent by Gasser to MISAT, without the latter having raised any objection in that regard. According to Gasser, that showed that, in accordance with their practice and the usage prevailing in trade between Austria and Italy, the parties had concluded an agreement conferring jurisdiction within the meaning of art 17 of the Brussels Convention. b  
c

14. MISAT contended that the Landesgericht Feldkirch had no jurisdiction, on the ground that the court of competent jurisdiction was the court for the place where it was established, under the general rule laid down in art 2 of the Brussels Convention. It also contested the very existence of an agreement conferring jurisdiction and stated that, before the action was brought by Gasser before the Landesgericht Feldkirch, it had commenced proceedings before the Tribunale Civile e Penale di Roma in respect of the same business relationship. d

15. On 21 December 2001, the Landesgericht Feldkirch decided of its own motion to stay proceedings, pursuant to art 21 of the Brussels Convention, until the jurisdiction of the Tribunale Civile e Penale di Roma had been established. It confirmed its own jurisdiction as the court for the place of performance of the contract, but did not rule on the existence or otherwise of an agreement conferring jurisdiction, observing that although the invoices issued by the claimant systematically included a reference to the courts of Dornbirn under the heading 'Competent Courts', the orders, on the other hand, did not record any choice of court. e  
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16. Gasser appealed against that decision to the Oberlandesgericht Innsbruck, contending that the Landesgericht Feldkirch should be declared to have jurisdiction and that proceedings should not be stayed.

17. The national court considers, first, that this is a case of *lis pendens* since the parties are the same and the claims made before the Austrian and Italian courts have the same cause of action within the meaning of art 21 of the Brussels Convention, as interpreted by the Court of Justice (see, to that effect, *Gubisch Maschinenfabrik KG v Palumbo* Case 144/86 [1987] ECR 4861). g

18. After noting that the Landesgericht Feldkirch had not ruled as to the existence of an agreement conferring jurisdiction, the national court raises the question whether the fact that one of the parties repeatedly and without objection settled invoices sent by the other even though those invoices contained a jurisdiction clause can be seen as acceptance of that clause, in accordance with art 17(1)(c) of the Brussels Convention. The national court states that such conduct by the parties reflects a usage in international trade and commerce which is applicable to the parties and of which they are aware or are deemed to be aware. In the event of the existence of an agreement conferring jurisdiction being established, then, according to the national court, the Landesgericht Feldkirch alone has jurisdiction to deal with the dispute under art 17 of the convention. In those circumstances, the question arises whether the obligation to stay proceedings, provided for in art 21 of the convention, should nevertheless apply. h  
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a 19. In addition, the national court asks to what extent the excessive and generalised slowness of legal proceedings in the contracting state where the court first seised is established is liable to affect the application of art 21 of the Brussels Convention.

b 20. It was in those circumstances that the Oberlandesgericht Innsbruck stayed proceedings and referred the following questions to the court for a preliminary ruling (see [2003] IL Pr 216 at 231–232):

c ‘(1) May a court which refers questions to the Court of Justice for a preliminary ruling do so purely on the basis of a party’s (unrefuted) submissions, whether they have been contested or not contested (on good grounds), or is it first required to clarify those questions as regards the facts by the taking of appropriate evidence (and if so, to what extent)?

d (2) May a court other than the court first seised, within the meaning of the first paragraph of Art. 21 of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters [“the Brussels Convention”] review the jurisdiction of the court first seised if the second court has exclusive jurisdiction pursuant to an agreement conferring jurisdiction under Art. 17 of the Brussels Convention, or must the agreed second court proceed in accordance with Art. 21 of the Brussels Convention notwithstanding the agreement conferring jurisdiction?

e (3) Can the fact that court proceedings in a contracting state take an unjustifiably long time (for reasons largely unconnected with the conduct of the parties) so that material detriment may be caused to one party, have the consequence that the court other than the court first seised, within the meaning of the first paragraph of Art. 21, is not allowed to proceed in accordance with that provision?

f (4) Do the legal proceedings provided for by Italian Law No. 89 of March 24, 2001 justify the application of Art. 21 of the Brussels Convention even if a party is at risk of detriment as a consequence of the possible excessive length of proceedings before the Italian court and therefore, as suggested in Question 3, it would not actually be appropriate to proceed in accordance with Art. 21?

g (5) Under what conditions must the court other than the court first seised refrain from applying Art. 21 of the Brussels Convention?

(6) What course of action must the court follow if, in the circumstances described in Question 3, it is not allowed to apply Art. 21 of the Brussels Convention?

h Should it be necessary in any event, even in the circumstances described in Question 3, to proceed in accordance with Art. 21 of the Brussels Convention, there is no need to answer Questions 4, 5 and 6.’

#### THE FIRST QUESTION

i 21. By its first question, the national court seeks in essence to ascertain whether a national court may, under the Protocol, seek an interpretation of the Brussels Convention from the Court of Justice even where the national court is relying on the submissions of a party to the main proceedings, the merits of which it has not yet assessed.

22. In this case, the national court refers to the fact that the second question is based on the premiss, not yet confirmed by the trial judge, that an agreement conferring jurisdiction within the meaning of art 17 of the Brussels Convention designates the court within whose jurisdiction Dornbirn is located as the court having jurisdiction to settle the dispute in the main proceedings.

23. It must be borne in mind in that connection that, in the light of the division of responsibilities in the preliminary ruling procedure laid down by the Protocol, it is for the national court alone to define the subject matter of the questions which it proposes to refer to the Court of Justice. According to settled case law, it is solely for the national court before which the dispute has been brought, and which must assume the responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of each case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the court (see *Van den Boogaard v Laumen* Case C-220/95 [1997] All ER (EC) 517, [1997] ECR I-1147 (para 16), *Farrell v Long* Case C-295/95 [1997] All ER (EC) 449, [1997] ECR I-1683 (para 11), *Trasporti Castelletti Spedizioni Internazionali SpA v Hugo Trumpy SpA* Case C-159/97 [1999] ECR I-1597 (para 14) and *Gantner Electronic GmbH v Basch Exploitatie Maatschappij BV* Case C-111/01 [2003] ECR I-4207 (paras 34, 38)).

24. However, the spirit of co-operation which must prevail in the preliminary ruling procedure requires the national court, for its part, to have regard to the function entrusted to the Court of Justice, which is to assist in the administration of justice in the member states and not to deliver advisory opinions on general or hypothetical questions. In order to enable the court to provide a useful interpretation of Community law, it is appropriate that the national court should define the legal and factual context of the interpretation sought and it is essential for it to explain why it considers that a reply to its questions is necessary to enable it to give judgment (see to that effect the *Gantner Electronic* case, cited above (paras 35, 37, 38)).

25. According to the account of the facts given by the national court, the proposition that there may be an agreement conferring jurisdiction is not purely hypothetical.

26. Moreover, as has been emphasised both by the Commission of the European Communities and by Advocate General Léger in paras 38–41 of his opinion, the national court, before verifying the existence of a clause conferring jurisdiction within the meaning of art 17 of the Brussels Convention and the existence of usage in international trade and commerce in that connection—a process which may necessitate delicate and costly investigations—considered it necessary to refer to the court the second question, to establish whether the existence of an agreement conferring jurisdiction allows non-application of art 21 of the Brussels Convention. If that question is answered in the affirmative, the national court will have to rule as to the existence of such an agreement conferring jurisdiction and, if the existence thereof is established, it will have to consider itself to have exclusive jurisdiction to give judgment in the main proceedings. Conversely, if the answer is in the negative, art 21 of the Brussels Convention will have to apply, so that the question whether there is an agreement conferring jurisdiction will no longer be an issue with which the national court is concerned.

27. Consequently, the answer to the first question must be that a national court may, under the Protocol, refer to the Court of Justice a request for interpretation of the Brussels Convention, even where it relies on the submissions of a party to the main proceedings of which it has not yet examined the merits, provided that it considers, having regard to the particular circumstances of the case, that a preliminary ruling is necessary to enable it to give judgment and that the questions on which it seeks a ruling from the court are relevant. It is nevertheless incumbent on the national court to provide the

- a Court of Justice with factual and legal information enabling it to give a useful interpretation of the convention and to explain why it considers that a reply to its questions is necessary to enable it to give judgment.

#### THE SECOND QUESTION

- b 28. By its second question, the national court seeks in essence to establish whether art 21 of the Brussels Convention must be interpreted as meaning that, where a court is the second court seised and has exclusive jurisdiction under an agreement conferring jurisdiction, it may, by way of derogation from that article, give judgment in the case without waiting for a declaration from the court first seised that it has no jurisdiction.

- c *Observations submitted to the court*

29. According to Gasser and the United Kingdom government, this question should be answered in the affirmative. In support of their interpretation, they rely on the judgment in *Overseas Union Insurance Ltd v New Hampshire Insurance Co* Case C-351/89 [1992] 2 All ER 138, [1991] ECR I-3317, in which it was held (at para 26) that it is 'without prejudice to the case where the court second seised has exclusive jurisdiction under the convention and in particular under art 16 thereof' that the court held that art 21 of the Brussels Convention was to be interpreted as meaning that, where the jurisdiction of the court first seised is contested, the court second seised may, if it does not decline jurisdiction, only stay the proceedings and may not itself examine the jurisdiction of the court first seised. According to Gasser and the United Kingdom government, there is no reason to treat arts 16 and 17 of the convention differently in relation to the *lis pendens* rule.

- f 30. The United Kingdom government states that, whilst art 17 comes below art 16 in the hierarchy of the bases of jurisdiction provided for in the Brussels Convention, it nevertheless prevails over the other bases of jurisdiction, such as art 2 and the special rules on jurisdiction contained in arts 5 and 6 of the convention. The national courts are thus required to consider of their own motion whether art 17 is applicable and requires them, if appropriate, to decline jurisdiction.

- g 31. The United Kingdom government adds that it is necessary to examine the relationship between arts 17 and 21 of the Brussels Convention taking account of the needs of international trade. The commercial practice of agreeing which courts are to have jurisdiction in the event of disputes should be supported and encouraged. Such clauses contribute to legal certainty in commercial relationships, since they enable the parties, in the event of a dispute, easily to determine which courts will have jurisdiction to deal with it.

- h 32. Admittedly, the United Kingdom government observes that, to justify the general rule embodied in art 21 of the Brussels Convention, the court held, in para 23 of the *Overseas Union Insurance* case, that in no case is the court second seised in a better position than the court first seised to determine whether the latter has jurisdiction. However, that reasoning is not applicable to cases in which the court second seised has exclusive jurisdiction under art 17 of the Brussels Convention. In such cases, the court designated by the agreement conferring jurisdiction will, in general, be in a better position to rule as to the effect of such an agreement since it will be necessary to apply the substantive law of the member state in whose territory the designated court is situated.

- i 33. Finally, the United Kingdom government concedes that the thesis which it defends might give rise to a risk of irreconcilable judgments. To avoid that risk,



it proposes that the Court of Justice hold that a court first seised whose jurisdiction is contested in reliance on an agreement conferring jurisdiction must stay proceedings until the court which is designated by that agreement, and is the court second seised, has given a decision on its own jurisdiction. a

34. MISAT, the Italian government and the Commission, on the other hand, favour the application of art 21 of the Brussels Convention and therefore consider that the court second seised is required to stay proceedings. b

35. The Commission, like the Italian government, considers that the derogation under which the court second seised has jurisdiction, on the ground that it enjoys exclusive jurisdiction under art 16 of the Brussels Convention, cannot be extended to a court designated under a choice-of-court clause.

36. The Commission justifies the derogation from the rule laid down in art 21, in the event of recourse to art 16, by reference to the first paragraph of art 28 of the Brussels Convention, according to which decisions given in the state of the court first seised in disregard of the exclusive jurisdiction of the court second seised, based on art 16 of the convention, cannot be recognised in any contracting state. It would therefore be inconsistent to require, under art 21 of the convention, that the second court, which alone has jurisdiction, should stay proceedings and decline jurisdiction in favour of a court which has no jurisdiction. Such a course of action would result in parties obtaining a decision from a court lacking jurisdiction, which could not take effect in the contracting state where it was given. In such circumstances, the aim of the Brussels Convention, which is to improve legal protection and for that purpose to ensure the cross-border recognition and enforcement of judgments in civil matters would not be attained. c  
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37. The foregoing considerations do not apply, however, in the event of jurisdiction being conferred on the court second seised under art 17 of the Brussels Convention. Article 28 of the convention does not apply to the infringement of art 17, which forms part of Section 6 of Title II of the convention. A decision given in breach of the exclusive jurisdiction which the court second seised derives from a choice-of-court clause should be recognised and enforced in all the contracting states. f

38. The Commission also states that art 21 of the Brussels Convention seeks not only to obviate irreconcilable decisions which, under art 27(3) of the convention, are not recognised, but also to uphold economy of procedure, the court second seised being required initially to stay proceedings, and then to decline jurisdiction as soon as the jurisdiction of the court first seised is established. That clear rule is conducive to legal certainty. g

39. Referring to para 23 of *Overseas Union Insurance*, the Commission considers that the court second seised is not in any circumstances in a better position than the court first seised to determine whether the latter has jurisdiction. In this case, the Italian court is in as good a position as the Austrian court to establish whether it has jurisdiction under art 17 of the Brussels Convention, because, by virtue of commercial usage between Austria and Italy, the parties conferred exclusive jurisdiction upon the court in whose jurisdiction the registered office of the claimant in the main proceedings is located. h

40. Finally, the Commission and the Italian government observe that the jurisdiction referred to in art 17 of the Brussels Convention is distinguished from that referred to in art 16 thereof in that, within the scope of the latter article, the parties cannot conclude agreements conferring jurisdiction contrary to art 16 (see art 17(3)). Moreover, the parties are entitled at any time to cancel or amend a jurisdiction clause of the kind referred to in art 17. Such a case i

a would arise, for example, where, under art 18 of the convention, a party brought an action in a state other than that to the courts of which jurisdiction has been attributed and the other party enters an appearance before the court seised without contesting its jurisdiction (see to that effect *Elefanten Schuh GmbH v Jacqmain* Case 150/80 [1981] ECR 1671 (paras 10, 11)).

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#### *Findings of the court*

c 41. It must be borne in mind at the outset that art 21 of the Brussels Convention, together with art 22 on related actions, is contained in Section 8 of Title II of the convention, which is intended, in the interests of the proper administration of justice within the Community, to prevent parallel proceedings before the courts of different contracting states and to avoid conflicts between decisions which might result therefrom. Those rules are therefore designed to preclude, so far as possible and from the outset, the possibility of a situation arising such as that referred to in art 27(3) of the convention, that is to say the non-recognition of a judgment on account of its irreconcilability with a judgment given in proceedings between the same parties in the state in which recognition is sought (see the *Gubisch Maschinenfabrik* case (para 8), cited above). It follows that, in order to achieve those aims, art 21 must be interpreted broadly so as to cover, in principle, all situations of *lis pendens* before courts in contracting states, irrespective of the parties' domicile (see the *Overseas Union Insurance* case (para 16), cited above).

e 42. From the clear terms of art 21 it is apparent that, in a situation of *lis pendens*, the court second seised must stay proceedings of its own motion until the jurisdiction of the court first seised has been established and, where it is so established, must decline jurisdiction in favour of the latter.

f 43. In that regard, as the court also observed in para 13 of the *Overseas Union Insurance* case, art 21 does not draw any distinction between the various heads of jurisdiction provided for in the Brussels Convention.

g 44. It is true that, in para 26 of the *Overseas Union Insurance* case, before holding that art 21 of the Brussels Convention must be interpreted as meaning that, where the jurisdiction of the court first seised is contested, the court second seised may, if it does not decline jurisdiction, only stay proceedings and may not itself examine the jurisdiction of the court first seised, the Court of Justice stated that its ruling was without prejudice to the case where the court second seised has exclusive jurisdiction under the convention and in particular under art 16 thereof.

h 45. However, it is clear from para 20 of the same judgment that, in the absence of any claim that the court second seised had exclusive jurisdiction in the main proceedings, the Court of Justice simply declined to prejudge the interpretation of art 21 of the convention in the hypothetical situation which it specifically excluded from its judgment.

i 46. In this case, it is claimed that the court second seised has jurisdiction under art 17 of the convention.

47. However, that fact is not such as to call in question the application of the procedural rule contained in art 21 of the convention, which is based clearly and solely on the chronological order in which the courts involved are seised.

48. Moreover, the court second seised is never in a better position than the court first seised to determine whether the latter has jurisdiction. That jurisdiction is determined directly by the rules of the Brussels Convention,

which are common to both courts and may be interpreted and applied with the same authority by each of them (see, to that effect, the *Overseas Union Insurance* case (para 23)). a

49. Thus, where there is an agreement conferring jurisdiction within the meaning of art 17 of the Brussels Convention, not only, as observed by the Commission, do the parties always have the option of declining to invoke it and, in particular, the defendant has the option of entering an appearance before the court first seised without alleging that it lacks jurisdiction on the basis of a choice-of-court clause, in accordance with art 18 of the convention, but, moreover, in circumstances other than those just described, it is incumbent on the court first seised to verify the existence of the agreement and to decline jurisdiction if it is established, in accordance with art 17, that the parties actually agreed to designate the court second seised as having exclusive jurisdiction. b  
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50. The fact nevertheless remains that, despite the reference to usage in international trade or commerce contained in art 17 of the Brussels Convention, real consent by the parties is always one of the objectives of that provision, justified by the concern to protect the weaker contracting party by ensuring that jurisdiction clauses incorporated in a contract by one party alone do not go unnoticed (see *Mainschiffahrts-Genossenschaft eG (MSG) v Les Gravières Rhénanes SARL* Case C-106/95 [1997] All ER (EC) 385, [1997] ECR I-911 (para 17) and the *Castelletti* case (para 19)). d

51. In those circumstances, in view of the disputes which could arise as to the very existence of a genuine agreement between the parties, expressed in accordance with the strict formal conditions laid down in art 17 of the Brussels Convention, it is conducive to the legal certainty sought by the convention that, in cases of *lis pendens*, it should be determined clearly and precisely which of the two national courts is to establish whether it has jurisdiction under the rules of the convention. It is clear from the wording of art 21 of the convention that it is for the court first seised to pronounce as to its jurisdiction, in this case in the light of a jurisdiction clause relied on before it, which must be regarded as an independent concept to be appraised solely in relation to the requirements of art 17 (see, to that effect, *Powell Duffryn plc v Petereit* Case C-214/89 [1992] ECR I-1745 (para 14)). e  
f

52. Moreover, the interpretation of art 21 of the Brussels Convention flowing from the foregoing considerations is confirmed by art 19 of the convention which requires a court of a contracting state to declare of its own motion that it has no jurisdiction only where it is 'seised of a claim which is principally concerned with a matter over which the courts of another Contracting State have exclusive jurisdiction by virtue of Article 16'. Article 17 of the Brussels Convention is not affected by art 19. g  
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53. Finally, the difficulties of the kind referred to by the United Kingdom government, stemming from delaying tactics by parties who, with the intention of delaying settlement of the substantive dispute, commence proceedings before a court which they know to lack jurisdiction by reason of the existence of a jurisdiction clause are not such as to call in question the interpretation of any provision of the Brussels Convention, as deduced from its wording and its purpose. i

54. In view of the foregoing, the answer to the second question must be that art 21 of the Brussels Convention must be interpreted as meaning that a court second seised whose jurisdiction has been claimed under an agreement



- a conferring jurisdiction must nevertheless stay proceedings until the court first seised has declared that it has no jurisdiction.

### THE THIRD QUESTION

- b 55. By its third question, the national court seeks in essence to ascertain whether art 21 of the Brussels Convention must be interpreted as meaning that it may be derogated from where, in general, the duration of proceedings before the courts of the contracting state in which the court first seised is established is excessively long.

### *Admissibility*

- c 56. The Commission raises doubts as to the admissibility of this question and, therefore, of the questions which follow it and are related to it, on the ground that the national court has not provided concrete information such as to allow the inference that the Tribunale Civile e Penale di Roma has failed to fulfil its obligation to give judgment within a reasonable time and thereby infringed art 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) (hereinafter the ECHR).

- d 57. That view cannot be accepted. As observed by Advocate General Léger in para 87 of his opinion, it was indeed in relation to the fact that the average duration of proceedings before courts in the member state in which the court first seised is established is excessively long that the national court submitted the question whether the court second seised may validly decline to apply art 21 of the Brussels Convention. To answer that question, which the latter court considered relevant for the decision to be given in the main proceedings, it is not necessary for it to provide information as to the conduct of procedure before the Tribunale Civile e Penale di Roma.

- e 58. It is therefore necessary to answer the third question.

### *Substance*

#### *Observations submitted to the court*

- f 59. According to Gasser, art 21 of the Brussels Convention must be interpreted in any event as excluding excessively protracted proceedings (that is to say of a duration exceeding three years), which are contrary to art 6 of the ECHR and would entail restrictions on freedom of movement as guaranteed by arts 28, 39, 48 and 49 EC (formerly arts 30, 48, 58 and 59 of the EC Treaty). It is the responsibility of the European Union authorities or the national courts to identify those states in which it is well known that legal proceedings are excessively protracted.

- g 60. Therefore, in a case where no decision on jurisdiction has been given within six months following the commencement of proceedings before the court first seised or no final decision on jurisdiction has been given within one year following the commencement of those proceedings, it is appropriate, in Gasser's view, to decline to apply art 21 of the Brussels Convention. In any event, the courts of the state where the court second seised is established are entitled themselves to rule both on the question of jurisdiction and, after slightly longer periods, on the substance of the case.

- i 61. The United Kingdom government also considers that art 21 of the Brussels Convention must be interpreted in conformity with art 6 of the ECHR. It observes in that connection that a potential debtor in a commercial case will often bring, before a court of his choice, an action seeking a judgment

exonerating him from all liability, in the knowledge that those proceedings will go on for a particularly long time and with the aim of delaying a judgment against him for several years. a

62. The automatic application of art 21 in such a case would grant the potential debtor a substantial and unfair advantage which would enable him to control the procedure, or indeed dissuade the creditor from enforcing his rights by legal proceedings. b

63. In those circumstances, the United Kingdom government suggests that the Court of Justice should recognise an exception to art 21 whereby the court second seised would be entitled to examine the jurisdiction of the court first seised where:

(1) the claimant has brought proceedings in bad faith before a court without jurisdiction for the purpose of blocking proceedings before the courts of another contracting state which enjoy jurisdiction under the Brussels Convention and c

(2) the court first seised has not decided the question of its jurisdiction within a reasonable time.

64. The United Kingdom government adds that those conditions should be appraised by the national courts, in the light of all the relevant circumstances. d

65. MISAT, the Italian government and the Commission, on the contrary, advocate the full applicability of art 21 of the Brussels Convention, notwithstanding the excessive duration of court proceedings in one of the states concerned.

66. According to MISAT, the effect of an affirmative answer to the third question would be to create legal uncertainty and increase the financial burden for litigants, who would be required to pursue proceedings at the same time in two different states and to appear before the two courts seised, without being in a position to foresee which court would give judgment before the other. The already abundant litigation on the jurisdiction of courts would thereby be pointlessly increased, contributing to paralysis of the legal system. e

67. The Commission states that the Brussels Convention is based on mutual trust and on the equivalence of the courts of the contracting states and establishes a binding system of jurisdiction which all the courts within the purview of the convention are required to observe. The contracting states can therefore be obliged to ensure mutual recognition and enforcement of judgments by means of simple procedures. This compulsory system of jurisdiction is at the same time conducive to legal certainty since, by virtue of the rules of the Brussels Convention, the parties and the courts can properly and easily determine international jurisdiction. Within this system, Section 8 of Title II of the convention is designed to prevent conflicts of jurisdiction and conflicting decisions. f

68. It is not compatible with the philosophy and the objectives of the Brussels Convention for national courts to be under an obligation to respect rules on *lis pendens* only if they consider that the court first seised will give judgment within a reasonable period. Nowhere does the convention provide that courts may use the pretext of delays in procedure in other contracting states to excuse themselves from applying its provisions. g

69. Moreover, the point from which the duration of proceedings becomes excessively long, to such an extent that the interests of a party may be seriously affected, can be determined only on the basis of an appraisal taking account of all the circumstances of the case. That is an issue which cannot be settled in the context of the Brussels Convention. It is for the European Court of Human h

*i*

- a Rights to examine the issue and the national courts cannot substitute themselves for it by recourse to art 21 of the convention.

*Findings of the court*

- b 70. As has been observed by the Commission and by Advocate General Léger in paras 88 and 89 of his opinion, an interpretation of art 21 of the Brussels Convention whereby the application of that article should be set aside where the court first seised belongs to a member state in whose courts there are, in general, excessive delays in dealing with cases would be manifestly contrary both to the letter and spirit and to the aim of the convention.

- c 71. First, the convention contains no provision under which its articles, and in particular art 21, cease to apply because of the length of proceedings before the courts of the contracting state concerned.

- d 72. Second, it must be borne in mind that the Brussels Convention is necessarily based on the trust which the contracting states accord to each other's legal systems and judicial institutions. It is that mutual trust which has enabled a compulsory system of jurisdiction to be established, which all the courts within the purview of the convention are required to respect, and as a corollary the waiver by those states of the right to apply their internal rules on recognition and enforcement of foreign judgments in favour of a simplified mechanism for the recognition and enforcement of judgments. It is also common ground that the convention thereby seeks to ensure legal certainty by allowing individuals to foresee with sufficient certainty which court will have jurisdiction.

- f 73. In view of the foregoing, the answer to the third question must be that art 21 of the Brussels Convention must be interpreted as meaning that it cannot be derogated from where, in general, the duration of proceedings before the courts of the contracting state in which the court first seised is established is excessively long.

THE FOURTH, FIFTH AND SIXTH QUESTIONS

- g 74. In view of the answer given to the third question, it is unnecessary to answer the fourth, fifth and sixth questions, which were submitted by the national court only in the event of the third question being answered in the affirmative.

COSTS

- h 75. The costs incurred by the Italian and United Kingdom governments and by the Commission, which have submitted observations to the court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds, the Court of Justice (Full Court) in answer to the questions referred to it by the Oberlandesgericht Innsbruck by judgment of 25 March 2002, hereby rules:

- i (1) A national court may, under the Protocol of 3 June 1971 on the interpretation by the Court of Justice of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968, as amended by the Convention on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland 1978, by the Convention on the Accession of the Hellenic Republic 1982, by the



Convention on the Accession of the Kingdom of Spain and the Portuguese Republic 1989 and by the Convention on the Accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden 1996, refer to the Court of Justice a request for interpretation of the Brussels Convention, even where it relies on the submissions of a party to the main proceedings of which it has not yet examined the merits, provided that it considers, having regard to the particular circumstances of the case, that a preliminary ruling is necessary to enable it to give judgment and that the questions on which it seeks a ruling from the court are relevant. It is nevertheless incumbent on the national court to provide the Court of Justice with factual and legal information enabling it to give a useful interpretation of the convention and to explain why it considers that a reply to its questions is necessary to enable it to give judgment.

(2) Article 21 of the Brussels Convention must be interpreted as meaning that a court second seised whose jurisdiction has been claimed under an agreement conferring jurisdiction must nevertheless stay proceedings until the court first seised has declared that it has no jurisdiction.

(3) Article 21 of the Brussels Convention must be interpreted as meaning that it cannot be derogated from where, in general, the duration of proceedings before the courts of the contracting state in which the court first seised is established is excessively long.

# De Danske Bilimportører v Skatteministeriet, Told- og Skattestyrelsen

(Case C-383/01)

COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

JUDGES PUISSOCHET (PRESIDENT OF THE SIXTH CHAMBER, ACTING FOR THE PRESIDENT), WATHELET (RAPPORTEUR), SCHINTGEN (PRESIDENTS OF CHAMBERS), GULMANN, LA PERGOLA, JANN, SKOURIS, MACKEN, COLNERIC, VON BAHR AND CUNHA RODRIGUES

ADVOCATE GENERAL JACOBS

6 NOVEMBER 2002, 27 FEBRUARY, 17 JUNE 2003

- European Community – Taxation – Discrimination – Denmark having no domestic production of motor vehicles and charging duty upon first registration of new or used motor vehicle imported into national territory – Whether duty having ‘equivalent effect to a quantitative restriction’ or being ‘internal taxation’ – Whether duty precluded by Community law – Articles 28, 90 EC (formerly EC Treaty, arts 30, 95).*
- There was no domestic production of motor vehicles in Denmark. Where a new or used vehicle was imported into national territory, charges were payable upon its first registration, but not upon any subsequent resale. The main proceedings concerned a claim for repayment of the registration duty paid following the purchase of a new vehicle, which proceedings had been brought on the basis that the duty charged had been in breach of art 28 EC<sup>a</sup> (formerly art 30 of the EC Treaty), since its excessive level rendered the importation of motor vehicles into national territory under normal commercial conditions impossible, to the benefit of domestic purchases of previously registered used motor vehicles. The national court decided to stay the proceedings and refer to the Court of Justice of the European Communities under art 234 EC (formerly art 177 of the EC Treaty) a question concerning whether the national duty was a measure having equivalent effect to a quantitative restriction prohibited by art 28 EC or discriminatory internal taxation prohibited by art 90 EC<sup>b</sup> (formerly art 95 of the EC Treaty).
- Held** – A charge on the registration of a new motor vehicle established by a member state that had no domestic production of its own constituted internal taxation that was to be interpreted in the light of, and was not precluded by, art 90 EC. Obstacles to trade of a fiscal nature or having an effect equivalent to customs duties did not fall within the scope of art 28 EC. Further, although, in the absence of comparable domestic production, it was not permissible for the member states to impose on products which escaped the application of the provisions contained in art 90 EC charges of such an amount that the free movement of goods within the common market would be impeded; in the main proceedings, it was clear that, in fact, there was no impediment to

<sup>a</sup> Article 28 EC, so far as material, is set out at judgment para 5, below

<sup>b</sup> Article 90 EC, so far as material, is set out at judgment para 8, below

the free movement of goods. Therefore, it could not be considered that the national charges had ceased to be internal taxation within the meaning of art 90 EC, such that they should be classified as a measure having equivalent effect to a quantitative restriction, for the purposes of art 28 EC. Moreover, although art 90 EC guaranteed the complete neutrality of internal taxation as regards competition between domestic products and imported products, that article could not be invoked against internal taxation imposed on imported products where there was no similar or competing production, and it was not to provide a basis for censuring the excessiveness of the level of taxation which a member state might adopt for particular products, in the absence of any protective discriminatory effect (see judgment paras 32, 37, 38, 40–42, below).

*EC Commission v Denmark* Case C-47/88 [1990] ECR I-4509 considered.

### Notes

For discriminatory taxation in regards to the customs union of the Community, see 12(2) *Halsbury's Laws* (4th edn reissue) para 7.

For EC Treaty, arts 28, 90 EC (formerly arts 30, 95 of the EC Treaty), see 50 *Halsbury's Statutes* (4th edn) Current Statutes Service (issue 88) 363, 382.

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*BASF AG v Präsident des Deutschen Patentamts* Case C-44/98 [1999] ECR I-6269, ECJ.

*Bergandi v Directeur Général des Impôts* Case 252/86 [1991] STC 529, [1988] ECR 1343, ECJ.

*Campus Oil Ltd v Minister for Industry and Energy* Case 72/83 [1984] ECR 2727, ECJ.

*Cie commerciale de l'Ouest v Receveur principal des douanes de la Pallice-Port* Joined cases C-78/90 and C-83/90 [1992] ECR I-1847, ECJ.

*Cooperative Co-Frutta Srl v Amministrazione delle Finanze dello Stato* Case 193/85 [1987] ECR 2085, ECJ.

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*Decker v Caisse de Maladie des Employés Privés* Case C-120/95 [1998] All ER (EC) 673, [1998] ECR I-1831, ECJ.

*Dounias v Ipourgos Ikonomikon* Case C-228/98 [2000] ECR I-577, ECJ.

*Duphar BV v Netherlands* Case 238/82 [1984] ECR 523, ECJ.

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*Firma August Stier v Hauptzollamt Hamburg-Ericus* Case 31/67 [1968] ECR 235, ECJ.

*Franzén (Criminal proceedings against)* Case C-189/95 [1997] ECR I-5909, ECJ.



- a* *Hahn (Criminal proceedings against)* Case C-121/00 [2002] ECR I-9193, ECJ.  
*Konsumentombudsmannen (KO) v Gourmet International Products AB* Case C-405/98 [2001] All ER (EC) 308, [2001] ECR I-1795, ECJ.  
*Nygård v Svineavgiftsfonden* Case C-234/99 [2002] ECR I-3657, ECJ.  
*Prantl (Criminal proceedings against)* Case 16/83 [1984] ECR 1299, ECJ.  
*Procureur du Roi v Dassonville* Case 8/74 [1974] ECR 837, ECJ.  
*b* *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* Case 120/78 [1979] ECR 649, ECJ.  
*Schutzverband gegen Unlauteren Wettbewerb v TK-Heimdienst Sass GmbH* Case C-254/98 [2000] ECR I-151, ECJ.  
*Sociaal Fonds voor de Diamantarbeiders v SA Ch Brachfeld and Sons* Joined cases 2/69 and 3/69 [1969] ECR 211, ECJ.  
*c* *Van de Haar (Criminal proceedings against)* Joined cases 177/82 and 178/82 [1984] ECR 1797, ECJ.

## Reference

- d* By order of 26 September 2001, the Østre Landsret (Eastern Regional Court) of Denmark referred two questions (set out at judgment para 22, below) to the Court of Justice of the European Communities for a preliminary ruling under art 234 EC (formerly art 177 of the EC Treaty) on the interpretation of arts 28 and 30 EC (formerly arts 30 and 36 of the EC Treaty). The questions were raised in the context of proceedings between De Danske Bilimportører (DBI), a professional association of car importers, and Skatteministeriet, Told- og Skattestyrelsen (Danish Ministry of Fiscal Affairs) concerning the levy of a charge on the registration of new motor vehicles. Written observations were submitted on behalf of: De Danske Bilimportører by K Dyekjær-Hansen and T Ryhl, Advokaterne; the Danish government by J Molde, acting as agent, and K Hagel-Sørensen, Advokat; the Italian government by U Leanza, acting as agent, and M Fiorilli, Avvocato dello Stato; the Finnish government by E Bygglin, acting as agent; the Commission of the European Communities by HC Støvlbæk, acting as agent. Oral observations were made on behalf of: De Danske Bilimportører, represented by K Dyekjær-Hansen; the Danish government, represented by J Molde and K Hagel-Sørensen; the Finnish government, represented by T Pynnä, acting as agent; and the Commission, represented by HC Støvlbæk. The language of the case was Danish. The facts are set out in the opinion of the Advocate General.

27 February 2003. **The Advocate General (FG Jacobs)** delivered the following opinion<sup>1</sup>.

- h* 1. In Denmark, new passenger cars are subject to a registration tax levied at a particularly high rate. An association of car importers objects to the level of the tax and has challenged it in the national courts on a number of grounds, alleging in particular that it constitutes a measure having an effect equivalent to a quantitative restriction on imports, prohibited by art 28 EC (formerly art 30 of the EC Treaty). In that connection, the Østre Landsret (Eastern Regional Court) wishes to know (i) whether such a tax is capable of being caught by that prohibition and, (ii) if so, whether it may none the less be justified on any of the grounds set out in art 30 EC (formerly art 36 of the EC Treaty) or accepted by the Court of Justice of the European Communities in its case law.

<sup>1</sup> Original language: English.

## RELEVANT TREATY PROVISIONS

2. The EC Treaty contains three specific sets of provisions prohibiting obstacles to trade in goods between member states: arts 23 and 25 EC (formerly arts 9 and 12 of the EC Treaty); arts 28 to 30 EC, on which a ruling is sought; and art 90 EC (formerly art 95 of the EC Treaty). They apply to different types of obstacle respectively, customs duties and charges having equivalent effect, quantitative restrictions and measures having equivalent effect, and internal taxation and the conditions of their application also differ.

3. Articles 23 to 31 EC concern free movement of goods. They provide for a customs union and for a prohibition of quantitative restrictions on trade.

4. In particular, art 25 EC provides:

‘Customs duties on imports and exports and charges having equivalent effect shall be prohibited between Member States. This prohibition shall also apply to customs duties of a fiscal nature.’<sup>2</sup>

5. Article 28 EC provides: ‘Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States.’ Article 29 EC (formerly art 34 of the EC Treaty) embodies an identical prohibition as regards exports.

6. In *Procureur du Roi v Dassonville*<sup>3</sup>, the court defined measures having such an effect as all those which are ‘capable of hindering, directly or indirectly, actually or potentially, intra-Community trade’.

7. Under art 30 EC, however, arts 28 and 29 EC do not preclude—

‘prohibitions or restrictions ... justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants ... Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.’

8. In addition, the Court of Justice has developed a line of case law, starting with the *Cassis de Dijon* case (*Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein*)<sup>4</sup>, to the effect that indistinctly applicable measures (which apply in the same way to domestic and imported goods) may be caught by art 28 EC if they restrict trade but may be justified if they are necessary in order to satisfy mandatory requirements such as the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer, provided that they are also proportionate to the desired objective and are the means of achieving that objective which least hinders trade.

9. Articles 90 to 93 EC (formerly arts 95, 96, 98 and 99 of the EC Treaty), in the title on common rules on competition, taxation and approximation of laws, concern tax provisions. Article 90 EC provides:

‘No Member State shall impose, directly or indirectly, on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products.

2 Article 25 EC is often referred to in tandem with art 23 EC, which contains the same prohibition but does not explicitly include ‘customs duties of a fiscal nature’; for the sake of simplicity I shall refer only to art 25.

3 Case 8/74 [1974] ECR 837 (para 5).

4 Case 120/78 [1979] ECR 649.

a Furthermore, no Member State shall impose on the products of other Member States any internal taxation of such a nature as to afford indirect protection to other products.'

#### BACKGROUND AND PROCEDURE

b 10. All member states except Germany, France, Luxembourg, Sweden and the United Kingdom levy a registration tax on the acquisition of new passenger cars. In Italy the amount is fixed, in Belgium and Portugal the tax base is the cubic capacity of the vehicle, and in the remaining states the basis of calculation is the price of the car. In Spain, Greece, the Netherlands, Austria and Finland, that basis is the price excluding VAT, whilst in Denmark and c Ireland it already includes VAT. Percentage rates vary considerably between member states, and may also vary according to other criteria (such as cubic capacity or type of use) within each member state<sup>5</sup>.

d 11. Although variation is thus great and the differences in method of calculation make precise comparisons difficult, the amount and proportion of registration tax levied in Denmark are very significantly higher than in any other member state. The tax is levied at a rate of 105% of purchase price up to a threshold determined each year—apparently some DKK 53,000 (€7,122) in 2002—and 180% of the remainder, where the price taken as tax base already includes 25% VAT and a flat-rate mark-up of 9% to take account of dealer margin, regardless of the margin actually taken by the dealer. It would thus e seem that a car with a basic price equivalent to €10,000 is likely to cost the purchaser some €30,000 in all, including some €17,000 in registration tax, and one whose basic price is €30,000 would cost some €107,000 in all, including some €67,000 in registration tax.

f 12. Such an overall tax burden often exceeding 200% is unrivalled in any other member state—the next heaviest rates of taxation, in Finland and Greece, do not attain 100% for an engine capacity of under 2,000 cc and the proportion of registration tax is less there because it is levied before VAT. In Luxembourg, by complete contrast, the only tax on the purchase price of (new) cars is 15% VAT, and Belgium, Germany, Greece, France, Italy, Sweden and the United Kingdom all levy under 30% in all.

g 13. The Danish car registration tax dates apparently from 1924 and it seems to be common ground that its purpose has always been largely to raise revenue, although other considerations—such as environmental and road-safety concerns—may also be present.

h 14. Denmark does not possess any car manufacturing industry, so that all new cars entering the Danish market are in practice imported from another member state or from outside the Community. The tax is levied on a cars first registration in Denmark, but not on any subsequent resale; it is also levied when a secondhand car is imported.

i 15. Before 1990, the tax was applied to imported secondhand cars in a way which did not adequately reflect depreciation in their value. Considering the tax on both new and secondhand cars to be incompatible with Community rules, the Commission initiated Treaty-infringement proceedings against

5 This and much other useful background information is to be found in the Commission of the European Communities' communication to the Council of the European Communities and the European Parliament on taxation for passenger cars in the European Union—options for action at national and Community levels (COM(2002) 431 final).



Denmark, culminating in the court's judgment of 11 December 1990<sup>6</sup>, in which it was found that, by imposing a registration duty on imported used motor vehicles generally based on an estimated value higher than the real value of the vehicle<sup>7</sup> with the result that imported used motor vehicles were taxed more heavily than used motor vehicles sold on the domestic market after being registered in Denmark, the Kingdom of Denmark had failed to fulfil its obligations under what is now art 90 EC.

16. The court dismissed, however, the allegation of infringement in so far as it related to the tax on new cars. Its reasoning was as follows<sup>8</sup>.

17. The Commission's action was based solely on what is now art 90 EC, and both parties agreed that the tax was internal taxation for that purpose. However, the role of that article is to guarantee complete neutrality of internal taxation as between domestic and imported products. It cannot be invoked against a tax imposed on imported products where there is no similar or competing domestic production; in particular, in the absence of any discriminatory or protective effect, it does not provide a basis for censuring the excessiveness of the level of taxation which a member state might adopt for particular products.

18. The court acknowledged that, as it had held in *Firma August Stier v Hauptzollamt Hamburg-Ericus*<sup>9</sup>, member states may not impose charges so high as to impede the free movement of products where, in the absence of comparable domestic production, the prohibitions in art 90 EC do not apply. However, such charges could be assessed only on the basis of what are now arts 28 to 30 EC, and the action was not brought on that basis<sup>10</sup>.

19. The applicant before the national court in the present proceedings, De Danske Bilimportører (DBI), is a trade association of car importers. In 1999 it purchased a new Audi motor car—presumably imported from another member state—for the use of its director, for a total price (including delivery costs) of DKK 498,546 of which DKK 297,456 was registration tax.

20. It has brought proceedings against the Danish Treasury in which it claims that the tax is unlawful in the light of a number of provisions of Community law, and claims a reimbursement.

21. In addition to arts 28, 29 and 90 EC, quoted above, it refers to arts 11A(2)(a) and 33 of the Sixth VAT Directive<sup>11</sup>, under which, respectively, the taxable amount for VAT purposes must include all other taxes, duties, levies and charges, and member states may maintain or introduce taxes, duties and charges other than turnover taxes only if they do not give rise to formalities connected with the crossing of frontiers; to arts 3(1)(g) and 10 EC (formerly arts 3(1)(g) and 5 of the EC Treaty), which together require member states to refrain from any action jeopardising the attainment of undistorted competition in the internal market; to art 81 EC (formerly art 85 of the EC Treaty), which

6 *EC Commission v Denmark* Case C-47/88 [1990] ECR I-4509. At the material time, the threshold between the 105% and 180% rates was DKK 19,750.

7 100% of the price of the vehicle when new for a vehicle less than six months old, 90% of that price for all older vehicles.

8 See paras 5–14 of the judgment.

9 Case 31/67 [1968] ECR 235.

10 See para 13 of the judgment.

11 Sixth Council Directive (EEC) 77/388 (on the harmonisation of the laws of the member states relating to turnover taxes—common system of value added tax: uniform basis of assessment) (OJ 1977 L145 p 1).

a prohibits agreements and concerted practices restricting or distorting competition; and to Commission Regulation (EC) 1475/95<sup>12</sup>, which applies art 81(3) EC to motor vehicle distribution agreements in the Community.

22. The Østre Landsret, hearing the case, wishes to obtain guidance from the court specifically on the interpretation of art 28 EC; in its order for reference, it does not address the alternative claims based on the other provisions mentioned in the preceding paragraph. It has stayed the proceedings and referred the following questions for a preliminary ruling:

c '(1) Can an indirect duty (registration duty) charged by a Member State, which in the case of new cars amounts to 105% of DKK 52 800 and 180% of the remainder of the taxable value, be a measure having an effect equivalent to a quantitative restriction on imports and for that reason prohibited under Article 28 EC (reference is made in this connection to the Court's judgment in [*Commission v Denmark* (para 13)])?

d '(2) If the answer to Question (1) is yes: can that registration duty be justified on the grounds that are mentioned in Article 30 EC or follow from the Court's case law on Article 28 EC (reference is made to [*the Rewe-Zentral case*])?'

23. Written observations have been submitted by DBI, by the Danish government representing the Treasury as defendant in the main proceedings, by the Italian and Finnish governments, and by the Commission, all of whom except the Italian government presented oral argument at the hearing.

#### e ASSESSMENT

24. The essential question here is whether a car registration tax of the kind described may be assessed under art 28 EC; the possibility of justification arises in the event of an affirmative answer. The national court does not explicitly seek guidance on any other provisions—indeed, with regard to certain of DBI's contentions, it has rather pointedly refrained from doing so. However, art 28 EC must be viewed in the context of the structure of the Treaty, so that some consideration of arts 25 and 90 EC will also be necessary.

#### Articles 25, 28 and 90 EC in general

25. I have set out these provisions briefly above<sup>13</sup>, but a further recapitulation of some of their most relevant features may be helpful.

26. Article 25 EC prohibits any customs duties or charges having equivalent effect. The concept covers any charge, however small, levied by reason of the fact that goods cross a frontier<sup>14</sup>. It includes charges in connection with administrative formalities such as inspections, unless the charges do not exceed the actual costs involved and unless the formalities in question are obligatory and uniform, are prescribed by Community law in the general interest of the Community and promote free movement of goods, in particular by neutralising obstacles which could arise from unilateral measures<sup>15</sup>. Otherwise,

i 12 On the application of art [81(3) EC] of the Treaty to certain categories of motor vehicle distribution and servicing agreements (OJ 1995 L145 p 25).

13 See paras 3–9, above.

14 See the judgment in *EC Commission v Italy* Case 24/68 [1969] ECR 193 (paras 8–10) and *Sociaal Fonds voor de Diamantarbeiders v SA Ch Brachfeld and Sons* Joined cases 2/69 and 3/69 [1969] ECR 211 (paras 15–18); see most recently *Nygård v Svineafgiftsfonden* Case C-234/99 [2002] ECR I-3657 (para 19).

15 See the judgment in *EC Commission v Germany* Case 18/87 [1988] ECR 5427 (para 8).

the prohibition is absolute and independent of any restrictive effect on trade—although it might be thought that some degree of restrictive effect is normally inherent in any such charge. Where such a duty or charge exists, however minute it may be, compliance with art 25 EC can be achieved only by its abolition.

27. Article 90 EC prohibits any internal taxation that discriminates against similar goods from other member states or indirectly protects domestic production in any way. Supplementing art 25 EC, its aim is to ensure free movement of goods in normal conditions of competition by eliminating any protection which might result from discriminatory internal taxation, and thus to guarantee complete neutrality of internal taxation as between domestic and imported products<sup>16</sup>.

28. As with art 25 EC, there is no provision for taxation to escape the prohibition on the basis of any *de minimis* rule or any justifying ground. However, the prohibition is not of taxation but of discrimination or protection so that it is enough to eliminate the discriminatory or protective element in order to comply with the article. The situation is considered globally when deciding whether there is any discrimination or protection, so that compensating factors may come into play—depending on the conditions of its application, a flat-rate tax may in fact give rise to discrimination<sup>17</sup>, and it would be possible to conceive of a charge applied only to imported products which in fact redresses an imbalance caused by the imposition of a different charge on domestic goods at an earlier stage in production.

29. Article 28 EC prohibits all quantitative restrictions and measures having equivalent effect. The concept is very broad<sup>18</sup> and again (it is generally accepted) there is no *de minimis* rule<sup>19</sup>. However, in contrast to the situations governed by arts 25 or 90 EC, if a national measure is in principle caught by art 28 EC, it may none the less be justified, and thus escape the prohibition, on any of the grounds set out in art 30 EC and the court's case law<sup>20</sup>.

30. Compared to arts 25 and 90 EC, art 28 EC is clearly very broad in scope and serves something of the purpose of a safety net. The court has said that it covers in general all barriers to imports which are not already specifically covered by other Treaty provisions<sup>21</sup>. In relation to those articles, each of which constitutes a *lex specialis*, it has been described as a *lex generalis*<sup>22</sup>.

31. Clearly, in view of the different consequences flowing from application of the three articles, it is important to know with certainty in each case which one

16 See, for example, the judgment in *Bergandi v Directeur Général des Impôts* Case 252/86 [1991] STC 529, [1988] ECR 1343 (para 24).

17 See, for example, *EC Commission v Belgium* Case 77/69 [1970] ECR 237.

18 See the *Dassonville* definition quoted in para 6, above.

19 See, for example, the judgment in *Criminal proceedings against Van de Haar* Joined cases 177/82 and 178/82 [1984] ECR 1797 (para 13), *Criminal proceedings against Pranti* Case 16/83 [1984] ECR 1299 (para 20), *EC Commission v France* Case 269/83 [1985] ECR 837 (para 10) and *EC Commission v Italy* Case 103/84 [1986] ECR 1759 (para 18). However, the court has accepted that some restrictions may be so uncertain and indirect in their effects as not to be regarded as capable of hindering trade: see *Corsica Ferries France SA v Gruppo Antichi Ormeggiatori del Porto di Genova Coop arl* Case C-266/96 [1998] ECR I-3949 (para 31), *BASF AG v Präsident des Deutschen Patentamts* Case C-44/98 [1999] ECR I-6269 (para 16) and *Schutzverband gegen Unlauteren Wettbewerb v TK-Heimdienst Sass GmbH* Case C-254/98 [2000] ECR I-151 (para 30).

20 See paras 7 and 8, above.

21 See, for example, the judgment in *Bergandi's case* (para 33), cited in footnote 16, above.

22 See, for example, the opinion of Advocate General Tesaro in *Cie commerciale de l'Ouest v Receveur principal des douanes de la Pallice-Port* Joined cases C-78/90 and C-83/90 [1992] ECR I-1847 at 1865.



- a of them is relevant. If a charge is caught by art 25 EC it must be abolished, whereas if it is caught by art 90 EC then only the discriminatory or protective element need be removed. A measure caught by art 28 EC may be permitted if it pursues one or more justified aims in a manner proportionate to their achievement, whereas the scope for justification under arts 25 or 90 EC is very much more limited. On the other hand, those two articles apply only in a limited set of circumstances, always involving a charge or tax, whereas art 28 EC is capable of applying to a very wide variety of measures which may hinder trade.

32. In those circumstances, it is not surprising that the court has repeatedly indicated that there are barriers between the respective scopes of the three articles, only one of which can apply to any given measure.

33. In the *Cie commerciale de l'Ouest* case (paras 20–22)<sup>23</sup>, for example, it noted that—

‘the scope of Article [28 EC] does not extend to the obstacles covered by other, specific provisions of the Treaty ... obstacles which are of a fiscal nature or have an effect equivalent to customs duties and are covered by Articles [25 and 90 EC] do not fall within the prohibition laid down in Article [28 EC] ... the Court must consider, first, whether a measure ... is covered by Articles [25 or 90 EC], and only if it finds that it is not will it have to decide whether the measure in question comes within the scope of Article [28 EC] ...’

34. And as regards the separate scopes of arts 25 and 90 EC, the court has consistently held<sup>24</sup> that—

‘provisions relating to charges having equivalent effect and those relating to discriminatory internal taxation cannot be applied together, with the result that, under the system established by the Treaty, the same charge cannot belong to both categories at the same time ...’

#### *Articles 25 and 90 EC in the present case*

35. The registration tax in issue is clearly fiscal in nature. On the basis of that characteristic and in the light of the case law quoted in para 33, above, it might fall to be examined under either art 25 EC as a charge having an effect equivalent to that of a customs duty or art 90 EC as a measure of internal taxation.

36. However, art 25 EC applies only to charges levied by reason of the fact that goods cross a frontier. Here, although the tax is probably levied in practice shortly after importation, it seems that the chargeable event is the first registration for use on the road in Denmark rather than the crossing of the frontier. Although the court does not have full details of the mode of application, it may be presumed that the tax would also apply if an enthusiast were to build his own car in Denmark and seek to use it on the road there. Conversely, it seems plausible that a vehicle imported solely in order to be exhibited in a museum or, perhaps, used exclusively on private property might escape the levy. It has not in any event been suggested, either before this court or—apparently—before the national court, that the tax is in fact a customs duty

<sup>23</sup> Cited in footnote 22, above; see also, for a more recent confirmation, *Dounias v Ipourgus Ikonimikon* Case C-228/98 [2000] ECR I-577 (para 39).

<sup>24</sup> See most recently the judgment in *Nygård's* case (para 17), cited in footnote 14, above.

or charge having equivalent effect, that it is levied by reason of the fact that cars cross a frontier or that it should be assessed in the light of art 25 EC. a

37. If those assumptions on the application of the registration tax are correct, art 90 EC would thus seem the yardstick against which to measure it even if it is in fact levied only on imported cars. As the court noted in *EC Commission v France*<sup>25</sup>—

‘even a charge which is borne by a product imported from another Member State, when there is no identical or similar domestic product, does not constitute a charge having equivalent effect but internal taxation within the meaning of Article [90 EC] if it relates to a general system of internal dues applied systematically to categories of products in accordance with objective criteria irrespective of the origin of the products.’ b

38. The registration tax in issue here appears to meet that definition. It applies systematically to categories of vehicles in accordance with objective criteria. Vehicle registration taxes have moreover consistently been assessed by the court as internal taxation within the meaning of what is now art 90 EC<sup>26</sup>. And in *Commission v Denmark*<sup>27</sup>, the Danish tax was regarded by both parties c and by the court as internal taxation within the meaning of that article. d

39. However, in that judgment the court very clearly decided that art 90 EC was not infringed by the tax on new cars since there was no similar or competing domestic production and thus no possible discriminatory or protective effect. With regard to used cars, it appears from the order for reference that Denmark has complied with the judgment in *Commission v Denmark* and that the discriminatory element found by the court has now been eliminated. e

40. It is true that DBI has alleged, in a comment on other aspects of its case before the national court, that the fact that a fixed rate 9% dealer margin is automatically included when taxing new cars but not used cars and that spare parts and repairs are not affected favours used cars (overwhelmingly a ‘domestic product’) over new cars (all imported) and thus introduces a discrimination prohibited by art 90 EC. However, no other argument having been submitted—and no question having been referred—in that regard, I do not think it appropriate for the court to address that point. f

41. At this stage, therefore, it seems necessary to conclude that, being part of a system of internal dues rather than being levied by reason of the crossing of a frontier, the registration tax in issue falls to be assessed with reference not to art 25 EC but to art 90 EC; however, since it contains no element which is discriminatory or protective, it is not incompatible with that provision. g

#### *Article 28 EC in the present case* h

42. If the Danish car registration tax falls to be assessed by reference to art 90 EC, it may be doubted whether, having escaped prohibition under that article, it could then be considered under art 28 EC. None the less, it might be considered that a manifestly excessive tax, clearly liable to hinder trade in the goods to which it applies, could exceptionally be assessed under art 28 EC. Indeed, in *Commission v Denmark* the court indicated that member states may i

<sup>25</sup> See the judgment in Case 90/79 [1981] ECR 283 (para 14).

<sup>26</sup> In, for example, a series of cases involving French motor vehicle taxes; see, for a recent instance, *European Commission v France* Case C-265/99 [2001] ECR I-2305.

<sup>27</sup> Cited in footnote 6, above.

a not impose charges so high as to impede the free movement of products where, in the absence of comparable domestic production, the prohibitions in art 90 EC do not apply, and that such charges could be assessed on the basis of art 28 EC.

b 43. However, at least two sets of objections can be raised to that approach. It seems irreconcilable with, first, the system of the Treaty as repeatedly emphasised in the case law, namely the mutually exclusive nature of the prohibitions contained in arts 25, 28 and 90 EC, and, second, the court's overall approach to the analysis of art 28 EC, in particular as regards the absence of any threshold of applicability and the nature of the justifications which may be available.

c *Mutually exclusive nature of arts 25, 28 and 90 EC*

d 44. As I have noted above<sup>28</sup>, the court has consistently held that art 28 EC does not apply to obstacles to trade which fall to be assessed by reference to other specific Treaty provisions, so that obstacles to be assessed under arts 25 and 90 EC do not fall within its scope.

e 45. Such a rule is justified by the structure of the provisions in question.

f 46. Articles 25 and 28 EC are clearly parallel provisions designed to cover parallel situations and not to overlap. The same seems clear for art 90 EC, in relation to those articles, even though its wording is slightly different and it is to be found in a different title of the Treaty.

g 47. It may also be justified on grounds of legal certainty.

h 48. The three articles explicitly concern different types of measure and apply different criteria to their assessment. It is important that national authorities—and affected individuals—should know what criteria each specific measure must meet. Member states must be able to determine the areas in which their fiscal sovereignty may freely be exercised and be aware of the limits beyond which that sovereignty is constrained. Moreover, if a fiscal obstacle to trade falling within the scope of, but not within the prohibition laid down by, either art 25 or art 90 EC could be assessed under art 28 EC, it could in principle be allowed if it were justified on one of the grounds set out in art 30 EC or in the *Cassis de Dijon* case law<sup>29</sup>. If on the other hand it fell within either prohibition, it could not be allowed on those grounds. It does not seem reasonable that a fiscal measure adopted by a member state should be thus assessed on the basis of an alternative standard.

i 49. To ignore the distinctions between the three sets of rules would thus introduce undesirable uncertainty in an area where clarity is required.

50. It appears that the only case other than *Commission v Denmark* in which the court may have alluded to the possibility of applying what is now art 28 EC to exceptionally high internal taxation is the *Stier* case, which it cited in *Commission v Denmark*. It may be noted, though, that in the *Stier* case the court did not refer specifically to that provision but more generally to free movement of goods, no restraint on which, resulting from the imposition of particularly high charges, can be presumed to exist 'when the rate of taxation remains within the general framework of the national system of taxation of which the

28 See para 33, above.

29 But see para 64 et seq, below.



tax in question is an integral part<sup>30</sup>. Indeed, it seems plausible that the court may have been thinking rather of what is now art 25 EC<sup>31</sup>. a

51. It may also be noted that the court's statements did not in fact lead to examination under art 28 EC in either the *Stier* case or *Commission v Denmark* and might thus be viewed as adventitious in those contexts.

52. It is true that the court has, in more than one other instance, examined under what is now art 28 EC fiscal measures which might have been thought to fall under art 90 EC. In *EC Commission v France*<sup>32</sup>, for example, as the Commission has pointed out, it examined a tax advantage granted to newspaper publishers in respect of publications printed in France but not in other member states, and concluded that since such an advantage was likely to restrict imports it must be regarded as a measure having an effect equivalent to a quantitative restriction prohibited by art 28 EC. And in *Criminal proceedings against Franzén*<sup>33</sup> a national licensing system for importers of alcoholic beverages, under which traders had to pay a high fixed charge to apply for a licence and a high annual fee to keep the licence, was examined with reference to art 28 EC and found incompatible. That system, the court held, constituted an obstacle to the importation of alcoholic beverages from other member states in that it imposed additional costs on such beverages, including payment of charges and fees for the grant of a licence. b

53. However, it might be thought that *Commission v France*, in which the possibility that art 90 EC might be a more appropriate yardstick does not seem to have been raised, should have been decided on a different basis, and the type of charge involved in *Franzén's* case can undoubtedly be distinguished from a tax on goods, so that art 90 EC would not in any event have been appropriate. c

54. It thus seems to me desirable, for the reasons expressed in paras 45–49, above, that a clear dividing line should be maintained between the scopes of the articles in question and that fiscal measures should not—unless they in some way fall outside the scope of both arts 25 and 90 EC—be examined under art 28 EC. d

#### *Scheme and analysis of art 28 EC*

55. Not only does the suggested assessment of an internal tax under art 28 EC clash with the scheme of the Treaty, it also and even more significantly clashes in various ways with the scheme of that article itself and with the court's analysis of it in consistent case law. e

56. However, trade in any product is at least potentially restricted to some extent when it is taxed, compared to trade in the same product untaxed. Actual or appreciable restriction of trade may however be unlikely to result (where there is no alternative domestic product) unless the rate of tax is particularly high. Conversely, there is a clear danger that an exceptionally heavy domestic tax, such as the one in issue here, will have a noticeable effect on imports. f

57. To examine such taxes under art 28 EC would, however, give rise to two major difficulties. g

<sup>30</sup> See the *Stier* case (at 241), cited in footnote 9, above.

<sup>31</sup> See the Commission's arguments (summarised at 240) and the opinion of Advocate General Gand (at 166).

<sup>32</sup> Case 18/84 [1985] ECR 1339: see in particular paras 16, 17 of the judgment.

<sup>33</sup> See the judgment in Case C-189/95 [1997] ECR I-5909 (paras 67–77). h

*a*    *Need for a threshold*

58. First, any tax on goods of which there is no domestic production must fall within the *Dassonville* definition as 'capable of hindering, directly or indirectly, actually or potentially, intra-Community trade'. A number of member states have no car production, so that any registration taxes levied there would be concerned, whatever their level, and other taxes may be levied on many types of goods not produced domestically.

*b*    59. Yet to regard all such charges as falling within the scope of the prohibition in art 28 EC would be a momentous innovation going far beyond what is suggested in *Commission v Denmark*.

*c*    60. Thus, if 'charges of such an amount that the free movement of goods within the common market would be impeded'<sup>34</sup> are to be caught by that provision, some (presumably high) threshold of applicability must be set.

*d*    61. However, on the one hand, the introduction of such a threshold is impossible to reconcile with the general view, reflected in the court's consistent case law, that there is not even a *de minimis* exception to art 28 EC<sup>35</sup>; and on the other hand, in defining such a threshold, it would seem impossible to meet the necessary requirements of practical applicability and legal certainty without selecting some purely arbitrary criterion.

*e*    62. If such difficulties are to be overcome, the proper route might seem to be via clarification in the Treaty itself rather than judicial intervention, particularly since the authors of the Treaty appear to have intended the effects of internal taxation on intra-Community trade to be dealt with in accordance with the provisions of art 90 EC.

*Type of justification available*

*f*    63. The second major problem concerns the fact that measures caught by art 28 EC cannot, according to the court's case law, be justified on economic grounds, a point which relates more particularly to the second question posed by the national court.

*g*    64. If the Danish car registration tax is to be examined under art 28 EC and if it proves to be caught by the prohibition in that article then the answer to that second question is, in principle, clear. Once a restriction falls to be assessed under art 28 EC, the various grounds of justification available under art 30 EC or the *Cassis de Dijon* case law may come into play.

*h*    65. However, as both DBI and the Commission have pointed out, the court has held that 'aims of a purely economic nature cannot justify a barrier to the fundamental principle of the free movement of goods'<sup>36</sup>.

*i*    66. Yet the primary purpose of taxation is in general always the economic one of raising revenue for the state. Some charges also seek to render less attractive the purchase of certain goods, considered to have harmful or undesirable consequences but not to warrant outright prohibition. None the less, the goods in question often display great elasticity of demand and can thus provide considerable general income for the state.

<sup>34</sup> See *Commission v Denmark* (para 12).

<sup>35</sup> See for example the case law cited in footnote 19, above; it may be noted that the criterion of uncertain and indirect effect referred to there would be of no assistance in a case such as the present.

<sup>36</sup> Case C-120/95 [1998] All ER (EC) 673, [1998] ECR I-1831 (para 39): see also *EEC Commission v Italy* Case 7/61 [1961] ECR 317 at 329, *EC Commission v Italy* Case 95/81 [1982] ECR 2187 (para 27) and *Duphar BV v Netherlands* Case 238/82 [1984] ECR 523 (para 23).

67. If a charge compatible with art 90 EC were caught by the prohibition in art 28 EC, its inherently economic nature would appear, on the basis of the case law cited, to disqualify it from any justification. a

68. Such an outcome would be perverse, requiring taxes not prohibited by art 90 EC to run, none the less, the gauntlet of art 28 EC without allowing the state to plead in justification the very aim for which they were levied, namely the raising of revenue, though it can scarcely be denied that the aim of financing public expenditure by public taxation is itself justifiable. b

69. However, the case law cited by DBI and the Commission is not entirely conclusive in support of such a categorical view.

70. In the *Duphar* case<sup>37</sup> the court stated that art 30 EC cannot justify a measure 'whose primary objective is budgetary', implying that justification can be available only if the primary objective is other than economic. In *Campus Oil Ltd v Minister for Industry and Energy*<sup>38</sup>, it accepted that, where measures are justified by the needs of public security, the fact that they also make it possible to achieve other objectives of an economic nature does not exclude the application of art 30 EC—which still does not cover a situation where public interest concerns are merely secondary. In *Decker v Caisse de Maladie des Employés Privés*<sup>39</sup>, the court referred only to 'aims of a purely economic nature'<sup>40</sup> and allowed that the risk of seriously undermining the financial balance of a social security system might constitute an overriding reason in the general interest. c

71. That case law seems to suggest that an economic objective, such as raising revenue to finance public spending, cannot itself constitute a justification under art 30 EC or the *Cassis de Dijon* case law but that its presence does not negate the existence of a public interest justification of that kind if (i) it is subsidiary to the latter aim or (ii) it provides the means of achieving that aim. In those circumstances, many levies would still seem likely to remain incapable of justification. d

72. In the present case, the Danish government has stated that the car registration tax is levied essentially for reasons of public finance (it accounts for some 9.5% of all state revenue from excise duties and consumer taxes) but that environmental concerns (to reduce traffic congestion and encourage public transport) are also present. e

73. The aims of levying the tax would thus appear incapable of falling within the scope of art 30 EC or the court's case law relating to justification. f

74. If they were to do so, however, it would still be necessary for the levying of the tax to comply with the principle of proportionality; it must be proportionate to the objective to be achieved<sup>41</sup>, and it cannot qualify for a derogation if the aims sought can be achieved as effectively using measures which are less restrictive of intra-Community trade<sup>42</sup>. In that case, it would be for the national court to verify compliance with the principle. g

<sup>37</sup> Cited in footnote 36, above.

<sup>38</sup> Case 72/83 [1984] ECR 2727 (paras 35, 36).

<sup>39</sup> Cited in footnote 36, above.

<sup>40</sup> My emphasis.

<sup>41</sup> See, for example, the judgment in *Konsumentombudsmannen (KO) v Gourmet International Products AB* Case C-405/98 [2001] All ER (EC) 308, [2001] ECR I-1795 (para 28).

<sup>42</sup> See, for a recent example, the judgment in *Criminal proceedings against Hahn* Case C-121/00 [2002] ECR I-9193 (para 39). h



*a* Final considerations

75. The difficulties involved in establishing—in a manner consistent with the existing case law—both a threshold which could trigger the application of art 28 EC to internal taxation and a scheme of possible justifications for such taxation reinforce in my view the conclusion that art 28 is not the appropriate provision in the light of which to review measures of internal taxation, even though they may have a de facto restrictive effect on intra-Community trade.

*b* 76. I am aware that such a conclusion appears to indicate a lacuna in the Treaty where none would be expected. It does indeed seem totally incompatible with the aims of the internal market for a member state to be able to tax certain imported goods to such an extent that the flow of intra-Community trade is appreciably affected.

*c* 77. It may also seem anomalous—having regard to the case law on arts 25 and 90 EC—that the most minute charge levied on the occasion of goods crossing a frontier infringes the Treaty whilst a very high internal tax in many cases does not, regardless of the respective effects of each on intra-Community trade.

*d* 78. However, the answer to both apparent anomalies may lie in part, when compatibility with art 90 EC is in issue, in a more careful scrutiny of the extent to which any disputed tax actually forms a coherent part of a normal system of taxation in the member state in question—scrutiny of a kind which has been carried out, in slightly different contexts, in the past<sup>43</sup>. For that purpose, it might also be relevant to consider the level of the tax in relation both to that of other national taxes in comparable fields and even to differential rates of such taxation in the other member states.

*e* 79. It may finally be recalled that the Commission has submitted certain recommendations to the Council and the Parliament in its communication of 6 September 2002<sup>44</sup>. Those recommendations seek, inter alia, to achieve a degree of restructuring and approximation of national taxation on motor vehicles with a view in particular to improving the functioning of the internal market and encouraging CO2 emissions reduction. I express no view on the content of those recommendations but a legislative initiative seems to me to be more appropriate, for a matter of taxation, than a case-by-case approach under art 28 EC.

*g* CONCLUSION

80. I am therefore of the opinion that the Court of Justice should give the following answer to the Østre Landsret:

*h* A charge levied by a member state on the first registration of a motor vehicle is not in principle a measure having an effect equivalent to a quantitative restriction on imports prohibited under art 28 EC but falls to be assessed under art 90 EC as internal taxation, unless the mode of imposition is such that it constitutes a customs duty or charge having equivalent effect within the meaning of art 25 EC.

17 June 2003. **THE COURT OF JUSTICE** delivered the following judgment.

*i* 1. By order of 26 September 2001, received at the Court of Justice of the European Communities on 5 October 2001, the Østre Landsret (Eastern

<sup>43</sup> For example in *Cooperative Co-Frutta Srl v Amministrazione delle Finanze dello Stato* Case 193/85 [1987] ECR 2085, in particular at para 12 of the judgment, concerning the distinction between arts 25 and 90 EC.

<sup>44</sup> Cited in footnote 5, above.

Regional Court) referred to the court for a preliminary ruling under art 234 EC (formerly art 177 of the EC Treaty) two questions on the interpretation of arts 28 and 30 EC (formerly arts 30 and 36 of the EC Treaty).

2. The questions were raised in the context of proceedings between De Danske Bilimportører (DBI), a professional association of car importers, and the Skatteministeriet (Danish Ministry of Fiscal Affairs) concerning the levy of a charge on the registration of new motor vehicles.

#### LEGAL BACKGROUND

##### *Community provisions*

3. Articles 23 to 31 EC (formerly arts 9 to 37 of the EC Treaty), which form Title I, entitled 'Free movement of goods', of the EC Treaty, introduce a customs union and prohibit quantitative restrictions on trade between member states.

4. In particular, art 25 EC states:

'Customs duties on imports and exports and charges having equivalent effect shall be prohibited between Member States. This prohibition shall also apply to customs duties of a fiscal nature.'

5. Furthermore, under art 28 EC, '[q]uantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States'. Article 29 EC contains an identical prohibition in respect of exports.

6. However, under art 30 EC:

'The provisions of Articles 28 and 29 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants ... Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.'

7. Articles 90 to 93 EC (formerly arts 95 to 99 of the EC Treaty) form Ch 2, entitled 'Tax provisions', of Title VI, entitled 'Common rules on competition, taxation and approximation of laws', of the Treaty.

8. Article 90 EC states:

'No Member State shall impose, directly or indirectly, on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products.'

Furthermore, no Member State shall impose on the products of other Member States any internal taxation of such a nature as to afford indirect protection to other products.'

##### *National legislation*

9. The lov om registreringsafgift af motorkøretøjer (Law on registration duty on motor vehicles), in the version resulting from Consolidating Law No 222 of 14 April 1999, which was applicable at the material time, provides for the levy of a charge, known as 'registration duty', on new motor vehicles. That charge, levied upon first registration of the vehicle in the national territory, is based on the purchase price. The rate of the charge is 105% on the first portion, which is fixed annually, and 180% on the remainder of the price. In 1999, the first portion was DKK 52,800.

- a 10. Furthermore, the price taken as the tax base already includes 25% value added tax and a flat-rate mark-up of 9% to take account of dealer margin, regardless of the margin actually taken by the dealer.
- b 11. It is apparent from the documents before the Court of Justice that the principal purpose of the registration duty is to raise tax revenue, although other considerations such as environmental protection and road safety may also account for the levy.
- c 12. Since the duty is levied upon first registration of the vehicle in Denmark, but not upon any subsequent resale, it is also levied when a used vehicle is imported into Denmark.
- d 13. Before 1990, the registration duty was applied to imported used vehicles in a way which did not adequately reflect depreciation in their value. Therefore, in *EC Commission v Denmark* Case C-47/88 [1990] ECR I-4509, the court held that, by imposing a registration duty on imported used motor vehicles generally based on an estimated value which is higher than the real value of the vehicle, with the result that imported used motor vehicles were taxed more heavily than used motor vehicles sold on the domestic market after being registered in Denmark, the Kingdom of Denmark had failed to fulfil its obligations under art 95 of the EEC Treaty (which became art 95 of the EC Treaty and is now, after amendment, art 90 EC).
- e 14. In the infringement proceedings which resulted in that judgment, the Commission of the European Communities also contested the compatibility of the registration duty on new motor vehicles with art 95 of the Treaty, having regard in particular to the very high level of the duty.
- f 15. The court however rejected that claim of infringement after having found that art 95 of the Treaty could not be invoked against internal taxation imposed on imported products where there is no similar or competing domestic production, and that, in particular, that article did not provide a basis for censuring the excessiveness of the level of taxation which the member states might adopt for particular products, in the absence of any discriminatory or protective effect (see *Commission v Denmark* (para 10)).
- g 16. In *Commission v Denmark* (para 12), the court admittedly noted that, as it had held in *Firma August Stier v Hauptzollamt Hamburg-Ericus* Case 31/67 [1968] ECR 235, it is not permissible for the member states to impose on products which, in the absence of comparable domestic production, escape the application of the prohibitions contained in art 95 of the Treaty charges of such an amount that the free movement of goods within the common market would be impeded as far as those goods were concerned. It added, however, in para 13 of *Commission v Denmark*, that the only possibility of appraising an adverse effect of that kind on the free movement of goods is by reference to art 30 of the EEC Treaty (which became art 30 of the EC Treaty and is now, after amendment, art 28 EC) et seq. The Commission's action in that case was not however based on those articles.
- h

i THE MAIN PROCEEDINGS AND THE QUESTIONS REFERRED FOR A PRELIMINARY RULING

17. It should be stated at the outset that, as is apparent from the documents before the court, there is no production of motor vehicles in Denmark. During the period from 1985 to 2000, the total number of registered vehicles in Denmark rose from 1,501,000 to 1,854,000 and the number of new registrations varied between 78,453 and 169,492 per year.



18. In January 1999, DBI purchased a new Audi vehicle for the use of its director for a total price (including delivery costs) of DKK 498,546, including DKK 297,456 in registration duty.

19. Since DBI took the view that that charge had been levied in breach, inter alia, of art 28 EC, it requested its repayment from the tax authorities, relying in particular on paras 12 and 13 of *Commission v Denmark*. In its submission, the excessive level of the registration duty made it impossible to import motor vehicles to Denmark under normal commercial conditions, to the benefit of domestic purchases of previously registered used vehicles, which were to be regarded as Danish products, in accordance with the case law of the court (see *Commission v Denmark* (para 17) and *Dounias v Ipourgos Ikonomikon* Case C-228/98 [2000] ECR I-577 (para 42)).

20. The Skatteministeriet responded that, according to the case law of the court (see, inter alia, *Dounias'* case (para 39)), fiscal contributions cannot be caught by art 28 EC, since the lawfulness of domestic taxation may be assessed only in the light of art 90 EC. It stated further that, in *EC Commission v Greece* Case C-132/88 [1990] ECR I-1567 (para 17), the court found that, as Community law stands at present, the member states are at liberty to make products such as cars subject to a system of tax which increases progressively in amount according to an objective criterion and that art 95 of the Treaty does not provide a basis for censuring the excessiveness of the level of taxation which the member states might adopt for particular products in the light of considerations of social policy.

21. According to the Skatteministeriet, the proviso adopted by the court in paras 12 and 13 of *Commission v Denmark* relates only to cases in which, as a result of internal taxation, trade in the product in question ceases or is insignificant in volume. The registration duty on motor vehicles, however, is not prohibitive and the total number of motor vehicles in Denmark is comparable to that in other member states.

22. In those circumstances the Østre Landsret decided to stay proceedings and to refer the following two questions to the Court of Justice for a preliminary ruling:

'(1) Can an indirect duty (registration duty) charged by a Member State, which in the case of new cars amounts to 105% of DKK 52 800 and 180% of the remainder of the taxable value, be a measure having an effect equivalent to a quantitative restriction on imports and for that reason prohibited under Article 28 EC (reference is made in this connection to the Court's judgment in [*Commission v Denmark* (para 13)])?

(2) If the answer to Question (1) is yes: can that registration duty be justified on the grounds that are mentioned in Article 30 EC or follow from the Court's case law on Article 28 EC (reference is made to [*Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* Case 120/78 [1979] ECR 649])?'

#### THE FIRST QUESTION REFERRED FOR A PRELIMINARY RULING

23. By its first question, the national court is essentially asking the court whether art 28 EC must be interpreted as precluding, as a rule, the levy of a charge on the registration of new motor vehicles, such as the registration duty at issue in the main proceedings.

*a Observations submitted to the court*

24. DBI claims, in substance, that the Danish registration duty impedes the free movement of new vehicles since, because of its excessive level, it prevents the importation of those goods to Denmark under normal commercial conditions, whilst benefiting domestic purchases of used vehicles previously registered in Denmark, which must be regarded as Danish products. That duty thus amounts to a quantitative restriction on imports contrary to art 28 EC.

*b* 25. The applicant in the main proceedings bases its analysis on paras 12 and 13 of *Commission v Denmark*, from which it is apparent that charges of an amount such that they impede the free movement of goods may be assessed in the light of art 28 EC.

*c* 26. The Danish government submits that the registration duty cannot be regarded as a quantitative restriction on imports prohibited under art 28 EC. It argues that the assertion in para 13 of *Commission v Denmark* has never been reiterated by the court in subsequent judgments. On the contrary, it follows from settled case law that barriers of a fiscal nature to the free movement of goods must be assessed in the light of arts 23 to 25 EC or arts 90 to 93 EC. In *d* the main proceedings, however, the registration duty on new motor vehicles, which is internal taxation, neither discriminates against imported products nor protects domestic production, with the result that it is not prohibited by art 90 EC.

*e* 27. As to the remainder, if the Commission were to consider that the registration duty is excessively high, it would be for it to draw up a proposal for a measure on the basis of art 93 EC with a view to harmonising national legislation.

*f* 28. In the alternative, the Danish government contends that para 13 of *Commission v Denmark* must be interpreted as meaning that the prohibition on quantitative restrictions on imports, laid down in art 28 EC, relates only to fiscal provisions which have such an impact on intra-Community trade that, as far as the taxed product is concerned, that trade is reduced to nothing or becomes insignificant. However, that is not the case in the main proceedings since the number of motor vehicles per inhabitant in Denmark is comparable to that in other member states.

*g* 29. The observations of the Italian and Finnish governments are to the same effect.

*h* 30. The Commission considers that barriers of a fiscal nature which do not have an effect equivalent to a customs duty fall, as a rule, under art 90 EC, which is a *lex specialis* as opposed to the general prohibition on barriers to trade, laid down in art 28 EC. Barriers of a fiscal nature which are not covered by art 90 EC—or by arts 23 to 25 EC—may therefore be caught by art 28 EC *i* where they impede the free movement of goods. By contrast, according to the case law of the court, a barrier of a fiscal nature cannot fall at the same time under the two provisions.

*i* 31. As a consequence, it is for the national court to assess, in the light of the facts in the main proceedings, whether the registration duty on new motor vehicles is of a level such that it impedes the free movement of goods. The Commission notes, in that regard, that it is apparent from the order for reference that a considerable number of motor vehicles are registered each year in Denmark, that the variations in the number of registrations appear to be purely short-term and that the number of motor vehicles per inhabitant is at the same level as in other countries of the Organisation for Economic

Co-operation and Development (OECD). It is therefore not established that the Danish legislation at issue in the main proceedings impedes the free movement of goods. a

*Reply of the court*

32. The scope of art 28 EC does not extend to the obstacles to trade covered by other specific provisions of the Treaty and obstacles of a fiscal nature or having an effect equivalent to customs duties, which are covered by arts 23, 25 and 90 EC, do not fall within the prohibition laid down in art 28 EC (see *Cie commerciale de l'Ouest v Receveur principal des douanes de la Pallice-Port* Joined cases C-78/90 and C-83/90 [1992] ECR I-1847 (para 20) and *Downias' case* (para 39)). b

33. Furthermore, as regards the scope of arts 25 and 90 EC, it is settled case law that provisions relating to charges having equivalent effect and those relating to discriminatory internal taxation cannot be applied together, with the result that, under the system established by the Treaty, the same charge cannot belong to both categories at the same time (see *Nygård v Svineavgiftsfonden* Case C-234/99 [2002] ECR I-3657 (para 17)). c

34. In the present case, since a charge on the registration of new motor vehicles, such as the Danish registration duty at issue in the main proceedings, is manifestly of a fiscal nature and is charged not by reason of the vehicle crossing the frontier of the member state which introduced the charge, but upon first registration of the vehicle in the territory of that state, the charge must be regarded as part of a general system of internal dues on goods and thus examined in the light of art 90 EC. d

35. The fact that a charge of that sort is in fact imposed solely on imported new vehicles, because there is no domestic production, is not such as to cause it to be characterised as a charge having equivalent effect, for the purposes of art 25 EC, rather than internal taxation, within the meaning of art 90 EC, since it is part of a general system of internal dues applied systematically to categories of vehicles in accordance with objective criteria irrespective of the origin of the products (see, to that effect, *EC Commission v France* Case 90/79 [1981] ECR 283 (para 14)). e

36. Since the applicability of art 90 EC in the main proceedings is thus established, it should be noted that that article expressly prohibits the imposition on products from other member states of internal taxation in excess of that imposed on similar domestic products or internal taxation of such a nature as to afford indirect protection to other products (see *Commission v Denmark* (para 8)). f

37. It should also be noted that, as para 9 of *Commission v Denmark* shows, the aim of art 90 EC as a whole is to ensure the free movement of goods between the member states in normal conditions of competition by the elimination of all forms of protection which may result from the application of internal taxation that discriminates against products from other member states. Thus art 90 EC must guarantee the complete neutrality of internal taxation as regards competition between domestic products and imported products. g

38. On the other hand, art 90 EC cannot be invoked against internal taxation imposed on imported products where there is no similar or competing domestic production. In particular, it does not provide a basis for censuring the excessiveness of the level of taxation which the member states might adopt for particular products, in the absence of any discriminatory or protective effect (see *Commission v Denmark* (para 10)). h

i



- a 39. At present there is no domestic production of cars in Denmark, as has already been noted in para 17, above, nor indeed of any products liable to compete with cars. In those circumstances, it must be concluded that the Danish registration duty imposed on new motor vehicles is not covered by the prohibitions laid down in art 90 EC.
- b 40. It is true, as DBI pointed out, that the court held, in para 12 of *Commission v Denmark*, that it is not permissible for the member states to impose on products which, in the absence of comparable domestic production, escape the application of the prohibitions contained in art 90 EC charges of such an amount that the free movement of goods within the common market would be impeded as far as those goods were concerned.
- c 41. It is however sufficient in that regard to state that, in any event, the figures communicated by the national court as to the number of new vehicles registered in Denmark, and thus imported into that member state, do not in any way show that the free movement of that type of goods between Denmark and the other member states is impeded.
- d 42. In those circumstances, it cannot be considered that a charge such as the Danish registration duty has ceased to be internal taxation, within the meaning of art 90 EC, and should be classified as a measure having equivalent effect to a quantitative restriction, for the purposes of art 28 EC, nor is it appropriate to examine the scope of the proviso adopted by the court in paras 12 and 13 of *Commission v Denmark*.
- e 43. In conclusion, the answer to the first question referred for a preliminary ruling must be that:  
—a charge on the registration of new motor vehicles established by a member state which does not have any domestic production of vehicles, such as that laid down by the lov om registreringsafgift af motorkøretøjer (Law on registration duty on motor vehicles), in the version resulting from Consolidating Law No 222 of 14 April 1999, constitutes internal taxation whose compatibility with Community law must be examined in the light not of art 28 EC, but of art 90 EC;  
—art 90 EC must be interpreted as not precluding such a charge.

#### THE SECOND QUESTION REFERRED FOR A PRELIMINARY RULING

- g 44. Having regard to the considerations set out in connection with the first question, it is not necessary to examine the justifications put forward in the alternative by the Danish government in support of the compatibility of the Danish registration duty with Community law, with the result that the second question becomes devoid of purpose.
- h COSTS
45. The costs incurred by the Danish, Italian and Finnish governments and by the Commission, which have submitted observations to the court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

i On those grounds, the Court of Justice, in answer to the question referred to it by the Østre Landsret by order of 26 September 2001, hereby rules:

(1) A charge on the registration of new motor vehicles established by a member state which does not have any domestic production of vehicles, such as that laid down by the lov om registreringsafgift af motorkøretøjer (Law on

registration duty on motor vehicles), in the version resulting from Consolidating Law No 222 of 14 April 1999, constitutes internal taxation whose compatibility with Community law must be examined in the light not of art 28 EC, but of art 90 EC. *a*

(2) Article 90 EC must be interpreted as not precluding such a charge.

**a** Delahaye v Ministre de la Fonction  
publique et de la Réforme  
administrative

**b** (Case C-425/02)

COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES (SECOND CHAMBER)

JUDGES TIMMERMANS (PRESIDENT), GULMANN AND COLNERIC (RAPPORTEUR)  
ADVOCATE GENERAL LÉGER

**c** 6 MAY, 17 JUNE, 11 NOVEMBER 2004

**d** *European Community – Employment – Continuity of employment – Transfer of trade, business or undertaking – Transfer of undertaking from private company to public body – Allocation of rate of remuneration pursuant to national provisions on employment conditions for employees of state – Whether reduction in remuneration prohibited by Community law – Whether reduction in remuneration constituting substantial change in working conditions to detriment of transferred employee – Council Directive (EEC) 77/187, art 4(2).*

**e** In the main proceedings, the employee had concluded a contract of employment with the state of Luxembourg after the activity of the undertaking for whom she had worked had been transferred to the state. As the result of the relevant provisions of national law—which fixed the employment conditions and amounts of remuneration of employees of the state—she had been allocated a lower remuneration than she had originally received since no allowance had been made for her length of service with her former employer. The national court decided to stay the proceedings and refer a question to the Court of Justice of the European Communities under art 234 EC (formerly art 177 of the EC Treaty) concerning: (i) whether Council Directive (EEC) 77/187 (on the approximation of the laws of the member states relating to the safeguarding of employees' rights in the event of transfers or undertakings, businesses or parts of businesses) precluded the reduction of the transferred employee's remuneration; and (ii) whether such a reduction in the transferred employee's remuneration might constitute a substantial change in working conditions to the detriment of the transferred employee within the meaning of art 4(2)<sup>a</sup> of the directive.

**h** **Held** – Where an undertaking had been transferred from a legal person governed by private law to the state, in principle, that state was not precluded by the directive from reducing a transferred employee's remuneration in order to comply with national rules for public employees. However, having regard to the spirit of the directive, the transferred employee's length of service had to be taken into account when calculating his or her remuneration in the same way that length of service would be taken into account for state employees. Furthermore, where that calculation had been applied a substantial reduction in the transferred employee's remuneration resulting none the less would constitute a substantial change in working conditions to the detriment of the

<sup>a</sup> Article 4(2) of the directive is set out at judgment para 6, below



transferred employee within the meaning of art 4(2) of the directive, such that termination of the contract of employment for that reason had to be regarded as resulting from the action of the employer (see judgment paras 30, 32–35, below).

*Mayeur v Association Promotion de l'Information Messine (APIM)* Case C-175/99 [2000] IRLR 783 applied.

## Notes

For the effect of a relevant transfer on contracts of employment, see 16 *Halsbury's Laws* (4th edn reissue) para 390.

## Cases cited

- Abler v Sodexho MM Catering GmbH* Case C-340/01 [2004] IRLR 168, ECJ.
- Allen v Amalgamated Construction Co Ltd* Case C-234/98 [2000] All ER (EC) 97, [1999] ECR I-8643, ECJ.
- Barber v Guardian Royal Exchange Assurance Group* Case C-262/88 [1990] 2 All ER 660, [1991] 1 QB 344, [1991] 2 WLR 72, [1990] ECR I-1889, ECJ.
- Brown v Secretary of State for Scotland* Case 197/86 1989 SLT 402, [1988] ECR 3205, ECJ.
- Collino v Telecom Italia SpA* Case C-343/98 [2001] All ER (EC) 405, [2000] ECR I-6659, ECJ.
- Foreningen af Arbejdsledere i Danmark v A/S Danmols Inventar (in liq)* Case 105/84 [1985] ECR 2639, ECJ.
- Foreningen af Arbejdsledere i Danmark v Daddy's Dance Hall A/S* Case 324/86 [1988] IRLR 315, [1988] ECR 739, ECJ.
- Henke v Gemeinde Schierke* Case C-298/94 [1997] All ER (EC) 173, [1996] ECR I-4989, ECJ.
- Jämställdhetsombudsmannen v Örebro Läns Landsting* Case C-236/98 [2000] ECR I-2189, ECJ.
- Lawrie-Blum v Land Baden-Württemberg* Case 66/85 [1986] ECR 2121, ECJ.
- Martin v South Bank University* Case C-4/01 [2004] IRLR 74, ECJ.
- Mayeur v Association Promotion de l'Information Messine (APIM)* Case C-175/99 [2000] IRLR 783, [2002] ICR 1316, [2000] ECR I-7755, ECJ.
- Merckx v Ford Motors Co Belgium SA* Joined cases C-171/94 and C-172/94 [1996] All ER (EC) 667, [1997] ICR 352, [1996] ECR I-1253, ECJ.
- Redmond (Dr Sophie) Stichting v Bartol* Case C-29/91 [1992] ECR I-3189, ECJ.
- Sánchez Hidalgo v Asociación de Servicios Aser, Ziemann v Ziemann Sicherheit GmbH* Joined cases C-173/96 and C-247/96 [1999] IRLR 136, [2002] ICR 73, [1998] ECR I-8237, ECJ.
- Spijkers v Gebr Benedik Abattoir CV* Case 24/85 [1986] ECR 1119, ECJ.
- Süzen v Zehnacker Gebäudereinigung GmbH Krankenhausservice* Case C-13/95 [1997] All ER (EC) 289, [1997] ECR I-1259, ECJ.
- Union de Recouvrement des Cotisations de Sécurité Sociale et d'Allocations Familiales de la Savoie (URSSAF) v Hostellerie Le Manoir Sàrl* Case C-27/91 [1991] ECR I-5531, ECJ.

## Reference

By decision of 21 November 2002, the Cour Administrative (Administrative Court) Luxembourg, referred under art 234 EC (formerly art 177 of the EC Treaty) a question (set out at judgment para 27, below) on the interpretation of Council Directive (EEC) 77/187 (on the approximation of the laws of the

a member states relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses). The reference was made in the course of proceedings between Johanna Maria Boor, née Delahaye, and the Minister for Public Service and Administrative Reform concerning the minister's refusal to maintain the remuneration under the contract of employment originally concluded between Mrs Boor and Foprogest ASBL (association sans but lucratif, non-profit-making association), a legal person governed by private law, after the latter's undertaking had been transferred to the Luxembourg state. Observations were submitted on behalf of: Mrs Boor, née Delahaye, by R Assa and N Prüm-Carré, Avocats; the Luxembourg government, by S Schreiner, acting as agent, and A Rukavina, Avocat; the Italian government, by IM Braguglia and D Del Gaizo, acting as agents, and A Gingolo, Avvocato dello Stato; the Portuguese government, by L Inez Fernandes and A Seica Neves, acting as agents; the Commission of the European Communities, by A Aresu and D Martin, acting as agents. The language of the case was French. The facts are set out in the opinion of the Advocate General.

d 17 June 2004. **The Advocate General (P Léger)** delivered the following opinion<sup>1</sup>.

1. Where the state takes over activities previously carried on by a non-profit-making association (a legal person governed by private law), is the state, as transferee of the undertaking, obliged under Community law, to preserve unchanged the private law contracts of employment existing at the date of transfer of this undertaking, without reducing the amount of the employees' remuneration, or is it entitled, under the national rules in force relating to the status of public employees, to make such a reduction?

e 2. This, essentially, is the question referred for a preliminary ruling by the Cour Administrative (Administrative Court), Luxembourg. In this question, f the referring court is requesting the Court of Justice of the European Communities, following on from the decision in *Mayeur v Association Promotion de l'Information Messine (APIM)*<sup>2</sup>, to interpret Council Directive (EEC) 77/187 (on the approximation of the laws of the member states relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses)<sup>3</sup>.

g I—LEGAL BACKGROUND

A—The Community legislation

3. Directive 77/187 aims, as set out in its second recital, to 'provide for the protection of employees in the event of a change of employer, in particular, to ensure that their rights are safeguarded'.

h 4. To that end, art 3(1) of the directive lays down the principle that—

i '[t]he transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer within the meaning of Article 1(1)<sup>4</sup> shall, by reason of such transfer, be transferred to the transferee.'

1 Original language: French.

2 Case C-175/99 [2000] IRLR 783, [2000] ECR I-7755.

3 OJ 1977 L61 p 26.

4 Article 1(1) of the directive states that '[t]his Directive shall apply to the transfer of an undertaking, business or part of a business to another employer as a result of a legal transfer or merger'.

5. Furthermore, the directive provides that the transferee shall continue to observe the conditions of work agreed in any collective agreement (see art 3(2)) and that the employees concerned shall be protected against dismissal by the transferor or the transferee solely on the grounds of the transfer (see art 4(1)). a

6. Further, art 6(1) of the directive imposes on the transferor and the transferee the requirement to inform the representatives of the employees concerned of the legal, economic and social implications of the transfer for these employees and of measures envisaged in relation to them. It is specified that the transferee must give such information in good time, and in any event before these employees are directly affected by the transfer as regards their conditions of work and employment. Article 6(2) of the directive supplements this requirement for information from the transferor or the transferee by a requirement to consult with a view to seeking agreement with the representatives of the employees concerned when measures are envisaged in relation to these employees. b  
c

7. Where the measures envisaged and consulted on are finally decided upon, art 4(2) of the directive provides that— d

‘[i]f the contract of employment or the employment relationship is terminated [on the employee’s initiative] because the transfer ... involves a substantial change in working conditions to the detriment of the employee, the employer shall be regarded as having been responsible for termination of the contract of employment or of the employment relationship.’ e

8. All these provisions were reproduced, in their entirety, by Council Directive (EC) 98/50 (amending Council Directive (EEC) 77/187)<sup>5</sup>, and then by Council Directive (EC) 2001/23 (on the approximation of the laws of the member states relating to the safeguarding of employees’ rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses)<sup>6</sup>, which codified Directive 77/187 in the light of the substantial amendments made by Directive 98/50. f

#### *B—The national legislation*

9. In Luxembourg law, the relevant national legislation on safeguarding employees’ rights in the event of the transfer of an undertaking is set out in art 36 of the Law of 24 May 1989 on contracts of employment<sup>7</sup>. g

10. Article 36(1) provides that—

‘[i]f any change arises in the legal situation of the employer, in particular by reason of succession, sale, merger, transformation of business assets or incorporation, all contracts of employment in force on the date of that change shall continue to exist between the new employer and the employees of the undertaking.’ h

11. The first subparagraph of art 36(2) explains, in addition, that a—

‘transfer of the undertaking as a result inter alia of a legal transfer or merger shall not in itself constitute grounds for dismissal by the transferor or the transferee.’ i

<sup>5</sup> OJ 1998 L201 p 88.

<sup>6</sup> OJ 2001 L82 p 16.

<sup>7</sup> Mémorial [Official Journal of Luxembourg] A No 35, 1989, p 611.



- a 12. The second subparagraph of art 36(2) of the Law states that—

‘[i]f the contract of employment is terminated because the transfer involves a substantial change in working conditions to the detriment of the employee, the employer shall be regarded as having been responsible for termination of the contract of employment.’

- b II—FACTS AND MAIN PROCEEDINGS

- c 13. Mrs Boor, née Delahaye, was employed as a secretary by the association ‘Pour l’insertion professionnelle’ (from 2 January 1995), then by the association ‘Foprogest ASBL’<sup>8</sup> (from 1 April 1998), after the latter association took over the activities initially carried on by the former. On this takeover of activities, her contract of employment with the first association was preserved by the second, and her working conditions and remuneration remained unaltered.

- d 14. According to art 3 of its articles of association, Foprogest, established in Luxembourg, had the object of promoting and implementing various training activities intended, *inter alia*, to improve the situation of persons seeking work and unemployed persons, so as to enable them to join or rejoin the workforce. It was also responsible for providing technical and administrative assistance within the framework of vocational training programmes and for managing the budgets of some of these programmes. Under art 19 of its articles of association, this non-profit-making association’s resources were to be largely derived from contributions, donations and bequests, grants and subsidies.

- e 15. At the end of 1999, the activities carried on by Foprogest were, in turn, taken over by the administration of the Luxembourg state, namely the Ministry of National Education, Vocational Training and Sport.

- f 16. In the context of this transfer of activities, the employment of Mrs Boor and Foprogest’s other employees was taken over by the Luxembourg state. This process gave rise to the conclusion of several contracts between the new employer and the employees concerned. In these circumstances, on 22 December 1999, Mrs Boor concluded a contract for an indefinite period with the Ministry of National Education, Vocational Training and Sport. The contract came into effect on 1 January 2000.

- g 17. Under the terms of art 2 of this contract, the claimant’s status as a state employee was recognised, in accordance with the provisions of the amended Law of 27 January 1972 laying down rules for state employees. According to art 4 of her contract, Mrs Boor’s employment was subject to the Regulation of the Government in Council of 1 March 1974 laying down rules for the indemnities of employees of state administrations and services.

- h 18. By letter of 25 January 2001, Mrs Boor brought before the Minister for Public Service and Administrative Reform an internal appeal against an order adopted by the minister on 27 October 2000, which had categorised her at a certain career and grade<sup>9</sup>. She contested this order on the grounds that it placed her, *inter alia* in terms of remuneration, in a less favourable situation than she had earlier enjoyed with her previous employer<sup>10</sup>.

- i 19. Mrs Boor maintained that, according to art 36 of the Law of 24 May 1989 on contracts of employment, a change in the employer’s legal situation cannot

8 Or Foprogest.

9 The category in question was: career A, grade 1.

10 Mrs Boor claims, without contradiction by the Luxembourg government, that she was subject, by reason of the transfer of activities in question, to a reduction in remuneration of 37%; her salary had, according to her statements, initially been €2,000 a month.

be accompanied by a change in working conditions or remuneration. The same applies, *inter alia*, where a legal person governed by public law takes over activities carried on until then by a legal person governed by private law. Consequently, Mrs Boor requested that the working conditions she had enjoyed before 1 January 2000, that is to say within the framework of her contract with Foprogest, be re-established retroactively. a

20. The competent administration did not allow her application. According to the administration, there had been no changes in the employer's situation, but only the formation of a new working relationship with a new employer, which had given rise to the conclusion of a new contract, so that the provisions of national law on which Mrs Boor relied did not apply. b

21. Mrs Boor then applied to the Tribunal Administratif (Administrative Court) Luxembourg, with a view to having the contested grading order and the later amending order varied or set aside, inasmuch as neither of them permitted her to preserve her level of remuneration<sup>11</sup>. In support of her action, Mrs Boor relied *inter alia* on the provisions of art 36 of the Law of 24 May 1989 on contracts of employment and the way they should be interpreted in accordance with the provisions of Directive 77/187, which was relevant to this case by reason of the *Mayeur* judgment. c

22. By a judgment of 13 March 2002, the Tribunal Administratif dismissed Mrs Boor's action. According to the court, the applicant's situation fell within the context of the transfer of an economic entity, meeting the conditions governing the application of art 36 of the Law of 24 May 1989. However, the national court pointed out that the activity taken over is now carried on as an administrative public service and therefore comes under the rules of public law, which means that the takeover of the economic entity in question can proceed only subject to its compatibility with mandatory rules of public law on, *inter alia*, the remuneration of state employees. d

23. The Tribunal Administratif concluded from this that, while the reduction in remuneration of which Mrs Boor complains is capable of constituting a substantial change in her working conditions such that the employer is responsible for termination of her contract, she cannot preserve her contractual relationship while still enjoying the same remuneration. e

24. Mrs Boor appealed to the Cour Administrative (Higher Administrative Court) against that judgment. According to her, the effect of art 36 of the Law of 24 May 1989 and of art 3(1) of Directive 77/187 is that any transfer of an economic entity entails the safeguarding of the employees' rights without restriction or exception. The interpretation of these provisions given by the Tribunal Administratif would mean, firstly, that they were rendered completely redundant and, secondly, that the principle of primacy of Community law over national law was infringed. f

25. The Luxembourg government questioned whether the activities previously carried on by the non-profit-making association Foprogest and taken over by the state may be regarded as economic in nature within the meaning of Directive 77/187, as amended by Directive 98/50, since they involve combating unemployment, an activity which may come under the exercise of public power. g

h

i

<sup>11</sup> By an order of 6 July 2001, which set aside and replaced that of 27 October 2000, Mrs Boor was categorised as follows: career B, grade 2.

a III—THE QUESTION REFERRED FOR A PRELIMINARY RULING

26. Having regard to the arguments put forward by the parties, the Cour Administrative decided to stay proceedings and to refer a question to the Court of Justice for a preliminary ruling, asking whether—

b 'Having regard to the provisions of Directives 77/187/EEC, 98/50/EC and 2001/23/EC identified herein, in the event of the transfer of an undertaking from a non-profit-making association, which is a legal person under private law, to the State as transferee, is it permissible for the transferor's rights and obligations to be taken over only in so far as they are compatible with the State's own rules of public law, in particular in the field of remuneration, where the detailed provisions and amounts of compensation are laid down by Grand-Ducal regulation, bearing in mind that the status of public sector employee confers legal benefits in the fields of, inter alia, career development and job stability on the employees concerned, and that, in the event of disagreement as regards "substantial changes" to the employment relationship within the meaning of Article 4(2) of those directives, the employees concerned retain the right to request termination of that relationship according to the detailed rules in the relevant provisions?'  
c  
d

27. At the outset, it should be pointed out that the question referred for a preliminary ruling refers to Directive 77/187, Directive 98/50 and Directive 2001/23. However, the main proceedings took place at a date before the passing of the deadline for implementation of Directive 98/50, set at 17 July 2001, and before its transposition into Luxembourg law, which took effect later as a result of the Law of 19 December 2003<sup>12</sup>. It follows that Directive 98/50 does not apply to the main proceedings<sup>13</sup>. The same is true of Directive 2001/23, intended to codify Directive 77/187 in the light of the substantial amendments made by Directive 98/50. It is therefore not necessary, in the context of the main proceedings, to consider the interpretation of Directive 98/50 or of Directive 2001/23, particularly because the relevant provisions of Directive 77/187 were reproduced in their entirety by Directives 98/50 and 2001/23. It is necessary to interpret only Directive 77/187 and, in particular, art 3(1)<sup>14</sup>.  
e  
f

28. It follows that, by this question, the referring court is essentially asking whether art 3(1) of Directive 77/187 must be interpreted as precluding, where the transfer of an undertaking involves the state taking over activities previously carried on by a legal person governed by private law, the state, as new employer, from reducing, on the grounds of the transfer, the amount of the employees' remuneration in accordance with national rules in force relating to the status of public employees.  
g  
h

29. As in *Mayeur's* case, this question referred for a preliminary ruling falls within the context of a takeover by a legal person governed by public law,

i 12 Mémorial GD No 182, 2003, p 3678.

13 For a comparable situation, see, inter alia, *Abler v Sodexho MM Catering GmbH* Case C-340/01 [2004] IRLR 168 (para 5).

14 I refer to art 3(1) of the directive (on the rights arising from a contract of employment), rather than art 3(2) (on the working conditions agreed in a collective agreement). It was stated at the hearing that the remuneration which Mrs Boor is seeking to preserve derives solely from her contract of employment with Foprogest, and not from any collective agreement binding on that association, so that art 3(2) of the directive cannot apply.



acting according to the specific rules of administrative law, of activities previously carried on by a legal person governed by private law. a

30. However, unlike the situation in the earlier case, the court has not been asked whether such an operation is capable of constituting a transfer of an economic entity within the meaning of Directive 77/187. b

31. The referring court has already ruled on this point, *inter alia* in the light of *Mayeur's case*<sup>15</sup>. In this regard, it was careful to state that activities comparable to those referred to in the main proceedings have already been recognised by the court as economic<sup>16</sup>. The referring court has concluded from this that the state's takeover of the activities previously carried on by Foprogest indeed constitutes a transfer of an undertaking within the meaning of Directive 77/187, so that the directive is applicable in the present case. c

32. In continuation of *Mayeur's case*, the referring court simply invites the Court of Justice to state the appropriate conclusions to be drawn in this case from the existence of a transfer of an economic entity, regarding the employees' situation, in particular as far as their remuneration is concerned. d

#### IV—ANALYSIS e

33. In para 106 of my opinion in *Mayeur's case*, I pointed out that the directive is not intended to amend the national laws in force by bringing about full harmonisation of the rights of Community workers in the event of a change of employer following a transfer of an undertaking, but only to ensure, as far as possible, that the contract of employment or employment relationship continues unchanged with the transferee<sup>17</sup>. I added that the purpose of the directive is, therefore, to prevent employees affected by a transfer of an undertaking from being placed in a less favourable position solely by reason of this transfer<sup>18</sup>. f

34. I drew the inference from this that the directive could not be interpreted as requiring the member states to amend their national law in order to enable an entity governed by public law to maintain in force contracts of employment governed by private law, contrary to the applicable national rules<sup>19</sup>. g

15 See order for reference (p 4). To the same effect, the Tribunal Administratif had pointed out that it was common ground that the activities previously carried on by Foprogest remained the same, as did the staff, the organisation and the means and methods of working, so that the entity in question retained its identity, and therefore a transfer of an economic entity had taken place (see judgment of 13 March 2002, p 5). The consideration of these diverse elements by the national court, to which it falls to determine whether the conditions of a transfer have been met, is entirely consistent with the settled case law of the court. See, *inter alia*, *Spijkers v Gebr Benedik Abattoir* CV Case 24/85 [1986] ECR 1119 (para 13), *Süzen v Zehnacker Gebäudereinigung GmbH Krankenhausservice* Case C-13/95 [1997] All ER (EC) 289, [1997] ECR I-1259 (para 14), *Allen v Amalgamated Construction Co Ltd* Case C-234/98 [2000] All ER (EC) 97, [1999] ECR I-8643 (para 26), *Mayeur's case* (para 52), and, finally, *Abler's case* (para 33). h

16 See order for reference (p 4). It refers to *Dr Sophie Redmond Stichting v Bartol* Case C-29/91 [1992] ECR I-3189, concerning activities providing assistance to drug addicts, *Sánchez Hidalgo v Asociación de Servicios Ascr*, *Ziemann v Ziemann Sicherheit GmbH* Joined cases C-173/96 and C-247/96 [1999] IRLR 136, [1998] ECR I-8237, concerning activities providing home-help services for persons in need and *Mayeur's case* (paras 38–41), concerning activities relating to publicity and information on behalf of a municipality in connection with the services which it offers to the public. i

17 I referred, *inter alia*, to *Foreningen af Arbejdsledere i Danmark v A/S Danmøls Inventar (in liq)* Case 105/84 [1985] ECR 2639 (para 26) and *Foreningen af Arbejdsledere i Danmark v Daddy's Dance Hall A/S* Case 324/86 [1988] IRLR 315, [1988] ECR 739 (para 16). See also the *Daddy's Dance Hall* case (para 9).

18 See, *inter alia*, the *Danmøls Inventar* case (para 26) and *Collino v Telecom Italia SpA* Case C-343/98 [2001] All ER (EC) 405, [2000] ECR I-6659 (para 37).

19 Paragraph 106 of my opinion in *Mayeur's case*.

a 35. I pointed out, however, that, in this situation, art 4(2) of the directive applies<sup>20</sup>.

b 36. I took the view that the obligation imposed on an employer, a legal person governed by public law, by a provision of national law, to terminate contracts governed by private law entered into by the transferor, in circumstances in which all the conditions for the transfer of an undertaking are satisfied, would have to be regarded as a substantial change in working conditions to the detriment of the employee<sup>21</sup>.

c 37. I concluded from this that, in accordance with the provisions of art 4(2) of the directive, it would be incumbent on the new employer, the transferee of the activities previously carried on by the former entity, to assume responsibility for the dismissal brought about by reason of his act<sup>22</sup>.

38. In its judgment in *Mayeur's* case, the court agreed with my analysis.

d 39. It did not simply point out that the possible existence of national rules imposing an obligation on a legal person governed by public law to terminate private law contracts of employment, in the event of taking over an activity previously carried on by a person governed by private law, does not mean in principle that this takeover falls outside the scope of the directive<sup>23</sup>.

e 40. The court took care to state that any obligation, prescribed by national law, to terminate contracts of employment governed by private law in the case of transfer of an activity to a legal person governed by public law constitutes a substantial change in working conditions to the detriment of the employee, resulting directly from the transfer, with the result that termination of such contracts of employment must, in such circumstances, be regarded as resulting from the action of the employer, in accordance with art 4(2) of the directive<sup>24</sup>.

f 41. As the Luxembourg government and the Commission of the European Communities have rightly pointed out, these developments in case law shed light on the answer to be given to the question referred for a preliminary ruling.

g 42. It may be seen from *Mayeur's* case that, in the event of the transfer to a legal person governed by public law of an economic entity within the scope of a legal person governed by private law, the application of the directive does not necessarily mean that contracts of employment existing at the time of the transfer should be preserved, in accordance with art 3(1) of the directive.

h 43. Thus, in the event that national law lays down, in the context of this type of transfer, an obligation to terminate private law contracts of employment, the directive does not preclude termination.

i 44. However, in this situation, termination required by national law should be regarded as resulting from the action of the employer, under art 4(2) of the directive, since this requirement of national law would constitute a substantial change in working conditions to the detriment of the employees.

45. In my opinion, this rule in *Mayeur's* case is capable of being applied to the situation in the main proceedings. There are two sets of arguments in favour of this.

20 See footnote above (para 107).

i 21 See footnote 19, above (para 108).

22 See footnote 19, above (para 108). Classifying the termination of a contract of employment or of an employment relationship as being at the initiative of or resulting from the action of the employer may, under the applicable national law, present some financial advantages for the employee concerned. It can thus confer entitlement to redundancy payments or to damages.

23 See, to that effect, *Mayeur's* case (paras 50–55).

24 See footnote above (para 56).

46. Firstly, it is apparent from the order for reference and from the judgment at first instance that the reduction in the amount of the remuneration in question results from the application, to employees affected by a transfer of activities from a legal person governed by private law to a legal person governed by public law, of mandatory national rules governing the situation of state employees. In other words, according to the interpretation that the national court has placed on its domestic law, the state, as new employer, is required to set the remuneration of the employees affected by the transfer at a lower amount than that provided for in the contracts of employment governed by private law which these employees had with their former employer<sup>25</sup>.

47. Secondly, in my opinion, such an obligation to reduce the amount of remuneration constitutes a *substantial* change in working conditions to the detriment of the employees, within the meaning of art 4(2) of the directive.

48. It must be recognised that remuneration is an essential condition of the contract of employment<sup>26</sup>. In my opinion, it follows that the obligation, laid down by national law, to reduce the amount of remuneration of the employees affected by the transfer in question constitutes, *by its nature, a substantial change* in working conditions to the detriment of these employees. It must be categorised as such, whatever the size of the reduction at issue<sup>27</sup>. Admitting the opposite entails a risk of giving rise to numerous proceedings and of national courts diverging in their determinations on treatment of the reduction in the amount of the remuneration in question. That prospect would not meet the need to guarantee uniform protection of the rights of employees facing such a reduction.

49. In accordance with this logic, the court, in its judgment of 7 March 1996 in *Merckx v Ford Motors Co Belgium SA*<sup>28</sup>, held that—

‘a change in the level of remuneration awarded to an employee is a substantial change in working conditions within the meaning of [the

25 This interpretation of national law is disputed by Mrs Boor. According to her, a state employee's contract of employment continues to be covered by private law and therefore falls outside the application of mandatory rules relating to civil servants, in particular in the area of remuneration. I shall not take a view on this question of interpretation of domestic law, which is solely within the competence of the national court.

26 Indeed, the existence of remuneration is necessarily taken into account in defining an employment relationship and the corresponding application of the rules of Community law on freedom of movement for persons. According to settled case law, ‘the essential feature of an employment relationship ... is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration’ (my emphasis). See, *inter alia*, *Lawrie-Blum v Land Baden-Württemberg* Case 66/85 [1986] ECR 2121 (paras 16, 17), *Brown v Secretary of State for Scotland* Case 197/86 1989 SLT 402, [1988] ECR 3205 (para 21) and *Union de Recouvrement des Cotisations de Sécurité Sociale et d'Allocations Familiales de la Savoie (URSSAF) v Hostellerie Le Manoir Sàrl* Case C-27/91 [1991] ECR I-5531 (para 7). It follows that there cannot be any employment relationship without remuneration.

27 In my opinion, reduction in the level of remuneration should be distinguished from other changes in working conditions, such as changes in hours or place of work. It is true that, in some cases, such changes may significantly affect the situation of employees and thus may constitute substantial changes in working conditions. This would be the case, in particular, where daytime working was converted to night working or where the place of work was moved to somewhere far from the initial site. However, in other cases, changes in hours or place of work may have little impact on the employees' situation, so that it would be excessive to see them as substantial changes in working conditions. This is why, in my opinion, unlike a reduction in the amount of remuneration, which constitutes by its nature a substantial change in working conditions, changes in hours or place of work should be examined case by case in order to determine whether they actually amount to a substantial change in working conditions.

28 Joined cases C-171/94 and C-172/94 [1996] All ER (EC) 667, [1996] ECR I-1253.



a provisions of art 4(2) of the directive], even where the remuneration depends in particular on the turnover achieved'<sup>29</sup>.

50. In that case, a motor vehicle sales dealer refused, as transferee of the entity being transferred, to guarantee to maintain the level of remuneration which two salesmen had received from the transferor. This remuneration  
b depended in particular on the turnover achieved, so that the amount of the remuneration in question was likely to vary significantly. Despite this distinctive feature, the court took the view, generally, that any change in the level of remuneration constitutes a substantial change in working conditions.

51. This rule in *Merckx's* case cannot be disregarded on the ground that, unlike the situation in that case, Mrs Boor, upon the transfer, acquired the  
c status of public sector employee, which confers (as the referring court pointed out in the question it referred for a preliminary ruling) legal benefits in the areas of, inter alia, career development and job stability.

52. In my opinion, since the reduction in the amount of remuneration constitutes by its nature a substantial change in working conditions, it matters  
d little whether this reduction is likely to be offset, wholly or partly, by the conferring of benefits<sup>30</sup>.

53. It follows from all these considerations that what holds good, according to *Mayeur's* case, for any obligation, laid down by national law, to terminate  
e private law contracts of employment when an economic entity is transferred to a legal person governed by public law applies equally to any obligation, laid down by national law, to reduce in these circumstances the amount of remuneration provided for by private law contracts of employment, as is the case in the main proceedings.

54. Based on the analysis of *Mayeur's* case and *Merckx's* case, I take the view that art 3(1) of the directive does not preclude the reduction in the amount  
f of the remuneration at issue, but that any termination of the contract of employment on this ground should be regarded as resulting from the action of the employer, in accordance with art 4(2) of the directive. Thus, contrary to Mrs Boor's claim, continued observance of the working conditions existing at the date of the transfer does not amount to an absolute or sacrosanct principle.

55. This interpretation of the directive reflects the Community legislature's concern to reconcile the different opposing interests: those of the new  
g employer, who should be in a position to make the adjustments and adaptations necessary to the running of the economic entity transferred, and those of the employees affected by the transfer, whose interests should be maintained as far as possible.

56. Consequently, the answer to this question referred for a preliminary  
h ruling should be that art 3(1) of the directive must be interpreted as not precluding, where the transfer of an undertaking involves the state taking over activities previously carried on by a non-profit-making association (legal person governed by private law), the state, as new employer, from making a reduction,

29 See para 38.

i 30 This view can be likened to the method adopted by the court to ascertain whether the principle of equal pay for male and female workers is being observed. In *Barber v Guardian Royal Exchange Assurance Group* Case C-262/88 [1990] 2 All ER 660, [1990] ECR I-1889 (para 35), the court held that 'the principle of equal pay must be ensured in respect of each element of remuneration and not only on the basis of a comprehensive assessment of the consideration paid to workers'. This analysis is based on the idea that it would be particularly difficult for national courts to assess and compare all the varied forms of consideration paid, in different cases, to male or female workers. See also *Jämställthetsombudsmannen v Örebro Läns Landsting* Case C-236/98 [2000] ECR I-2189 (para 43).

by reason of the transfer, in the amount of the employees' remuneration, under the national rules in force relating to the status of public employees. However, this reduction in the amount of remuneration constitutes, by its nature, a substantial change in working conditions to the detriment of the employees affected by the transfer, so that the termination of their contract of employment must be regarded as resulting from the action of the employer, in accordance with the provisions of art 4(2) of the directive.

#### V—CONCLUSION

57. Having regard to all these considerations, I propose that the Court of Justice give the following answer to the question referred by the Cour Administrative for a preliminary ruling:

'Article 3(1) of Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses must be interpreted as not precluding, where the transfer of an undertaking involves the State taking over activities previously carried on by a non-profit-making association (legal person governed by private law), the State, as new employer, from making a reduction, by reason of the transfer, in the amount of the employees' remuneration, under the national rules in force relating to the status of public employees. However, this reduction in the amount of remuneration constitutes, by its nature, a substantial change in working conditions to the detriment of the employees affected by the transfer, so that the termination of their contract of employment must be regarded as resulting from the action of the employer, in accordance with Article 4(2) of Directive 77/187.'

11 November 2004. **The COURT OF JUSTICE (Second Chamber)** delivered the following judgment.

1. This reference for a preliminary ruling concerns essentially the interpretation of Council Directive (EEC) 77/187 (on the approximation of the laws of the member states relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses) (OJ 1977 L61 p 26).

2. The reference was made in the course of proceedings between Mrs Boor, née Delahaye, and the Minister for Public Service and Administrative Reform concerning the minister's refusal to maintain the remuneration under the contract of employment originally concluded between Mrs Boor and Foprogest ASBL (association sans but lucratif, non-profit-making association) (Foprogest), a legal person governed by private law, after the latter's undertaking had been transferred to the Luxembourg state.

#### LEGAL BACKGROUND

##### *Community legislation*

3. Article 1(1) of Directive 77/187 provides:

'This Directive shall apply to the transfer of an undertaking, business or part of a business to another employer as a result of a legal transfer or merger.'

4. Article 2 of that directive provides:

- a* 'For the purposes of this Directive ...  
(b) "transferee" means any natural or legal person who, by reason of a transfer within the meaning of Article 1(1), becomes the employer in respect of the undertaking, business or part of the business ...'
- b* 5. Article 3(1) and (2) of the directive states:
- c* '1. The transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer within the meaning of Article 1(1) shall, by reason of such transfer, be transferred to the transferee ...  
2. Following the transfer within the meaning of Article 1(1), the transferee shall continue to observe the terms and conditions agreed in any collective agreement on the same terms applicable to the transferor under that agreement, until the date of termination or expiry of the collective agreement or the entry into force or application of another collective agreement.
- d* Member States may limit the period for observing such terms and conditions, with the proviso that it shall not be less than one year.'
6. Article 4 of the directive reads as follows:
- e* '1. The transfer of an undertaking, business or part of a business shall not in itself constitute grounds for dismissal by the transferor or the transferee. This provision shall not stand in the way of dismissals that may take place for economic, technical or organizational reasons entailing changes in the workforce ...  
2. If the contract of employment or the employment relationship is terminated because the transfer within the meaning of Article 1(1) involves a substantial change in working conditions to the detriment of the employee, the employer shall be regarded as having been responsible for termination of the contract of employment or of the employment relationship.'
- f*
7. Directive 77/187 was amended by Council Directive (EC) 98/50 (OJ 1998 L201 p 88), which, under art 2 of that directive, was to be transposed by 17 July 2001.
- g*
8. Council Directive (EC) 2001/23 (on the approximation of the laws of the member states relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses) (OJ 2001 L82 p 16) codified Directive 77/187, taking into account the amendments made to it by Directive 98/50.
- h*

#### *National legislation*

- i* 9. Article 36 of the Loi du 24 mai 1989 sur le contrat de travail (Law of 24 May 1989 on contracts of employment, Mémorial A 1989, p 611; the Law of 24 May 1989) prescribes:

'1. If any change arises in the legal situation of the employer, in particular by reason of succession, sale, merger, transformation of business assets or incorporation, all contracts of employment in force on the date of that change shall continue to exist between the new employer and the employees of the undertaking.



2. A transfer of the undertaking as a result *inter alia* of a legal transfer or merger shall not in itself constitute grounds for dismissal by the transferor or the transferee. a

If the contract of employment is terminated because the transfer involves a substantial change in working conditions to the detriment of the employee, the employer shall be regarded as having been responsible for termination of the contract of employment ...' b

10. Article 37 of that law provides:

'Any change to the detriment of the employee relating to an essential term of the contract of employment must, in order not to be void, be notified to the employees in the forms and within the time-limits referred to in Article 19 and 20 and must state the date from which it takes effect. In such a case the employee may ask the employer for the reasons for the change and the employer is obliged to state those reasons in the forms and within the time-limits laid down in Article 22 ...' c

A termination of the contract of employment following from the employee's refusal to accept the change notified to him shall constitute a dismissal against which the legal proceedings referred to in Article 28 may be brought.' d

11. The conditions and amounts of the remuneration of employees of the Luxembourg state are fixed by Grand-Ducal regulation. e

#### THE MAIN PROCEEDINGS

12. Mrs Boor, née Delahaye, was an employee of Foprogest. There was no collective agreement governing her remuneration.

13. Foprogest's objects consisted in particular of promoting and implementing training activities intended to improve the social and occupational position of persons seeking work and unemployed persons in order to enable them to be integrated or reintegrated into the workforce. Its resources consisted essentially of grants, donations and legacies. f

14. Foprogest's activity was transferred to the Luxembourg state, namely the Minister for National Education, Vocational Training and Sport. The activity thus taken over is now carried on in the form of an administrative public service. g

15. With effect from 1 January 2000, Mrs Boor was taken on as an employee of the Luxembourg state. Other workers who had previously been employed by Foprogest were also taken on by the state. That operation gave rise to the conclusion of new contracts of employment between the state and the employees concerned. It was in those circumstances that Mrs Boor on 22 December 1999 concluded a contract for an indefinite period with the minister concerned. h

16. By virtue of the Grand-Ducal regulation on the remuneration of state employees, Mrs Boor was then allocated a lower remuneration than that she had received under the contract originally concluded with Foprogest.

17. She submitted at the hearing, without being contradicted by the Luxembourg government, that she had been classified by the Luxembourg state, with no allowance for length of service, in the first grade, last step, of the salary scale, which meant that she lost 37% of her monthly salary. i

18. The parties to the main proceedings disagree essentially on whether the state is obliged, after the transfer in question, to maintain all the rights of

- a the employees, including in particular the right to remuneration, deriving from the contract of employment concluded between them and the transferor association.

THE QUESTIONS REFERRED FOR A PRELIMINARY RULING

- b 19. The national court states that the parties agree that there was a transfer of an undertaking within the meaning of art 36 of the Law of 24 May 1989, a view which that court also shares.

- c 20. The national court expressly rejects the argument put forward by the defendant in the main proceedings that the classification of the activity in question as economic could legitimately be contested, since it is an activity for countering unemployment which may fall within the exercise of public power. In this respect the national court refers to the judgments of the Court of Justice of the European Communities in *Dr Sophie Redmond Stichting v Bartol* Case C-29/91 [1992] ECR I-3189 (concerning assistance to drug addicts), *Sánchez Hidalgo v Asociación de Servicios Aser*, *Ziemann v Ziemann Sicherheit GmbH* Joined cases C-173/96 and C-247/96 [1999] IRLR 136, [1998] ECR I-8237 (concerning home help) and *Mayeur v Association Promotion de l'Information Messine (APIM)* Case C-175/99 [2000] IRLR 783, [2000] ECR I-7755.

- d 21. On the basis of that case law, the national court accepts that in the case at issue in the main proceedings there was a transfer of an undertaking within the meaning of the Community legislation.

- e 22. According to that court, having regard to the subject matter of the case as it now stands on appeal, the question should first be examined whether art 36 of the Law of 24 May 1989, which must be applied in the light of the Community provisions and in particular Directives 77/187 and 98/50 taken over in Directive 2001/23, allows the transfer of the rights and obligations of the employees to take place, in the case of a transfer to the public sector, only 'subject to compatibility with existing rules of public law', as the judgment under appeal put it. In other words, it must be determined whether the state as transferee may substitute the rules on compensation applicable to its own employees for the terms laid down by the previous contract of employment.

- f 23. The national court observes, first, that the Community legislation provides, in principle, that in the event of a transfer of an undertaking the rights and obligations of the transferor—in this case Foprogest—are transferred to the transferee—in this case the Luxembourg state—by reason of the transfer. Moreover, art 36 of the Law of 24 May 1989 provides that in such cases all contracts of employment in force continue to exist between the new employer and the employees of the undertaking.

- g 24. It notes, second, that art 4(2) of Directive 77/187, reproduced word for word in the second subparagraph of art 36(2) of the Law of 24 May 1989, provides that, if the contract of employment or the employment relationship is terminated because the transfer involves a substantial change in working conditions to the detriment of the employee, the employer is to be regarded as having been responsible for termination of the contract of employment.

- h 25. It considers that, although their context is the termination of the employment relationship, the provisions of art 4(2) of that directive none the less necessarily imply that there is a possibility of changing the employees' situation by reason of the transfer.

- i 26. It says that the question therefore remains whether the transferee, the Luxembourg state, may, to comply with its own domestic rules of public law, impose on employees taken over on a transfer a restructuring of their

remuneration situation which could, in certain cases, lead to a procedure for termination of the employment relationship at the employee's initiative on the conditions laid down in art 4(2) of Directive 77/187, or whether, on the contrary, the principle that the contract continues to exist requires the state to maintain, disregarding its own legislation, the remuneration under the original contract.

27. Those were the circumstances in which the Cour Administrative (Administrative Court) decided to stay the proceedings and refer the following question to the Court of Justice of the European Communities for a preliminary ruling:

'Having regard to the provisions of Directives 77/187/EEC, 98/50/EC and 2001/23/EC identified herein, in the event of the transfer of an undertaking from a non-profit-making association, which is a legal person under private law, to the State as transferee, is it permissible for the transferor's rights and obligations to be taken over only in so far as they are compatible with the State's own rules of public law, in particular in the field of remuneration, where the detailed provisions and amounts of compensation are laid down by Grand-Ducal regulation, bearing in mind that the status of public sector employee confers legal benefits in the fields of, inter alia, career development and job stability on the employees concerned, and that, in the event of disagreement as regards "substantial changes" to the employment relationship within the meaning of Article 4(2) of those directives, the employees concerned retain the right to request termination of that relationship according to the detailed rules in the relevant provisions?'

#### THE QUESTION REFERRED FOR A PRELIMINARY RULING

28. For the reasons set out by Advocate General Léger in para 27 of his opinion, Directives 98/50 and 2001/23 do not apply to the dispute in the main proceedings. Consequently, only Directive 77/187 needs to be interpreted.

29. By its question the national court essentially seeks to know whether that directive precludes, in the event of a transfer of an undertaking from a legal person governed by private law to the state, the latter, as new employer, from reducing the amount of the remuneration of the employees concerned for the purpose of complying with the national rules in force for public employees.

30. It should be recalled that, according to the court's case law, the transfer of an economic activity from a legal person governed by private law to a legal person governed by public law is in principle within the scope of Directive 77/187. Only the reorganisation of structures of the public administration or the transfer of administrative functions between public administrative authorities is excluded from that scope (see *Henke v Gemeinde Schierke* Case C-298/94 [1997] All ER (EC) 173, [1996] ECR I-4989 (para 14) and *Mayeur's case* (paras 29–34)).

31. Under art 3(1) of Directive 77/187, the transferor's rights and obligations under the contract of employment or employment relationship are transferred to the transferee by reason of that transfer.

32. Since the directive is intended to achieve only partial harmonisation of the field in question (see, inter alia, *Foreningen af Arbejdsledere i Danmark v Daddy's Dance Hall A/S* Case 324/86 [1988] IRLR 315, [1988] ECR 739 (para 16) and *Martin v South Bank University* Case C-4/01 [2004] IRLR 74 (para 41)), it does not preclude, in the event of a transfer of an activity to a legal person



- a governed by public law, the application of national law which prescribes the termination of contracts of employment governed by private law (see, to that effect, *Mayeur's case* (para 56)). However, such a termination constitutes, in accordance with art 4(2) of the directive, a substantial change in working conditions to the detriment of the employee resulting directly from the transfer, so that the termination of those contracts of employment must, in such circumstances, be regarded as resulting from the action of the employer (see *Mayeur's case* (para 56)).

b 33. The same must apply where, as in the case at issue in the main proceedings, application of the national rules governing the position of state employees entails a reduction in the remuneration of the employees concerned by the transfer. Such a reduction must, if it is substantial, be regarded as a substantial change in working conditions to the detriment of the employees in question, within the meaning of art 4(2) of the directive.

c 34. Moreover, the competent authorities responsible for applying and interpreting the national law relating to public employees are obliged to do so as far as possible in the light of the purpose of the directive. It would be contrary to the spirit of that directive to treat an employee taken over from the transferor without taking length of service into account, in so far as the national rules governing the position of state employees take a state employee's length of service into consideration for calculating his remuneration.

d 35. Consequently, the answer to the national court's question must be that the directive must be interpreted as not precluding in principle, in the event of a transfer of an undertaking from a legal person governed by private law to the state, the latter, as new employer, from reducing the amount of the remuneration of the employees concerned for the purpose of complying with the national rules in force for public employees. However, the competent authorities responsible for applying and interpreting those rules are obliged to do so as far as possible in the light of the purpose of that directive, taking into account in particular the employee's length of service, in so far as the national rules governing the position of state employees take a state employee's length of service into consideration for calculating his remuneration. If such a calculation leads to a substantial reduction in the employee's remuneration, such a reduction constitutes a substantial change in working conditions to the detriment of the employees concerned by the transfer, so that the termination of their contracts of employment for that reason must be regarded as resulting from the action of the employer, in accordance with art 4(2) of the directive.

#### COSTS

- e f g h 36. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the court, other than the costs of those parties, are not recoverable.

i On those grounds, the Court of Justice (Second Chamber) rules as follows:  
Council Directive (EEC) 77/187 (on the approximation of the laws of the member states relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses) must be interpreted as not precluding in principle, in the event of a transfer of an undertaking from a legal person governed by private law to the state, the latter, as new employer, from reducing the amount of the remuneration of the

employees concerned for the purpose of complying with the national rules in force for public employees. However, the competent authorities responsible for applying and interpreting those rules are obliged to do so as far as possible in the light of the purpose of that directive, taking into account in particular the employee's length of service, in so far as the national rules governing the position of state employees take a state employee's length of service into consideration for calculating his remuneration. If such a calculation leads to a substantial reduction in the employee's remuneration, such a reduction constitutes a substantial change in working conditions to the detriment of the employees concerned by the transfer, so that the termination of their contracts of employment for that reason must be regarded as resulting from the action of the employer, in accordance with art 4(2) of Directive 77/187.

**Grossmann Air Service,  
Bedarfsluftfahrtunternehmen GmbH  
& Co KG v Austria**

(Case C-230/02)

COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES (SIXTH CHAMBER)

JUDGES SKOURIS (ACTING AS THE PRESIDENT OF THE SIXTH CHAMBER), GULMANN, CUNHA RODRIGUES, PUISOCHET AND SCHINTGEN (RAPPORTEUR)

ADVOCATE GENERAL GEELHOED

10 SEPTEMBER, 16 OCTOBER 2003, 12 FEBRUARY 2004

*European Community – Public procurement – Review procedures applicable to public contracts – Access to review procedures – Undertaking not submitting a tender for contract – Undertaking claiming invitation to tender discriminatory – Whether non-participation in award procedure precluding right of access to review procedures – Whether failure to refer case to conciliation committee precluding undertaking from having an interest in contract – Council Directive (EEC) 89/665, arts 1(3), 2(1)(b).*

The Austrian Federal Ministry of Finance had invited tenders for the provision of non-scheduled passenger transport air services for the federal government and its delegations. The company submitted a tender. The Ministry subsequently annulled its invitation pursuant to para 55(2) of the 1997 Federal Law on Public Procurement and issued another invitation to tender. Although the company obtained the relevant documents, it did not submit an offer. The Federal Law provided, inter alia, that until a contract had been awarded the Federal Public Procurement Review Commission was competent to reconcile any difference of opinion between the awarding body and candidates. The company was later notified of the award of the contract to another company. It applied to have the decision to award the contract set aside on the ground that the invitation had been tailored to one tenderer, namely the successful company. The Federal Public Procurement Office dismissed that application on the basis that the company had failed to assert its legal interest in obtaining the entire contract; and, moreover, that as the contract had been awarded the office did not have the competence to set it aside. In respect of the absence of a legal interest, the office found that the company had not been able to provide all of the services required, as it did not have large aircraft. On appeal, the Constitutional Court ruled that the office had wrongly failed to refer a question to the Court of Justice of the European Communities for a preliminary ruling as to whether its interpretation of para 115(1) of the Federal Law was in accordance with Community law. A question therefore arose as to whether the company could establish an interest in bringing proceedings in accordance with art 1(3)<sup>a</sup> of Council Directive (EEC) 89/665 (on the co-ordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts); since, as the company was not in a position to provide the services in question, owing, it claimed, to provisions in the documents relating

<sup>a</sup> Article 1(3), so far as material, is set out at judgment para 3, below



to the invitation which were discriminatory within the meaning of art 2(1)<sup>b</sup>, it had not submitted a tender. In those circumstances the proceedings were stayed and three questions relating to the interpretation of arts 1(3) and 2(1) were referred to the Court of Justice for a preliminary ruling. a

**Held** – (1) Articles 1(3) and 2(1)(b) had to be interpreted as not precluding a person from being regarded, once a public contract had been awarded, as having lost his right of access to the review procedures provided for by the directive if he had not participated in the award procedure for that contract on the ground that he was not in a position to supply all the services for which bids were invited, because there were allegedly discriminatory specifications in the documents relating to the invitation to tender, but he did not seek review of those specifications before the contract was awarded. Participation in the award procedure could, in principle, validly constitute a condition which had to be fulfilled before the person concerned could show an interest in obtaining the contract at issue or that he risked suffering harm as a result of the allegedly unlawful nature of the decision to award that contract. However, where an undertaking had not submitted a tender because there were allegedly discriminatory specifications in the documents relating to the invitation or the contract which prevented it from being in a position to provide all the services requested, it would be entitled to seek review of those specifications directly, even before the procedure for awarding the contract concerned had been terminated. It was clear from the wording of art 2(1)(b) that review procedures had to set aside decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications. It therefore had to be possible for an undertaking to seek review of such discriminatory specifications directly, without waiting for the contract award procedure to be terminated. The fact that a person did not seek review of a decision determining the specifications of an invitation to tender which in his view discriminated against him, but awaited notification of the decision awarding the contract and then challenged it before the responsible body, on the ground that the specifications were discriminatory, was not in keeping with the objectives of speed and effectiveness of the directive. In those circumstances a refusal to acknowledge the interest in obtaining the contract in question and therefore the right of access to the review procedures did not impair the effectiveness of that directive (see judgment paras 27, 28, 30, 37, 39, 40, below). b  
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(2) Article 1(3) had to be interpreted as precluding a person who had participated in a contract award procedure from being regarded as having lost his interest in obtaining the contract on the ground that, before seeking the review provided for by the directive, he failed to refer the case to a conciliation committee such as the commission. Article 1(3) did not authorise the member states to give the term ‘interest in obtaining a ... public ... contract’ an interpretation which might limit the effectiveness of the directive. The fact that access to the review procedures provided for by the directive was made subject to prior referral to a conciliation committee such as the commission was contrary to the objectives of speed and effectiveness of that directive (see judgment paras 42, 43, below). h  
i

## Notes

For procedures for awarding public works contracts and public supply contracts, see 51 *Halsbury's Laws* (4th edn) paras 11.78, 11.87.

<sup>b</sup> Article 2(1), so far as material, is set out at judgment para 4, below

**a Cases cited**

*Alcatel Austria AG v Bundesministerium für Wissenschaft und Verkehr* Case C-81/98 [1999] ECR I-7671, ECJ.

*Fritsch, Chiari & Partner, Ziviltechniker GmbH v Autobahnen- und Schnellstraßen-Finanzierungs-AG (Asfinag)* Case C-410/01 [2003] ECR I-6413, ECJ.

**b** *Hackermüller v WED Bundesimmobiliengesellschaft mbH (BIG) and Wiener Entwicklungsgesellschaft mbH für den Donaauraum AG (WED)* Case C-249/01 [2003] ECR I-6319, ECJ.

*Hospital Ingenieure Krankenhaustechnik Planungs-Gesellschaft mbH (HI) v Stadt Wien* Case C-92/00 [2002] ECR I-5553, ECJ.

*Universale-Bau AG v Entsorgungsbetriebe Simmering GesmbH* Case C-470/99 [2002]

**c** ECR I-11617, ECJ.**Reference**

By order of 14 May 2002, the Bundesvergabeamt (Federal Public Procurement Office) referred to the Court of Justice of the European Communities for a preliminary ruling under art 234 EC (formerly art 177 of the EC Treaty) three questions (set out at judgment para 22, below) on the interpretation of arts 1(3) and 2(1)(b) of Council Directive (EEC) 89/665 (on the co-ordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts), as amended by Council Directive (EEC) 92/50 (relating to the co-ordination of procedures for the award of public service contracts). Those questions were raised in a dispute between Grossmann Air Service, Bedarfsluftfahrtunternehmen GmbH & Co KG (Grossmann) and the Republic of Austria, represented by the Federal Ministry of Finance, concerning an award procedure for a public contract. Written observations were submitted on behalf of: Grossmann by P Schmutzer, Rechtsanwalt; the Austrian government by M Fruhmann, acting as agent; the Commission of the European Communities by K Wiedner, acting as agent. Oral observations were made on behalf of: Grossmann, represented by P Schmutzer; the Austrian government, represented by M Winkler, acting as agent; and the Commission, represented by J C Schieferer, acting as agent. The language of the case was German. The facts are set out in the opinion of the Advocate General.

16 October 2003. **The Advocate General (LA Geelhoed)** delivered the following opinion<sup>1</sup>.

**I—INTRODUCTION****h** 1. In this case the Austrian Bundesvergabeamt (Federal Public Procurement Office) has submitted for a preliminary ruling certain questions concerning the interpretation of Council Directive (EEC) 89/665 (on the co-ordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts)<sup>2</sup>, as amended by Council Directive (EEC) 92/50 (relating to the co-ordination of procedures for the award of public service contracts)<sup>3</sup> (Directive 89/665).**i**

1 Original language: Dutch.

2 OJ 1989 L395 p 33.

3 OJ 1992 L209 p 1.

2. These questions have arisen in a dispute between Grossmann Air Service, *a*  
Bedarfsluftfahrtunternehmen GmbH & Co KG (Grossmann) and the Republic  
of Austria.

## II—LEGAL BACKGROUND

### A—Community law *b*

3. Article 1(1) and (3) of Directive 89/665 provides:

‘1. The Member States shall take the measures necessary to ensure that,  
as regards contract award procedures falling within the scope of Directives  
71/305/EEC, 77/62/EEC, and 92/50/EEC, decisions taken by the  
contracting authorities may be reviewed effectively and, in particular, as *c*  
rapidly as possible in accordance with the conditions set out in the  
following Articles and, in particular, Article 2(7) on the grounds that such  
decisions have infringed Community law in the field of public  
procurement or national rules implementing that law ...

3. The Member States shall ensure that the review procedures are *d*  
available, under detailed rules which the Member States may establish, at  
least to any person having or having had an interest in obtaining a  
particular public supply or public works contract and who has been or risks  
being harmed by an alleged infringement. In particular, the Member States  
may require that the person seeking the review must have previously  
notified the contracting authority of the alleged infringement and of his *e*  
intention to seek review.’

4. Article 2(1)(b) of Directive 89/665 provides:

‘1. The Member States shall ensure that the measures taken concerning  
the review procedures specified in Article 1 include provision for the  
powers to ...

(b) either set aside or ensure the setting aside of decisions taken *f*  
unlawfully, including the removal of discriminatory technical, economic or  
financial specifications in the invitation to tender, the contract documents  
or in any other document relating to the contract award procedure ...’

### B—National law *g*

5. Directive 89/665 was transposed into Austrian law by the Bundesgesetz  
über die Vergabe von Aufträgen (Bundesvergabegesetz) 1997 (1997 Federal  
Public Procurement Law, BGBl I, 1997/56; the BVergG). The BVergG provides  
for the creation of a Bundes-Vergabekontrollkommission (Federal Public  
Procurement Review Commission; the B-VKK) and of a Bundesvergabeamt *h*  
(Federal Public Procurement Office).

6. Under para 109 of the BVergG, the B-VKK is to be competent, until such  
time as the contract is awarded, to reconcile any differences of opinion  
between the awarding body and one or more candidates or tenderers  
concerning the application of this law or its implementing regulations  
(sub-para (1)). A request for the B-VKK to take action must be submitted to the *i*  
directors of the B-VKK as soon as possible after the difference of opinion  
comes to light (sub-para (6)). Furthermore, the awarding body may not award  
the contract until four weeks after it has been informed of the request to take  
action, failing which the tendering procedure is to be declared void  
(sub-para (8)).



a 7. Under para 113 of the BVergG, the Bundesvergabeamt is responsible on application for carrying out a review procedure (sub-para (1)). To preclude infringements of this Federal Law and of the regulations implementing it, the Bundesvergabeamt is authorised until the time of the award to adopt interim measures and to set aside unlawful decisions of the contracting authority (sub-para (2)). After the award of the contract or the close of the contract  
b award procedure, the Bundesvergabeamt is competent to determine whether, on grounds of infringement of this law or of any regulations issued under it, the contract has not been awarded to the best tenderer (sub-para (3)).

c 8. Paragraph 115(1) of the BVergG provides that where a trader claims to have an interest in the conclusion of a contract within the scope of this law, it may apply for the contracting authority's decision in the contract award procedure to be reviewed on the ground of unlawfulness, provided that it has been or risks being harmed by the alleged infringement.

### III—FACTUAL AND PROCEDURAL BACKGROUND

d 9. On 27 January 1998 the Federal Ministry for Finances (the Ministry) invited bids in respect of the provision for the Austrian federal government and its delegations of non-scheduled passenger transport services by air in jet and propeller aircraft. Grossmann subsequently submitted a bid.

e 10. However, on 3 April 1998 the contract award procedure was discontinued. On 28 July 1998 bids were once again invited for these transport services. Although Grossmann requested the relevant tender documents, it did not submit a further bid.

f 11. By letter of 8 October 1998 the Austrian government informed Grossmann of its intention to award the contract to Lauda Air Luftfahrt AG (Lauda Air). This letter was received by Grossmann on 9 October 1998. The contract with Lauda was entered into on 29 October 1998.

g 12. By an application dated 19 October 1998, which was posted on 23 October 1998 and received by the Bundesvergabeamt on 27 October 1998, Grossmann applied for review of the decision of the contracting authority to award the air services to Lauda Air and claimed that the decision should be set aside. It submitted that the invitation to tender had from the beginning been 'tailored' to one bidder, namely Lauda Air, and that the other candidates had had no chance of winning the contract from the outset.

h 13. By decision dated 4 January 1999 the Bundesvergabeamt dismissed that application under para 115(1) and para 113(2) and (3) of the BVergG.

i 14. The Bundesvergabeamt took the view that Grossmann had failed to demonstrate adequately its interest in respect of the totality of the contract. It did not have available to it the requisite larger types of aircraft and was therefore unable to provide all the services requested. Moreover, it had not submitted a bid in the second invitation to tender. Furthermore, once the contract had been awarded the Bundesvergabeamt was no longer competent to annul it.

15. Grossmann subsequently brought a complaint against that decision before the Verfassungsgerichtshof (Constitutional Court). By decision of 10 December 2001 (B 405/99–9) the Verfassungsgerichtshof set aside the decision of the Bundesvergabeamt on grounds of a breach of the constitutionally guaranteed right to proceedings before the ordinary courts. The Verfassungsgerichtshof also ruled that the mere fact that the alleged unlawfulness of the invitation to tender was not raised by Grossmann at an

earlier stage of the contract award procedure was not necessarily sufficient to find that there was no legal interest in the review procedure. a

16. The Bundesvergabeamt subsequently submitted the following questions for a preliminary ruling.

*Questions submitted for a preliminary ruling*

(1) Is Article 1(3) of ... Directive 89/665 ... to be interpreted as meaning that the review procedure must be available to any undertaking which has submitted a bid, or applied to participate, in a public procurement procedure? b

In the event that the answer to Question (1) is no:

(2) Is the abovementioned provision to be understood as meaning that an undertaking only has or had an interest in a particular public contract if—in addition to its participating in the public procurement procedure—it takes all steps available to it under national law to prevent the contract from being awarded to another bidder? c

(3) Is Article 1(3) of Directive 89/665, in conjunction with Article 2(1) thereof, to be interpreted as meaning that an undertaking must be afforded the opportunity in law to seek review of an award procedure regarded by it as unlawful or discriminatory even where it is not capable of performing the totality of the services for which bids were invited and, for that reason, did not submit a bid in that award procedure.' d

*Explanation of the questions submitted for a preliminary ruling*

17. In respect of the first two questions submitted the national court has observed that Grossmann allowed a period of 14 days to elapse between notification of the decision concerning the award (9 October 1998) and lodgment of its application for review with the Bundesvergabeamt (23 October 1998) without requesting the B-VKK to take action and thus to make the four-week period laid down in para 109(8) of the BVergG start to run or, in the event that such action were unsuccessful, to request that the Bundesvergabeamt adopt interim measures and set aside the decision concerning the award. Therefore, the national court considers that it is important to establish whether the application requirements under para 115(1) of the BVergG, in conjunction with para 109(1), (6) and (8) thereof, are, when interpreted in the light of art 1(3) of Directive 89/665, to be understood as meaning that any bidder who wishes to be awarded a particular pending public contract has an interest in the conclusion of a contract falling within the scope of the BVergG simply by virtue of that fact or that the fact that not all remedies available in national law have been exhausted means that this interest has been lost. e

18. In respect of the third question the Bundesvergabeamt observes that it is clear from the Verfassungsgerichtshof's decision of 10 December 2001 that it considers that discriminatory specifications may be removed in review procedures pursuant to art 2(1)(b) of Directive 89/665. An interpretation whereby the availability of review procedures to challenge discriminatory tender specifications is subject to the applicant's ability to satisfy those specifications could run counter to the objective (of Community law) to ensure complete and effective protection in respect of invitations to tender. Therefore, an undertaking providing air services which credibly demonstrates an interest in the conclusion of a contract for air services and regards itself as f

- a discriminated against by the form in which those air services are put out to tender—as an all-in contract—has a legal interest within the meaning of para 115(1) of the BVerGG and is thus entitled to seek review of the allegedly unlawful specifications because it would otherwise be unable to prove the unlawfulness—in its view—of the invitation to tender and any harm that it may have suffered as a result.
- b 19. Against that background, the question arises as to whether review procedures within the meaning of art 1(3) of Directive 89/665 are also available to a trader where it applies to the review body because of specifications which it considers to be discriminatory within the meaning of art 2(1)(b) of Directive 89/665 and claims that it has been or risks being harmed as a result, even though it is unable to provide the service in the form set out in the invitation to tender and therefore did not submit a bid in that contract award procedure.
- c

*Procedure before the Court of Justice of the European Communities*

- d 20. The order for reference was lodged at the Registry of the Court of Justice on 20 June 2002. Written observations were submitted by Grossmann, the Austrian government and the Commission of the European Communities. They provided further clarification of their view at the hearing on 10 September 2003.

IV—APPRAISAL

- e 21. In view of the recent case law of the court the first two questions need not be dealt with in any great detail. These questions essentially seek to ascertain whether a trader having or having had an interest in obtaining a contract for the purposes of art 1(3) of Directive 89/665 may therefore avail himself of the review procedures provided for in that directive to have a decision concerning an award declared unlawful, even though not all the remedies available under national law have been exhausted, in order to prevent the contract being awarded to a third party.
- f

- g 22. These questions were raised recently inter alia in *Hackermüller v WED Bundesimmobiliengesellschaft mbH (BIG) and Wiener Entwicklungsgesellschaft mbH für den Donaauraum AG (WED)*<sup>4</sup> and more particularly in *Fritsch, Chiari & Partner, Ziviltechniker GmbH v Autobahnen- und Schnellstraßen-Finanzierungs-AG (Asfinag)*<sup>5</sup>.

- h 23. Both cases raised the question whether any trader who wishes to be considered for the award of a public contract may institute review procedures pursuant to art 1(3) of Directive 89/665. It is evident from *Hackermüller's* case that this is not so and that a member state may lay down the additional requirement that the person concerned has been or risks being harmed by the infringement he alleges.

- i 24. The second question is answered explicitly in the *Fritsch* case. This case also raised the question whether the national legislature can make a tenderer's interest in obtaining a specific contract, and therefore its right to institute the review procedures established by that directive, subject to the condition that it has beforehand applied to a conciliation commission such as the B-VKK. The court's answer to this question was in the negative. It held that such a condition is contrary to the directive's objective of speed and effectiveness. However, it

4 Case C-249/01 [2003] ECR I-6319.

5 Case C-410/01 [2003] ECR I-6413.



acknowledged that art 1(3) of Directive 89/665 expressly allows member states to determine the detailed rules according to which they must make the review procedures available to any person having or having had an interest in obtaining a particular public contract and who has been or risks being harmed by an alleged infringement, but that did not mean that they may give the term 'interest in obtaining a public contract' an interpretation which may limit the effectiveness of that directive. That is the case where a trader is considered as having lost its interest on the ground that it failed first to apply to a conciliation commission, such as the B-VKK.

25. In the above-mentioned cases the candidates participated in the contract award procedure. It is evident from the order for reference that this is not so in the present case. However, I concur with the Commission's view that participation in the award procedure is in principle a precondition for demonstrating an interest in obtaining a contract and possible harm caused by the allegedly unlawful award. It is difficult for a person who has not participated in the award procedure to maintain that he has an interest in challenging an allegedly unlawful decision concerning an award.

26. The third question, however, relates to a somewhat different situation. In that case it does not make sense for potential candidates to tender for a contract because the specifications for the services to be provided are laid down in such a way that they are unable to satisfy them from the outset. The question is then whether, in such a situation, the opportunity must be left open to apply for review of discriminatory specifications.

27. In my view, the answer to the question should be in the affirmative. In its recent case law the court has placed a broad interpretation on the words 'decisions taken by the contracting authorities' used in art 1(1) of Directive 89/665<sup>6</sup>. Moreover, it is clear from the wording of art 2(1)(b) of the directive that the courts' powers in review procedures must include *inter alia* the power to 'set aside ... decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications'. Therefore, it appears to me to be beyond dispute that the remedies intended by Directive 89/665 also extend to the review of decisions specifying the services requested in a contract award procedure.

28. However, such a remedy would have little practical value if it were not open to undertakings which had been excluded from participating in the contract award procedure from the outset by the relevant discriminatory specifications. Furthermore, in such a situation it may be excessive to ask that the effort to bid be made and the associated costs be incurred merely in order to retain the right to apply for review of discriminatory tender conditions. Therefore, these undertakings too must in principle be regarded as having an interest in the award of a public contract and consequently as entitled to apply for review.

29. The specifications for the requested services are relevant to the main proceedings underlying this case. Since the various elements of the requested air transport services had been brought together to create a single package, the number of candidates that could provide the overall package was greatly reduced and potential candidates for one or more parts of that package were excluded from the outset. It follows from what was stated in the preceding paragraph that they too must be regarded as persons having an interest in the

<sup>6</sup> See *Hospital Ingenieure Krankenhaustechnik Planungs-Gesellschaft mbH (HI) v Stadt Wien* Case C-92/00 [2002] ECR I-5553.

a award of the contract and therefore as entitled to apply for review. However, this is subject to the condition that they would have been able to participate in this procedure had it not been for these allegedly discriminatory conditions.

30. Finally, I further note that the interest of legal certainty requires that this opportunity to apply for review be used at the earliest possible stage. The lodgment of an application for review after the contract has been awarded  
b should be regarded as belated. However, this is a matter for the national court.

#### V—CONCLUSION

31. In the light of the foregoing, I would recommend that the Court of  
c Justice answer the questions submitted as follows:

—Article 1(3) of Council Directive (EEC) 89/665 (on the co-ordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts), as amended by Council Directive (EEC) 92/50 (relating to the co-ordination of procedures for the award of public service contracts), is to be interpreted as meaning that the review procedure referred to in the directive is open to any person who has submitted a bid or participated in the contract award procedure.

—Article 1(3) of Directive 89/665 precludes a trader which has participated in a procedure for the award of a contract from being regarded as having lost his interest in the award of that contract on the ground that he did not apply to a conciliation commission, such as the B-VKK established under the Bundesgesetz über die Vergabe von Aufträgen (Bundesvergabegesetz) 1997, before instituting a review procedure as referred to in that directive.

—Article 1(3) of Directive 89/665, in conjunction with art 2(1)(b) thereof, is to be interpreted as meaning that a trader having an interest in the award of a contract must be afforded the opportunity in law directly to seek review of specifications in the tender conditions regarded by it as unlawful or discriminatory. This opportunity must also be open to those who can show that they would have bid for the contract had it not been for the discriminatory specification referred to.

12 February 2004. **The COURT OF JUSTICE (Sixth Chamber)** delivered the following judgment.

1. By order of 14 May 2002, received at the Registry of the Court of Justice of the European Communities on 20 June 2002, the Bundesvergabeamt  
h (Federal Public Procurement Office) referred to the Court of Justice for a preliminary ruling under art 234 EC (formerly art 177 of the EC Treaty) three questions on the interpretation of arts 1(3) and 2(1)(b) of Council Directive (EEC) 89/665 (on the co-ordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts) (OJ 1989 L395 p 33), as amended by  
i Council Directive (EEC) 92/50 (relating to the co-ordination of procedures for the award of public service contracts) (OJ 1992 L209 p 1) (Directive 89/665).

2. Those questions were raised in a dispute between Grossmann Air Service, Bedarfsluftfahrtunternehmen GmbH & Co KG (Grossmann) and Republik Österreich (Republic of Austria), represented by the Federal Ministry of Finance (the Ministry), concerning an award procedure for a public contract.

## LEGAL BACKGROUND

*Community legislation*

## 3. Articles 1(1) and (3) of Directive 89/665 provide:

'1. The Member States shall take the measures necessary to ensure that, as regards contract award procedures falling within the scope of Directives 71/305/EEC, 77/62/EEC and 92/50/EEC, decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in the following Articles, and, in particular, Article 2(7) on the grounds that such decisions have infringed Community law in the field of public procurement or national rules implementing that law ...

3. The Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular public supply or public works contract and who has been or risks being harmed by an alleged infringement. In particular, the Member States may require that the person seeking the review must have previously notified the contracting authority of the alleged infringement and of his intention to seek review.'

## 4. Under art 2(1) of Directive 89/665:

'1. The Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for the powers to:

(a) take, at the earliest opportunity and by way of interlocutory procedures, interim measures with the aim of correcting the alleged infringement or preventing further damage to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a public contract or the implementation of any decision taken by the contracting authority;

(b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure;

(c) award damages to persons harmed by an infringement.'

*National legislation*

5. Directive 89/665 was transposed into Austrian law by the Bundesgesetz über die Vergabe von Aufträgen (Bundesvergabegesetz) 1997 (1997 Federal Law on Public Procurement, BGBl I, 1997/56, the BVergG). The BVergG provides for the creation of the Bundes-Vergabekontrollkommission (Federal Public Procurement Review Commission, the B-VKK) and of the Bundesvergabeamt (Federal Public Procurement Office).

6. Paragraph 109 of the BVergG sets out the powers of the B-VKK. It contains the following provisions:

'1. The B-VKK shall be competent:

(1) until such time as the contract is awarded, to reconcile any differences of opinion between the awarding body and one or more candidates or tenderers concerning the application of the present federal law or its implementing regulations ...



- a* 6. A request for the B-VKK to take action made under paragraph 1(1) must be submitted to the directors of the Commission as soon as possible after the difference of opinion comes to light.
7. If the B-VKK does not take action following a request from the awarding body, it must inform that body immediately it does take action.
- b* 8. The awarding body may not award the contract until four weeks after ... it has been informed in accordance with paragraph 7, failing which the tendering procedure shall be declared void ...'
7. Paragraph 113 of the BVerG sets out the powers of the Bundesvergabamt. It provides:
- c* '1. The Bundesvergabamt is responsible on application for carrying out a review procedure in accordance with the following provisions.
2. To preclude infringements of this Federal Law and of the regulations implementing it, the Bundesvergabamt is authorised until the time of the award:
- (1) to adopt interim measures and
- d* (2) to set aside unlawful decisions of the contracting authority.
3. After the award of the contract or the close of the contract award procedure, the Bundesvergabamt is competent to determine whether, on grounds of infringement of this Federal Law or of any regulations issued under it, the contract has not been awarded to the best tenderer ...'
- e* 8. Paragraph 115(1) of the BVerG provides:
- 'Where an undertaking claims to have an interest in the conclusion of a contract within the scope of this Federal Law, it may apply for the contracting authority's decision in the contract award procedure to be reviewed on the ground of unlawfulness, provided that it has been or risks being harmed by the alleged infringement.'
- f*
9. According to para 122(1) of the BVerG—
- 'in the event of a culpable breach of the Federal Law or its implementing rules by the organs of an awarding body, an unsuccessful candidate or tenderer may bring a claim against the contracting authority to which the conduct of the organs of the awarding body is attributable for reimbursement of the costs incurred in drawing up its bid and other costs borne as a result of its participation in the tendering procedure.'
- g*
10. Under para 125(2) of the BVerG, a claim for damages, which must be brought before the civil courts, is admissible only if the Bundesvergabamt has made a declaration under para 113(3) prior to that claim being made. The civil court called upon to hear the claim for damages, and the parties to the proceedings before the Bundesvergabamt, are bound by that declaration.
- h*

THE DISPUTE IN THE MAIN PROCEEDINGS AND THE QUESTIONS REFERRED TO THE COURT FOR A PRELIMINARY RULING

- i* 11. On 27 January 1998, the Ministry invited tenders for the provision 'for the Austrian Federal Government and its delegations of non-scheduled passenger transport services by air in executive jets and aircraft'. Grossmann participated in the award procedure for that contract by submitting a tender.

12. On 3 April 1998, the Ministry decided to annul the first invitation to tender, in accordance with para 55(2) of the BVerG, which provides that the

'invitation to tender may be revoked when, after offers have been rejected pursuant to para 52, only one offer remains'. a

13. On 28 July 1998, the Ministry issued another invitation to tender for non-scheduled passenger transport services by air for the Austrian federal government and its delegations. Grossmann obtained the documents for that invitation to tender, but it did not submit an offer.

14. By letter of 8 October 1998, the Austrian government notified Grossmann of its intention to award the contract to Lauda Air Luftfahrt AG (Lauda Air). Grossmann received that letter on the following day. The contract with Lauda Air was concluded on 29 October 1998. b

15. By application dated 19 October 1998, posted on 23 October and received at the Bundesvergabamt on 27 October 1998, Grossmann applied to have the contracting authority's decision to award the contract to Lauda Air set aside. In support of its application Grossmann claimed essentially that the invitation to tender had been tailored from the beginning to one tenderer, namely Lauda Air. c

16. By decision of 4 January 1999, the Bundesvergabamt dismissed Grossmann's application pursuant to paras 115(1) and 113(2) and (3) of the BVergG, on the ground that Grossmann had failed to assert its legal interest in obtaining the entire contract and that, in any event, after the award of the contract, the Bundesvergabamt no longer has competence to set it aside. d

17. As regards the absence of interest, the Bundesvergabamt found that since it did not have large aircraft available to it, Grossmann was not in a position to provide all the services requested, and that it had not submitted a tender in the second award procedure for the contract at issue. e

18. Grossmann appealed to the Verfassungsgerichtshof (Constitutional Court), Austria seeking to have the Bundesvergabamt's decision set aside. By judgment of 10 December 2001, the Verfassungsgerichtshof set aside that decision for breach of the constitutionally guaranteed right to proceedings before the ordinary courts, on the ground that the Bundesvergabamt had wrongly failed to refer a question to the Court of Justice for a preliminary ruling relating to whether its interpretation of para 115(1) of the BVergG was in accordance with Community law. f

19. In its order for reference, the Bundesvergabamt explains that the provisions of para 109(1), (6) and (8) of the BVergG are intended to guarantee that no contract will be concluded during the conciliation procedure. It adds that if an amicable agreement is not reached during that procedure an undertaking may still request, before the conclusion of the contract, the annulment of any decision of the contracting authority, including the decision awarding the contract, but subsequently the Bundesvergabamt is competent only to rule that the contract has not been awarded to the tenderer who made the best offer by reason of an infringement of the BVergG or its implementing rules. g

20. The national court points out that, in this case, Grossmann's application to have the decision awarding the contract to Lauda Air set aside, was indeed received before the contract between Lauda Air and the contracting authority was concluded, but that it could be dealt with by the Bundesvergabamt, within the time limit prescribed, only after the conclusion of the contract. The Bundesvergabamt also states that the application was only posted on 23 October 1998, although the contracting authority had notified Grossmann by letter of 8 October 1998, received the following day, of its intention to award the contract to Lauda Air. h

i

a 21. The Bundesvergabeamt thus finds that Grossmann allowed 14 days to elapse between notification to it of the decision awarding the contract (9 October 1998) and the institution by Grossmann of proceedings before the Bundesvergabeamt (23 October 1998), without any request for conciliation being lodged with the B-VKK (a request which would have caused the four-week time limit laid down in para 109(8) of the BVergG, during which  
b the contracting authority may not award the contract, to begin to run) or, in the case of a failure of the conciliation process, without the B-VKK being requested to grant interim measures and to set aside the decision awarding the contract. Therefore, according to the national court, the question arises  
c whether Grossmann can establish an interest in bringing proceedings, in accordance with art 1(3) of Directive 89/665, since as it was not in a position to provide the services in question, owing, it claims, to provisions in the documents relating to the invitation to tender that are discriminatory within the meaning of art 2(1)(b) of the directive, it did not submit an offer in the contract award procedure at issue.

d 22. It was in those circumstances that the Bundesvergabeamt decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Is Article 1(3) of ... Directive 89/665 ... to be interpreted as meaning that the review procedure must be available to any undertaking which has submitted a bid, or applied to participate, in a public procurement procedure?’

e In the event that the answer to Question (1) is no:

(2) Is the abovementioned provision to be understood as meaning that an undertaking only has or had an interest in a particular public contract if—in addition to its participating in the public procurement procedure—it takes all steps available to it under national law to prevent the contract  
f from being awarded to another bidder?

(3) Is Article 1(3) of Directive 89/665, in conjunction with Article 2(1) thereof, to be interpreted as meaning that an undertaking must be afforded the opportunity in law to seek review of an award procedure regarded by it as unlawful or discriminatory even where it is not capable of performing the totality of the services for which bids were invited and, for that reason,  
g did not submit a bid in that award procedure.’

#### THE FIRST AND THIRD QUESTIONS

23. In the light of the facts in the main proceedings, as described by the national court, the first and third questions, which it is appropriate to examine  
h together, must be regarded as asking, essentially, whether arts 1(3) and 2(1)(b) of Directive 89/665 must be interpreted as precluding a person from being regarded, once a public contract has been awarded, as having lost his right of access to the review procedures provided for by the directive if he did not participate in the award procedure for that contract on the ground that he was not in a position to supply all the services for which bids were invited, because  
i there were allegedly discriminatory specifications in the documents relating to the invitation to tender, but he did not seek review of those specifications before the contract was awarded.

24. In order to assess whether a person in a situation such as that referred to in the questions thus reformulated can establish an interest in bringing proceedings within the meaning of art 1(3) of Directive 89/665, it is



appropriate to consider the fact that he neither participated in the contract award procedure at issue nor did he appeal against the invitation to tender before the contract was awarded. a

*Failure to participate in the contract award procedure*

25. In that regard, it must be recalled that, in accordance with art 1(3) of Directive 89/665, the member states are required to ensure that the review procedures provided for are available 'at least' to any person having or having had an interest in obtaining a particular public contract and who has been or risks being harmed by an alleged infringement of the Community law on public procurement or national rules transposing that law. b

26. It follows that the member states are not obliged to make those review procedures available to any person wishing to obtain a public contract, but may also require that the person concerned has been or risks being harmed by the infringement he alleges (see *Hackermüller v WED Bundesimmobiliengesellschaft mbH (BIG) and Wiener Entwicklungsgesellschaft mbH für den Donauraum AG (WED)* Case C-249/01 [2003] ECR I-6319 (para 18)). c

27. In that sense, as the Commission of the European Communities pointed out in its written observations, participation in a contract award procedure may, in principle, with regard to art 1(3) of Directive 89/665, validly constitute a condition which must be fulfilled before the person concerned can show an interest in obtaining the contract at issue or that he risks suffering harm as a result of the allegedly unlawful nature of the decision to award that contract. If he has not submitted a tender it will be difficult for such a person to show that he has an interest in challenging that decision or that he has been harmed or risks being harmed as a result of that award decision. d

28. However, where an undertaking has not submitted a tender because there were allegedly discriminatory specifications in the documents relating to the invitation to tender, or in the contract documents, which have specifically prevented it from being in a position to provide all the services requested, it would be entitled to seek review of those specifications directly, even before the procedure for awarding the contract concerned is terminated. e

29. On the one hand, it would be too much to require an undertaking allegedly harmed by discriminatory clauses in the documents relating to the invitation to tender to submit a tender, before being able to avail itself of the review procedures provided for by Directive 89/665 against such specifications, in the award procedure for the contract at issue, even though its chances of being awarded the contract are non-existent by reason of the existence of those specifications. f

30. On the other hand, it is clear from the wording of art 2(1)(b) of Directive 89/665 that the review procedures to be organised by the member states in accordance with the directive must, in particular, 'set aside decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications'. It must, therefore, be possible for an undertaking to seek review of such discriminatory specifications directly, without waiting for the contract award procedure to be terminated. g

*Absence of proceedings against the invitation to tender*

31. In this case, Grossmann complains that the contracting authority imposed requirements in respect of a contract for non-scheduled air transport services that only an air company offering scheduled flights would be in a h

a position to fulfil, which had the effect of reducing the number of candidates capable of providing all the services required.

32. It is apparent, however, from the file that Grossmann did not seek review of the contracting authority's decision determining the specifications of the invitation to tender directly, but waited until the decision to award the contract to Lauda Air was notified before asking the Bundesvergabeamt to set that decision aside.

33. In that regard, in its order for reference the Bundesvergabeamt points out that, under para 115(1) of the BVergG, an undertaking may institute review proceedings against a decision of the contracting authority where it claims to have an interest in the conclusion of a contract in an award procedure and the unlawfulness on which it relies has caused or risks causing it harm.

34. The national court therefore asks, essentially, whether art 1(3) of Directive 89/665 must be interpreted as meaning that it precludes a person who not only has not participated in the award procedure for a public contract but has not sought any review of the decision of the contracting authority determining the specifications of the invitation to tender either, from being regarded as having lost his interest in obtaining the contract and, therefore, the right of access to the review procedures provided for by the directive.

35. This question must be examined in the light of the purpose of Directive 89/665.

36. In that regard, it is appropriate to recall that, as is apparent from the first and second recitals in the preamble, Directive 89/665 is intended to strengthen the existing mechanisms, both at national and Community level, to ensure the effective application of Community directives relating to public procurement, in particular at a stage when infringements can still be remedied. To that effect, art 1(1) of that directive requires member states to guarantee that unlawful decisions of contracting authorities can be subjected to effective review which is as swift as possible (see, in particular, *Alcatel Austria AG v Bundesministerium für Wissenschaft und Verkehr* Case C-81/98 [1999] ECR I-7671 (paras 33, 34), *Universale-Bau AG v Entsorgungsbetriebe Simmering GesmbH* Case C-470/99 [2002] ECR I-11617 (para 74) and *Fritsch, Chiari & Partner, Ziviltechniker GmbH v Autobahnen- und Schnellstraßen-Finanzierungs-AG (Asfinag)* Case C-410/01 [2003] ECR I-6413 (para 30)).

37. It must be pointed out that the fact that a person does not seek review of a decision of the contracting authority determining the specifications of an invitation to tender which in his view discriminate against him, in so far as they effectively disqualify him from participating in the award procedure for the contract at issue, but awaits notification of the decision awarding the contract and then challenges it before the body responsible, on the ground specifically that those specifications are discriminatory, is not in keeping with the objectives of speed and effectiveness of Directive 89/665.

38. Such conduct, in so far as it may delay, without any objective reason, the commencement of the review procedures which member states were required to institute by Directive 89/665 impairs the effective implementation of the Community directives on the award of public contracts.

39. In those circumstances, a refusal to acknowledge the interest in obtaining the contract in question and, therefore, the right of access to the review procedures provided for by Directive 89/665 of a person who has not participated in the contract award procedure, or sought review of the decision of the contracting authority laying down the specifications of the invitation to tender, does not impair the effectiveness of that directive.

40. Having regard to the foregoing, the answer to the first and third questions must be that arts 1(3) and 2(1)(b) of Directive 89/665 must be interpreted as not precluding a person from being regarded, once a public contract has been awarded, as having lost his right of access to the review procedures provided for by the directive if he did not participate in the award procedure for that contract on the ground that he was not in a position to supply all the services for which bids were invited, because there were allegedly discriminatory specifications in the documents relating to the invitation to tender, but he did not seek review of those specifications before the contract was awarded. a  
b

#### SECOND QUESTION

41. In the light of the facts in the main proceedings, as set out by the national court, the second question must be understood as asking, essentially, whether art 1(3) of Directive 89/665 must be interpreted as precluding a person who has participated in a contract award procedure from being regarded as having lost his interest in obtaining the contract on the ground that, before seeking the review provided for by the directive, he failed to refer the case to a conciliation committee such as the B-VKK. c  
d

42. In that regard, it is sufficient to recall that, in paras 31 and 34 of the *Fritsch* case, the court held that, even though art 1(3) of Directive 89/665 expressly allows member states to determine the detailed rules according to which they must make the review procedures provided for in that directive available to any person having or having had an interest in obtaining a particular public contract and who has been or risks being harmed by an alleged infringement it none the less does not authorise them to give the term 'interest in obtaining a public contract' an interpretation which may limit the effectiveness of that directive. The fact that access to the review procedures provided for by the directive is made subject to prior referral to a conciliation committee such as the B-VKK would be contrary to the objectives of speed and effectiveness of that directive. e  
f

43. Accordingly, the answer to the second question must be that art 1(3) of Directive 89/665 must be interpreted as precluding a person who has participated in a contract award procedure from being regarded as having lost his interest in obtaining the contract on the ground that, before seeking the review provided for by the directive, he failed to refer the case to a conciliation committee such as the B-VKK. g

#### COSTS

44. The costs incurred by the Austrian government and by the Commission, which have submitted observations to the court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court. h

On those grounds, the Court of Justice (Sixth Chamber), in answer to the questions referred to it by the Bundesvergabeamt by order of 14 May 2002, hereby rules: i

(1) Articles 1(3) and 2(1)(b) of Council Directive (EEC) 89/665 (on the co-ordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts), as amended by Council Directive (EEC) 92/50 (relating to the co-ordination of procedures for the award of public service contracts),



- a* must be interpreted as not precluding a person from being regarded, once a public contract has been awarded, as having lost his right of access to the review procedures provided for by the directive if he did not participate in the award procedure for that contract on the ground that he was not in a position to supply all the services for which bids were invited, because there were allegedly discriminatory specifications in the documents relating to the invitation to tender, but he did not seek review of those specifications before the contract was awarded.
- b*

- (2) Article 1(3) of Directive 89/665, as amended by Directive 92/50, must be interpreted as precluding a person who has participated in a contract award procedure from being regarded as having lost his interest in obtaining the contract on the ground that, before seeking the review provided for by the directive, he failed to refer the case to a conciliation committee such as Bundes-Vergabekontrollkommission (Federal Public Procurement Review Commission, established by the Bundesgesetz über die Vergabe von Aufträgen (Bundesvergabegesetz) 1997 (1997 Federal Law on Public Procurement)).
- c*

# Altmark Trans GmbH and another v Nahverkehrsgesellschaft Altmark GmbH (Oberbundesanwalt beim Bundesverwaltungsgericht, third party) <sup>a</sup>

## (Case C-280/00) <sup>b</sup>

COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES <sup>c</sup>

JUDGES RODRIGUEZ IGLESIAS (PRESIDENT), PUISOCHET, WATHELET, SCHINTGEN AND TIMMERMANS (RAPPORTEUR) (PRESIDENTS OF CHAMBERS), GULMANN, EDWARD, LA PERGOLA, JANN, SKOURIS, MACKEN, COLNERIC, VON BAHR, CUNHA RODRIGUES AND ROSAS

ADVOCATE GENERAL LÉGER <sup>d</sup>

6 NOVEMBER 2001, 19 MARCH, 18 JUNE 2002, 14 JANUARY, 24 JULY 2003

*European Community – State aids – Public subsidies – Public services – Local public transport – Grant of licences to provide public transport to company requiring subsidies to operate services – Whether subsidies subject to prohibition on state aid – Whether subsidies compensating for deficits in public transport permitted – EC Treaty, arts 77, 92(1) (now arts 73, 87(1) EC), Council Regulation (EEC) 1191/69, art 1(1). <sup>e</sup>*

The regional government granted Altmark Trans GmbH licences to operate scheduled bus services (the decision). To operate those services Altmark Trans required additional financing from the public authorities. Nahverkehrsgesellschaft Altmark GmbH, an unsuccessful applicant for those licences, brought a complaint against the decision contending that Altmark Trans did not satisfy the requirements of para 13 of the Law on passenger transport. It alleged that Altmark Trans was not an economically viable undertaking, as it was unable to survive without public subsidies, and that therefore the licences granted to Altmark Trans were unlawful. The regional government rejected that complaint. Nahverkehrsgesellschaft subsequently issued unsuccessful proceedings against the decision. On appeal, the Higher Administrative Court of Saxony-Anhalt, inter alia, set aside the licences. It held that those subsidies were not compatible with Community law respecting state aid, in particular Council Regulation (EEC) 1191/69 (on action by member states concerning the obligations inherent in the concept of a public service in transport by rail, road and inland waterway) (the regulation)<sup>a</sup>. Altmark Trans appealed on point of law to the Federal Administrative Court, which stayed the proceedings and referred to the Court of Justice of the European Communities for a preliminary ruling a question as to whether arts 77<sup>b</sup> and 92<sup>c</sup> of the EC Treaty (now arts 73 and 87 EC), read in conjunction with the regulation, <sup>f</sup> <sup>g</sup> <sup>h</sup> <sup>i</sup>

<sup>a</sup> Council Regulation (EEC) 1191/69, so far as material, is set out at judgment paras 7–10, below

<sup>b</sup> Article 77 of the EC Treaty provides: 'Aids shall be compatible with this Treaty if they meet the needs of coordination of transport or if they represent reimbursement for the discharge of certain obligations inherent in the concept of a public service.'

<sup>c</sup> Article 92(1) of the EC Treaty is set out at judgment para 3, below

- a precluded the application of a national provision which permitted licences for scheduled services in local public transport to be granted in respect of services which are necessarily dependent on public subsidies without regard being had to Sections II, III and IV of that regulation.
- b **Held** – (1) The regulation, and more particularly the second subparagraph of art 1(1) thereof, had to be interpreted as allowing a member state not to apply the regulation to the operation of urban, suburban or regional scheduled transport services which necessarily depended on public subsidies, and to limit its application to cases where the provision of an adequate transport service was not otherwise possible, provided, however, that the principle of legal certainty was duly observed. The second subparagraph in principle allowed the
- c legislature to provide that, for transport services provided on a commercial basis, public service obligations could be imposed and subsidies granted without complying with the conditions and details of operation laid down in the regulation. However, the legislature had to delimit clearly the use made of the option of derogation, so as to make it possible to determine the situations
- d in which the derogation applied and those in which the regulation applied. It was for the national court to ascertain whether the application by the legislature of the derogation provided for in the second subparagraph of art 1 satisfied the requirements of clarity and precision needed to comply with the principle of legal certainty (see judgment paras 57, 58, 63, 64, below).
- e (2) The condition for the application of art 92(1) that the aid had to be such as to affect trade between member states did not depend on the local or regional character of the transport services supplied or on the scale of the field of activity concerned. However, public subsidies intended to enable the operation of urban, suburban or regional scheduled transport services were not caught by that provision where such subsidies were to be regarded as compensation for the services provided by the recipient undertakings in order
- f to discharge public service obligations. For the purpose of applying that criterion, it was for the national court to ascertain that the following conditions were satisfied: (i) the recipient undertaking was actually required to discharge public service obligations and those obligations had been clearly defined; (ii) the parameters on the basis of which the compensation was calculated had been established beforehand in an objective and transparent manner; (iii) the
- g compensation did not exceed what was necessary to cover all or part of the costs incurred in discharging the public service obligations, taking into account the relevant receipts and reasonable profits for discharging those obligations; (iv) where the undertaking which was to discharge public service obligations was not chosen in a public procurement procedure, the level of
- h compensation needed had been determined on the basis of an analysis of the costs which a typical undertaking, well-run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations (see judgment paras 82, 87–95, below).
- i (3) Article 77 could not be applied to public subsidies which compensated for the additional costs incurred in discharging public service obligations without taking the regulation into account. To the extent that that regulation did not apply in the present case and the subsidies at issue in the main proceedings fell within art 92(1), Council Regulation (EEC) 1107/70 (on the granting of aids for transport by rail, road and inland waterway) exhaustively listed the



circumstances in which the authorities of the member states could grant aids under art 77 (see judgment paras 107–109, below). a

### Notes

For competition and state intervention in regard to state aids, see 47 *Halsbury's Laws* (4th edn) (2001 reissue) para 439.

For the EC Treaty, arts 73, 87(1) EC (formerly arts 77, 92(1)), see 50 *Halsbury's Statutes* (4th edn) Current Statutes Service (issue 88) 377, 381. b

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*Almelo (Municipality of) v Energiebedrijf IJsselmij NV* Case C-393/92 [1994] ECR I-1477, ECJ.

*Ambulanz Glöckner (Firma) v Landkreis Südwestpfalz* Case C-475/99 [2001] ECR I-8089, ECJ. d

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*Belgium v European Commission* Case C-5/01 [2002] ECR I-11991, ECJ.

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*Cityflyer Express Ltd v European Commission* Case T-16/96 [1998] ECR II-757, CFI.

*Corbeau (Criminal proceedings against)* Case C-320/91 [1993] ECR I-2533, ECJ. g

*Costa v ENEL* Case 6/64 [1964] ECR 585, ECJ.

*Danner (Proceedings brought by)* Case C-136/00 [2002] STC 1283, [2002] ECR I-8147, ECJ.

*Déménagements-Manutention Transport SA (DMT) (Proceedings relating to)* Case C-256/97 [1999] All ER (EC) 601, [1999] ECR I-3913, ECJ.

*Deufil GmbH & Co KG v EC Commission* Case 310/85 [1987] ECR 901, ECJ. h

*Diego Cali & Figli Srl v Servizi Ecologici Porto Di Genova SpA (SEPG)* Case C-343/95 [1997] ECR I-1547, ECJ.

*EC Commission v Germany* Case 29/84 [1985] ECR 1661, ECJ.

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*EC Commission v Greece* Case C-236/95 [1996] ECR I-4459, ECJ. i

*EC Commission v Italy* Case 363/85 [1987] ECR 1733, ECJ.

*Elliniki Radiophonia Tileorassi AE v Dimotiki Etairia Pliroforissis* Case C-260/89 [1991] ECR I-2925, ECJ.

*Enirisorse SpA v Ministero delle Finanze* Joined Cases C-34/01–38/01 [2004] 1 CMLR 296, ECJ.

- a* EPAC—*Empresa para a Agroalimentação e Cereais, SA v European Commission* Joined cases T-204/97 and T-270/97 [2000] ECR II-2267, CFI.  
*Fédération Française des Sociétés d'Assurance (FFSA) v European Commission* Case T-106/95 [1997] ECR II-229, CFI.  
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- b* *France v EC Commission* Case 102/87 [1988] ECR I-4067, ECJ.  
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- c* *France v European Commission* Case C-251/97 [1999] ECR I-6639, ECJ.  
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- d* *Italy v EC Commission* Case C-305/89 [1991] ECR I-1603, ECJ.  
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*Ladbroke Racing Ltd v European Commission* Case T-67/94 [1998] ECR II-1, CFI.
- e* *Lorenz (Gebr) GmbH v Germany* Case 120/73 [1973] ECR 1471, ECJ.  
*Matra SA v EC Commission* Case C-225/91 [1993] ECR I-3203, ECJ.  
*Ministre de l'Economie, des Finances et de l'Industrie v GEMO SA* Case C-126/01 [2004] 1 CMLR 259, ECJ.  
*Philip Morris Holland BV v EC Commission* Case 730/79 [1980] ECR 2671, ECJ.
- f* *Poucet v Assurances Générales de France (AGF), Pistre v Caisse Autonome Nationale de Compensation de L'Assurance Régionale des Artisans (CANCARA)* Joined cases C-159/91 and C-160/91 [1993] ECR 637, ECJ.  
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*SAT Fluggesellschaft mbH v European Organisation for the Safety of Air Navigation (Eurocontrol)* Case C-364/92 [1994] ECR I-43, ECJ.
- g* *Sociedade Independente de Comunicação SA (SIC) v Commission of the European Communities* Case T-46/97 [2000] ECR II-2125, CFI.  
*Spain v EC Commission* Case C-312/90 [1992] ECR I-4117, ECJ.  
*Spain v EC Commission* Joined cases C-278–280/92 [1994] ECR I-4103, ECJ.
- h* *Spain v European Commission* Case C-342/96 [1999] ECR I-2459, ECJ.  
*Steinike und Weinlig (Firma) v Germany* Case 78/76 [1977] ECR I-595, ECJ.  
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*Wouters v Algemene Raad van de Nederlandse Orde van Advocaten (Raad van de Balies van de Europese Gemeenschap intervening)* Case C-309/99 [2002] All ER (EC) 193, [2002] ECR I-1577, ECJ.
- i* *Zwartveld* Case C-2/88 Imm [1990] ECR I-3365, ECJ.

## Reference

By order of 6 April 2000, the Bundesverwaltungsgericht (Federal Administrative Court) referred to the Court of Justice of the European

Communities for a preliminary ruling under art 234 EC (formerly art 177 of the EC Treaty) a question (set out at judgment para 30, below) on the interpretation of art 92 of the EC Treaty (now, after amendment, art 87 EC), art 77 of the EC Treaty (now art 73 EC), and Council Regulation (EEC) 1191/69 (on action by member states concerning the obligations inherent in the concept of a public service in transport by rail, road and inland waterway), as amended by Council Regulation (EEC) 1893/91. The question arose in proceedings between Altmark Trans GmbH (Altmark Trans) and Nahverkehrsgesellschaft Altmark GmbH (Nahverkehrsgesellschaft) concerning the grant to the former by Regierungspräsidium Magdeburg (Magdeburg regional government, the Regierungspräsidium) of licences for scheduled bus transport services in the Landkreis of Stendal (Germany) and public subsidies for operating those services. Written observations were submitted on behalf of: Altmark Trans by M Ronellenfitsch, Rechtsanwalt; Regierungspräsidium Magdeburg by L-H Rode, acting as agent; Nahverkehrsgesellschaft Altmark GmbH by C Heinze, Rechtsanwalt; and the Commission of the European Communities by M Wolfcarius and D Triantafyllou, acting as agents. Oral observations were submitted on behalf of: Altmark Trans, represented by M Ronellenfitsch; Regierungspräsidium Magdeburg, represented by L-H Rode; Nahverkehrsgesellschaft, represented by C Heinze; and the Commission, represented by M Wolfcarius and D Triantafyllou. The oral procedure was reopened by order of 18 June 2002. Further oral observations were submitted on behalf of: Altmark Trans GmbH, represented by M Ronellenfitsch; Regierungspräsidium Magdeburg, represented by S Karnop, acting as agent; Nahverkehrsgesellschaft, represented by C Heinze; the German government, represented by M Lumma, acting as agent; the Danish government, represented by J Molde, acting as agent; the Spanish government, represented by R Silva de Lapuerta, acting as agent; the French government, represented by F Million, acting as agent; the Netherlands government, represented by N A J Bel, acting as agent; the United Kingdom government, represented by J E Collins, acting as agent, and E Sharpston QC; and the Commission, represented by D Triantafyllou. The language of the case was German. The facts are set out in the opinion of the Advocate General.

14 January 2003. **The Advocate General (P Léger)** delivered the following opinion<sup>1</sup>.

1. By order of 18 June 2002 the Court of Justice of the European Communities ordered the reopening of the oral procedure in the present case.

2. In the order the Court of Justice stated that the *Ferring* judgment<sup>2</sup> of 22 November 2001 had been delivered after submission of the parties' oral observations and could affect the answer to the questions referred by the Bundesverwaltungsgericht (Federal Administrative Court, Germany) for a preliminary ruling. The court also observed that the judgment in the *Ferring* case was discussed in my opinion of 19 March 2002 in the present case and in the opinion of Advocate General Jacobs in the *GEMO* case<sup>3</sup>.

3. The court therefore arranged a further hearing to give the parties in the main proceedings, the member states, the Commission and the Council of

<sup>1</sup> Original language: French.

<sup>2</sup> *Ferring SA v Agence Centrale des Organismes de Sécurité Sociale (ACOSS)* Case C-53/00 [2001] ECR I-9067.

<sup>3</sup> Opinion of 30 April 2002 in *Ministre de l'Economie, des Finances et de l'Industrie v GEMO SA* Case C-126/01 [2004] 1 CMLR 259.



a the European Communities an opportunity to state their position on the effect of the *Ferring* judgment. It asked them for their views on whether—and according to what criteria—a financial advantage granted by the authorities of a member state to offset the cost of the public service obligations they impose on an undertaking must be classified as state aid within the meaning of art 92(1) of the EC Treaty (now, after amendment, art 87(1) EC).

b 4. The question of the Community rules applicable to the financing of public services has been the subject of a number of statements of position at the political level<sup>4</sup>. It is also the subject of controversy among the Advocates General of the court<sup>5</sup> and in academic writing<sup>6</sup>. These different positions are well known, so that there is no need to repeat them. On the other hand, before  
c supplementing my opinion of 19 March 2002, I will give a brief account of the arguments put forward by the parties.

#### I—ARGUMENTS OF THE PARTIES

5. In addition to the parties in the main proceedings, six member states took part in the reopened oral procedure. These were the Federal Republic of  
d Germany, the Kingdom of Denmark, the French Republic, the Kingdom of the Netherlands, the Kingdom of Spain and the United Kingdom of Great Britain and Northern Ireland. The Commission also submitted observations. The Council did not appear.

6. The argument before the court has made it possible to divide the parties  
e into two distinct groups.

7. The first group consists of Altmark Trans GmbH (Altmark Trans), the  
Regierungspräsidium Magdeburg, the Federal Republic of Germany, the French Republic and the Kingdom of Spain. They propose that the court

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f 4 See in particular the Presidency conclusions of the Nice European Council (7–9 December 2000) point 47, the Presidency conclusions of the Laeken European Council (14–15 December 2001) point 26, the Presidency conclusions of the Barcelona European Council (15–16 March 2002) point 42, the Presidency conclusions of the Seville European Council (21–22 June 2002) point 54, the communication from the Commission on services of general interest in Europe (OJ 2001 C17 p 4), the Commission's report of 17 October 2001 to the Laeken European Council on services of general interest (COM(2001) 598 final), the communication from the Commission on the application of state aid rules to public service broadcasting (OJ 2001 C320 p 5), the report of the Commission of 16 June 2002 on the status of work on the guidelines for state aid and services of general economic interest (COM(2002) 280 final) and the report of the Commission of 27 November 2002 on the state of play in the work on the guidelines for state aid and services of general economic interest (COM(2002) 636 final).

g 5 See the opinion of Advocate General Tizzano in the *Ferring* case, my opinion of 19 March 2002 in the present case (paras 54–98), the opinion of Advocate General Jacobs in the *GEMO* case, cited in footnote 3, above (paras 87–132) and the opinion of Advocate General Stix-Hackl in *Enirisorse SpA v Ministero delle Finanze* Joined Cases C-34/01–38/01 [2004] 1 CMLR 296 (paras 138–165).

h 6 For opinions expressed before the *Ferring* judgment, see A Alexis 'Services publics et aides d'État', (2002/1) *Revue du droit de l'Union européenne* 63, D Grespan 'An example of the application of State aid rules in the utilities sector in Italy', *Competition Policy Newsletter* (No 3 October 2002) p 17, J Gundel 'Staatliche Ausgleichszahlungen für Dienstleistungen von allgemeinem wirtschaftlichem Interesse: Zum Verhältnis zwischen Artikel 86 Absatz 2 EGV und dem EG-Beihilfenrecht' (2002) *Recht der Internationalen Wirtschaft* 222, M Nettesheim 'Europäische Beihilfeaufsicht und mitgliedstaatliche Daseinsvorsorge' (2002) *Europäisches Wirtschafts- und Steuerrecht* 253, P Nicolaïdes 'Distortive effects of compensatory aid measures: a note on the economics of the *Ferring* judgment' (2002) *ECLR* 313, P Nicolaïdes 'The new frontier in State aid control. An economic assessment of measures that compensate enterprises' (2002) 37 *Intereconomics* 190 and C Rizza 'The financial assistance granted by Member States to undertakings entrusted with the operation of a service of general economic interest: the implications of the forthcoming *Altmark* judgment for future State aid control policy', to appear in the *Columbia Journal of European Law* (2003).

should follow the compensation approach<sup>7</sup> adopted in the *Ferring* case. Under that approach, state financing of public services constitutes aid within the meaning of art 92(1) of the EC Treaty only if, and to the extent that, the advantages conferred by the public authorities exceed the cost incurred in discharging public service obligations. a

8. In support of their contention, they put forward essentially three series of arguments, which may be summarised as follows<sup>8</sup>. b

—according to the case law, where the state purchases goods (for example, computers) or services (for example, cleaning services), there is aid only if, and to the extent that, the remuneration paid by the state exceeds the market price. The same principle should apply where the state acquires services which are made available directly to the collectivity (namely, public services); c

—the concept of aid in art 92(1) of the EC Treaty applies only to measures which provide a financial advantage for certain undertakings. A state measure which does no more than offset the cost of discharging public service obligations does not confer any real advantage on the recipient undertaking. It does not therefore constitute aid; d

—under art 93(3) of the EC Treaty (now art 88(3) EC), the member states are obliged to notify their plans to grant aid and to suspend payment of the aid until the Commission has given its authorisation. These obligations are liable to paralyse the functioning of services in the general interest in the member states. e

9. The second group consists of the Kingdom of Denmark, the Kingdom of the Netherlands and the United Kingdom. They propose that the court should adopt the approach of Advocate General Jacobs in his opinion in the *GEMO* case<sup>9</sup> ('the *quid pro quo* approach'). f

10. Under that approach, the court would distinguish between two categories of situation. Where there was a direct and manifest link between the state financing and clearly defined public service obligations, the sums paid by the state would not constitute aid within the meaning of art 92(1) of the EC Treaty. On the other hand, where there was no such link or the public service obligations were not clearly defined, the sums paid by the public authorities would constitute aid within the meaning of that provision. g

11. The Commission for its part has not expressed a view on the point. It may be noted, however, that in the *Ferring* case<sup>10</sup> and the *GEMO* case<sup>11</sup> it came out in favour of the state aid approach<sup>12</sup>. Under that approach, state financing of public services constitutes aid within the meaning of art 92(1) of the Treaty. That aid may, however, be justified on the basis of art 90(2) of the EC Treaty (now art 86(2) EC)<sup>13</sup>. h

7 To use the expression of Advocate General Jacobs in his opinion in the *GEMO* case, cited in footnote 3, above (para 95).

8 These arguments have already been summarised by Advocate General Jacobs in his opinion in the *GEMO* case, cited in footnote 3, above (para 115).

9 Cited in footnote 3, above (paras 117–129).

10 See the opinion of Advocate General Tizzano (paras 18, 74, 75).

11 See the opinion of Advocate General Jacobs (para 107).

12 To use the expression of Advocate General Jacobs in his opinion in the *GEMO* case, cited in footnote 3, above (para 94).

13 See *Fédération Française des Sociétés d'Assurance (FFSA) v European Commission* Case T-106/95 [1997] ECR II-229 (paras 164–178) and *Sociedade Independente de Comunicação SA (SIC) v Commission of the European Communities* Case T-46/97 [2000] ECR II-2125 (paras 76–84). i

## a II—ANALYSIS

12. In my opinion of 19 March 2002, I came down in favour of the state aid approach. It may be of use to state at the outset that the arguments put forward by the parties have not caused me to alter my position.

13. I will therefore confine myself to considering the new questions raised by the arguments of the parties. Those questions relate to:

- b
- the criterion of the private investor in a market economy;
  - the concept of ‘advantage’ in art 92(1) of the EC Treaty;
  - the procedural obligations laid down in art 93(3) of the EC Treaty; and
  - the *quid pro quo* approach.

c 14. I will not, on the other hand, return to the arguments I set out in my earlier opinion. I therefore refer the court to that opinion.

A—*The criterion of the private investor in a market economy*

15. The first group of parties point out that, according to the case law, not all state intervention constitutes aid within the meaning of art 92(1) of the EC Treaty. Thus where the state purchases goods (for example, computers) or services (for example, cleaning services), there is aid only if, and to the extent that, the remuneration paid by the state exceeds the market price.

d 16. They consider that the same principle must apply in the field of public services. In their view, financing by the state must be classified as aid only if, and to the extent that, the advantages conferred by the public authorities exceed the cost of complying with the public service obligations (that is, the normal price of the services provided)<sup>14</sup>.

e 17. The parties’ argument amounts in substance to applying the criterion of the private investor in the field of state financing of public services.

f 18. As is well known, the criterion of the private operator<sup>15</sup> was originally developed by the Commission for determining whether investment by the state in the capital of an undertaking constitutes aid within the meaning of art 92(1)<sup>16</sup>. Under that criterion, the Commission considers that such an investment is not aid where the public authorities effect it under the same conditions as a private investor operating under normal market economy conditions<sup>17</sup>. The court took up the criterion in its case law<sup>18</sup> and then applied it to other kinds of state measures. To assess whether a measure contains an element of aid, the court thus examines whether a private operator of comparable size to the public bodies would have carried out the operation in question under the same conditions.

g 19. Unlike the parties, I consider that this criterion cannot be applied to state financing of public services.

h 14 See also, to that effect, the *Ferring* case (paras 26, 27) and the opinion of Advocate General Jacobs in the *GEMO* case, cited in footnote 3, above (paras 121–123).

15 I consider, along with some writers, that the expression ‘private operator’ is more appropriate than ‘private investor’. It can cover not only investments in the strict sense but also the other kinds of state measures to which this criterion applies (see J-P Keppenne *Guide des aides d’État en droit communautaire* (1999) point 44, note 93).

i 16 See the communication of the Commission to the member states concerning public authorities’ holdings in company capital (EC Bulletin No 9/1984, point 3.5.1).

17 Commission communication to the member states on the application of arts 92 and 93 of the EEC Treaty and of art 5 of Commission Directive (EEC) 80/723 (to public undertakings in the manufacturing sector) (OJ 1993 C307 p 3) point 11.

18 See in particular *Belgium v EC Commission* Case 234/84 [1986] ECR 2263 (para 14), *Belgium v EC Commission* Case C-142/87 [1990] ECR I-959 (para 26) and *Italy v EC Commission* Case C-305/89 [1991] ECR I-1603 (para 19).



20. It appears from the case law that in the field of state aid the court distinguishes between two categories of situation: those where the intervention of the state is of an economic nature and those where it forms part of the exercise of public powers.

21. The court applies the private operator criterion only in situations in the first category. These cover cases where the public authorities contribute capital to an undertaking<sup>19</sup>, grant a loan to certain undertakings<sup>20</sup>, provide a state guarantee<sup>21</sup>, sell goods or services on the market<sup>22</sup>, or grant facilities for the payment of social security contributions<sup>23</sup> or the repayment of wages<sup>24</sup>. In such situations the private operator criterion is material because the conduct of the state is capable of being adopted, at least in principle, by a private operator acting with a view to profit (an investor, a bank, a surety, an undertaking or a creditor). Application of that criterion is justified by the principle of equal treatment between the public and private sectors<sup>25</sup>, which requires that intervention by the state should not be subject to stricter rules than those applicable to private undertakings.

22. On the other hand, the criterion of the private operator is not material where the intervention by the state has no economic character. That is the case where the public authorities pay a subsidy directly to an undertaking<sup>26</sup>, grant an exemption from tax<sup>27</sup> or agree to a reduction in social security contributions<sup>28</sup>. In situations of this kind, the intervention by the state cannot be adopted by a private operator acting with a view to profit but falls within the exercise of public powers of the state (such as tax policy or social policy). The private operator criterion is therefore not material, since, by definition, there cannot be any breach of equal treatment between the public and private sectors<sup>29</sup>.

19 As above.

20 See *France v EC Commission* Case C-301/87 [1990] ECR I-307 (paras 38–41) and *Cityflyer Express Ltd v European Commission* Case T-16/96 [1998] ECR II-757 (paras 8, 51).

21 See *EPAC—Empresa para a Agroalimentação e Cereais, SA v European Commission* Joined cases T-204/97 and T-270/97 [2000] ECR II-2267 (paras 67, 68).

22 See *Kwekerij Gebroeders van der Kooy BV v EC Commission* Joined cases 67/85, 68/85 and 70/85 [1988] ECR 219 (paras 28–30), *Belgium v European Commission* Case C-56/93 [1996] ECR I-723 (para 10) and *Syndicat Français de l'Express International (SFEL) v La Poste* Case C-39/94 [1996] All ER (EC) 685, [1996] ECR I-3547 (paras 59–62).

23 See *Proceedings relating to Déménagements-Manutention Transport SA (DMT)* Case C-256/97 [1999] All ER (EC) 601, [1999] ECR I-3913 (paras 24, 25).

24 See *Spain v European Commission* Case C-342/96 [1999] ECR I-2459 (para 46).

25 See *Italy v EC Commission* Case C-303/88 [1991] ECR I-1433 (para 20), *Italy v EC Commission* Case C-261/89 [1991] ECR I-4437 (para 15) and *Cie Nationale Air France v European Commission* Case T-358/94 [1996] ECR II-2109 (para 70).

26 See *Deufil GmbH & Co KG v EC Commission* Case 310/85 [1987] ECR 901 (para 8).

27 See *Banco de Crédito Industrial SA, now Banco Exterior de España SA v Ayuntamiento de Valencia* Case C-387/92 [1994] STC 603, [1994] ECR I-877 (para 14), *Italy v EC Commission* Case C-6/97 [1999] ECR I-2981 (para 16) and *Germany v European Commission* Case C-156/98 [2000] ECR I-6857 (paras 25–28).

28 See *Belgium v European Commission* Case C-75/97 [1999] ECR I-3671 (paras 24, 25) and *Ladbroke Racing Ltd v European Commission* Case T-67/94 [1998] ECR II-1 (para 110).

29 It will be noted that the criterion for identifying cases where the court applies the private operator principle is the same as the criterion for defining an undertaking in the context of competition law (see, on this point, my opinion in *Wouters v Algemene Raad van de Nederlandse Orde van Advocaten (Raad van de Balies van de Europese Gemeenschap interveniend)* Case C-309/99 [2002] All ER (EC) 193, [2002] ECR I-1577 (para 137) and the references cited, and *Firma Ambulanz Glöckner v Landkreis Südwestpfalz* Case C-475/99 [2001] ECR I-8089 (para 20)).

a 23. It follows from the above that the private operator criterion does not apply to interventions by the state which fall within the exercise of public powers.

b 24. The court expressly confirmed that principle in the *Spain v EC Commission* judgment of 14 September 1994<sup>30</sup>. It held that, for the purpose of applying the private operator criterion, 'a distinction must be drawn between the obligations which the State must assume as owner of the share capital of a company and its obligations as a public authority'<sup>31</sup>. The state's obligations as a public authority may not be taken into consideration for the purpose of applying the private investor criterion<sup>32</sup>, as otherwise unequal treatment of the public and private sectors would be introduced.

c 25. It is common ground that the financing of public services is an activity which typically falls within the exercise of public powers. It is for the public authorities to define the services which are to be made available to the collectivity. It is also for them to take the necessary measures to ensure the functioning and financing of those services. It is, moreover, hard to imagine a private operator embarking on his own initiative on such financing activity.

d 26. Consequently, I consider that the private operator criterion cannot validly be applied to the financing of public services.

e 27. The argument of the parties is thus based on a wrong comparison. It is not correct to compare cases where the state purchases goods or services on its own account with those where it 'acquires' services which are made available directly to the collectivity (namely public services). In the former case, the state conducts itself in a way which a private operator may adopt with a view to profit; whereas, in the latter case, the state acts as a public authority<sup>33</sup>.

#### B—The concept of 'advantage' in art 92(1) of the Treaty

f 28. The parties' second argument relates to the concept of 'advantage' in art 92(1) of the Treaty.

g 29. The concept of aid in art 92(1) of the Treaty applies to state measures which confer a financial advantage on certain undertakings and distort or threaten to distort competition. To assess whether a measure constitutes aid, it must therefore be determined whether the undertaking receives an economic advantage which it would not have obtained under normal market conditions<sup>34</sup>.

30. In the present case, the parties submit that a state measure which merely offsets the cost of public service obligations does not constitute aid. In so far as

30 Joined cases C-278–280/92 [1994] ECR I-4103.

h 31 See para 22.

32 As above. For the application of this principle in the Commission's practice, see Commission Decision (EC) 94/1073 (concerning the grant of state aid by France to the Bull group in the form of a non-notified capital increase) (OJ 1994 L386 p 1) point V, Commission Decision (EC) 96/631 (concerning state aid that the City of Mainz, a local authority of the Federal Republic of Germany, has granted to Grundstücksverwaltungsgesellschaft Fort Malakoff Mainz mbH & Co KG, a subsidiary of Siemens AG/Siemens Nixdorf Informationssysteme AG) (OJ 1996 L283 p 43) point IV and Commission Decision (EC) 98/204 (conditionally approving aid granted by France to the GAN group) (OJ 1998 L78 p 1) point 3.3.

i 33 See also, to that effect, A Alexis, cited in footnote 6, above (point B.3.5.a) and D Triantafyllou 'L'encadrement communautaire du financement du service public' [1999] Revue trimestrielle de droit européen 21, p 31.

34 See the *SFEI* case, cited in footnote 22, above (para 60), *Spain v Commission*, cited in footnote 24, above (para 41) and the *DMT* case, cited in footnote 23, above (para 22).

the performance of public service obligations involves additional costs, the effect of such a measure is merely to replace the recipient undertaking in a position comparable to that of its competitors. The measure thus does not provide the recipient undertaking with any 'real' advantage and is therefore not liable to distort competition. It merely constitutes consideration for the public service obligations<sup>35</sup>.

31. On this point, it will be seen that the parties' argument is based on a specific understanding of the concept of aid. They adopt what may be described as a 'net' definition of aid or the 'real' advantage theory.

32. In this approach, the advantages given by the public authorities are examined together with the obligations on the recipient of the aid. Public advantages thus constitute aid only if their amount exceeds the value of the commitments the recipient enters into.

33. That does not, however, correspond to the approach adopted by the authors of the Treaty in the field of state aid. The relevant provisions of the Treaty are based on a 'gross' theory of aid or the 'apparent' advantage theory.

34. Using this approach, the advantages given by the public authorities and what the recipient has to contribute in return must be examined separately. The existence of the contribution is of no relevance for determining whether the state measure constitutes aid within the meaning of art 92(1). It comes into consideration only at a later stage of the analysis, for assessing whether the aid is compatible with the common market.

35. The 'gross' theory of aid thus occurs in several provisions of the Treaty, in particular in art 92(2) and (3), and in art 77 of the EC Treaty (now art 73 EC).

36. Article 92(3) of the Treaty provides that aid may be regarded as compatible with the common market if it pursues certain objectives. Those objectives correspond essentially to those which the Treaties assign to the European Community or the European Union<sup>36</sup>. Examples are the strengthening of economic and social cohesion, the promotion of research and the protection of the environment.

37. The Commission considered from the outset that, for aid to be compatible with the common market, the recipient must contribute something in return<sup>37</sup>. This contribution must intervene to compensate the distortion of competition caused by the grant of aid<sup>38</sup>. It is intended to ensure that the recipient acts in a way liable to contribute to the realisation of the objectives set out in art 93(3) of the Treaty. The Commission considers that to authorise aid without requiring the contribution would amount to accepting distortions of competition without this being justified by the Community interest<sup>39</sup>.

35 See also, to that effect, the *Ferring* case (paras 25–27).

36 See A Evans *European Community Law of State Aid* (1997) pp 107, 108.

37 See First Report on Competition Policy 1972, para 132, Commission Decision (EEC) 79/743 (on proposed Netherlands government assistance to increase the production capacity of a cigarette manufacturer) (OJ 1979 L 217 p 17) point III and Tenth Report on Competition Policy 1980, para 213.

38 See J-P Keppenne, cited in footnote 15, above (point 495).

39 See inter alia Commission Decision (EEC) 88/318 (on Law No 64 of 1 March 1986 on aid to the Mezzogiorno) (OJ 1988 L143 p 37) point IV.2, Commission Decision (EEC) 93/133 (concerning aid granted by the Spanish government to the Merco company (agricultural processing industry)) (OJ 1993 L55 p 54) point VIII and Commission Decision (EEC) 93/155 (concerning an aid measure proposed by the German authorities (Rhineland-Palatinate) for the distillation of wine) (OJ 1993 L61 p 55) point IV.



a 38. The Commission's approach was expressly accepted by the court in *Philip Morris Holland BV v EC Commission*<sup>40</sup>. The court held that, to be able to authorise aid under art 92(3) of the Treaty, the Commission may require proof that the aid is necessary to ensure that the recipient undertakings act in such a way as to contribute to the realisation of the objectives referred to in that provision.

b 39. In its practice the Commission therefore looks to see whether there is a contribution on the part of the recipient of the aid which can justify the grant of aid<sup>41</sup>. The contribution may take several forms<sup>42</sup>.

c 40. In some cases the activity aided may be seen at once to be a sufficient contribution, since it falls within the framework of a Community objective. In that case the contribution takes the form of an investment, such as the construction of a factory or a programme of research or training. In other cases the contribution is a condition for the approval of aid and takes a different form, such as a reduction of production capacity which contributes to solving a problem of over-capacity at Community level. In any event, the Commission requires a link, direct or indirect, between the aid and the operations which form the contribution<sup>43</sup>. It also requires the contribution provided by the recipient to be proportionate to the size of the aid paid out<sup>44</sup>.

d 41. It follows that, to be eligible for authorisation under art 92(3) of the Treaty, aid must involve a contribution from the recipient, so that there is no net advantage for him in practice.

e 42. Contrary to the submissions of the parties, the existence of this contribution does not affect the interpretation of the concept of aid.

f 43. In the context of art 92(1), the aid does not correspond to the difference between the public advantages and the value of the commitments entered into by the recipient<sup>45</sup>. The aid corresponds solely to the amount of the public advantages. What the recipient contributes in return comes in only at a further stage of the analysis, to assess the compatibility of the aid with the common market.

g 44. An identical understanding of the concept of aid may be found in the provisions of the Treaty concerning land transport. Article 77 of the Treaty provides that '[a]ids shall be compatible with this Treaty ... if they represent reimbursement for the discharge of certain obligations inherent in the concept of a public service'.

40 Case 730/79 [1980] ECR 2671 (paras 16, 17).

h 41 See, inter alia, Commission Decision (EEC) 81/626 (on a scheme of aid by the Belgian government in respect of certain investments carried out by a Belgian undertaking to modernise its butyl rubber production plant) (OJ 1981 L229 p 12) point V, Commission Decision (EEC) 83/468 (under art 93(2) of the EEC Treaty, on a proposal to grant aid to an undertaking in the textile and clothing sector (undertaking No 111)) (OJ 1983 L253 p 18) point III, Commission Decision (EEC) 93/154 (concerning an AIMA national programme on aid which Italy plans to grant for the private storage of carrots) (OJ 1993 L61 p 52) point VI and Commission Decision (EEC) 97/611 (on aid to the sheepmeat industry (promotional aid)) (OJ 1997 L248 p 20) point VI.

42 See J-P Keppenne, cited in footnote 15, above (point 495).

i 43 See Commission Decision (EEC) 89/43 (on aids granted by the Italian government to ENI-Lanerossi) (OJ 1989 L16 p 52) point VII.

44 See Commission Decision (EC) 95/54 (giving conditional approval to the aid granted by France to the bank *Crédit Lyonnais*) (OJ 1995 L308 p 92) point 7.1 and Commission Notice (pursuant to art 93(2) of the EC Treaty to other member states and other parties concerned regarding aid which France has decided to grant to the bank *Crédit Lyonnais*) (OJ 1996 C390 p 7) point 5.3, penultimate and final paragraphs.

45 See also, to that effect, *France v European Commission* Case C-251/97 [1999] ECR I-6639 (paras 17–20, 38–48).

45. That provision shows that, in the field of state financing of public services, the authors of the Treaty likewise adopted a 'gross' concept of aid. For them, the existence and amount of aid must be assessed solely by reference to the 'financing entering'<sup>46</sup> the undertaking. What the recipient agrees to in return—that is, the public service obligations—has no effect on the interpretation of the concept of aid. It merely constitutes a criterion for assessing the compatibility of the aid from the point of view of the derogating provisions of the Treaty.

46. In view of the above factors, I consider that the court cannot follow the compensation approach adopted in the *Ferring* case. Such an interpretation would amount to depriving of their effect all the derogating provisions of the Treaty concerning state aid. It amounts in fact to examining the compatibility of aid within the framework of art 92(1) of the Treaty<sup>47</sup>.

47. Another solution might consist in restricting the compensation approach to the field of public services only. Two distinct concepts of aid would thus exist side by side in the Treaty. The view would be taken that:

—in the field of aid generally, the Treaty provisions are based on a 'gross' concept of aid, but

—in the field of public services (other than land transport), the Treaty provisions are based on a 'net' concept of aid.

48. I believe, however, that such a solution risks creating serious problems in terms of legal certainty. Some state measures will be capable of falling under both concepts at the same time. That applies to financial advantages granted by the member states to public broadcasting services<sup>48</sup>.

49. On the one hand, those advantages are intended to promote culture within the meaning of art 92(3)(d) of the Treaty. By virtue of art 92 of the Treaty and the 'gross' definition of aid, they will thus constitute aid which must be notified to the Commission and may be declared compatible with the common market. On the other hand, those same advantages are also intended to offset the cost of the public service obligations imposed on broadcasting institutions. By virtue of the compensation approach and the 'net' definition of aid, they will thus not be able to be categorised as aid within the meaning of art 92(1) of the Treaty.

50. It follows that, for measures of that kind, those concerned will all no longer be in a position to know whether the Treaty rules are applicable.

51. Member states will not be able to identify the measures which must be notified to the Commission. Nor will undertakings know whether they can rely on the lawfulness of the state financing. National courts too will have difficulty in knowing whether to apply the court's case law on the direct effect of art 93(3) of the Treaty. The Commission, finally, will not be able to determine with certainty whether it can start a procedure against an instance of state financing.

52. In view of these various factors, I therefore consider that the state aid approach is much more appropriate for analysing state financing of public services. Like arts 77 and 92 of the Treaty, this approach is based on a 'gross' definition of aid. It thus makes it possible to ensure the coherence of

<sup>46</sup> To use the expression of D Triantafyllou, cited in footnote 33, above (p 32).

<sup>47</sup> See also, on this point, my opinion of 19 March 2002 in the present case (paras 76–85).

<sup>48</sup> The importance of this field is illustrated by the Protocol on the system of public broadcasting in the member states annexed to the Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts (OJ 1997 C340 p 109).

a the Treaty provisions concerning state aid and to preserve the effect of the derogating provisions (namely arts 77, 90(2) and art 92(2) and (3) of the Treaty).

C—*The procedural obligations in art 93(3) of the Treaty*

53. The third argument of the parties relates to the procedural obligations laid down in art 93(3) of the Treaty.

54. Before analysing this argument, a short summary of certain aspects of the Community procedure for reviewing aid will be of use.

55. It is common ground that the Commission has exclusive competence to examine the compatibility of aid with the common market under arts 92 and 93 of the Treaty<sup>49</sup>. That competence is justified by the fact that examining the

c compatibility of aid involves assessments of an economic and social nature which must be made in a Community context<sup>50</sup>. It is also justified by the fact that aid constitutes a sensitive area both for those concerned and for the functioning of the common market. The authors of the Treaty did not therefore wish to entrust the member states with the function of assessing whether an aid presents risk for the common market. They entrusted that assessment to the European institution responsible for representing the Community interest<sup>51</sup>.

56. In the *Banco Exterior de España* case<sup>52</sup> the court expressly held (at para 17) that the Commission's power extends to aid to undertakings entrusted with public service functions for the purposes of art 90(2) of the Treaty. It follows that national courts do not have jurisdiction to apply art 90(2) in the field of aid<sup>53</sup>. Only the Commission may authorise an aid under that provision.

57. Under art 93(3) of the Treaty, the member states are obliged to notify their plans for introducing or altering aids (obligation to notify). They cannot implement those plans without the prior authorisation of the Commission (obligation to suspend). According to settled case law<sup>54</sup>, these procedural obligations constitute the safeguard of the aid review machinery, which in turn is essential for ensuring the functioning of the common market.

58. In *France v European Commission*<sup>55</sup> the court held that the notification and suspension obligations apply to aid to undertakings entrusted with the operation of services of general interest within the meaning of art 90(2) of the Treaty. It follows that aid granted to public services in breach of those obligations constitutes 'illegal' aid.

49 See *Firma Steinike und Weinlig v Germany* Case 78/76 [1977] ECR I-595 (paras 9, 10).

50 See, inter alia, the *Philip Morris* case, cited in footnote 40, above (para 24), the *Deufil* case, cited in footnote 26, above (para 18), *France v EC Commission* Case C-301/87, cited in footnote 20, above (para 49), *Belgium v EC Commission* Case C-142/87, cited in footnote 18, above (para 56) and *Matra SA v EC Commission* Case C-225/91 [1993] ECR I-3203 (para 24).

51 See M Waelbroeck and A Frignani 'Commentaire J Megret—Le droit de la CE' Vol 4, *Concurrence* (1997, 2nd edn) pp 324–325 (para 308).

52 Cited in footnote 27, above.

53 By contrast, they retain jurisdiction to apply that provision in the other fields of the Treaty, such as competition law or the freedom to provide services (see, inter alia, *Ahmed Saeed Flugreisen v Zentrale zur Bekämpfung unlauteren Wettbewerbs eV* Case 66/86 [1989] ECR 803 (paras 55–57), *Elliniki Radiophonia Tileorassi AE v Dimotiki Etairia Piroforissis* Case C-260/89 [1991] ECR I-2925 (para 34), *Criminal proceedings against Corbeau* Case C-320/91 [1993] ECR I-2533 (para 20) and *Municipality of Almelo v Energiebedrijf IJsselmij NV* Case C-393/92 [1994] ECR I-1477 (para 50).

54 See, for example, *Adria-Wien Pipeline GmbH v Finanzlandesdirektion für Kärnten* Case C-143/99 [2002] All ER (EC) 306, [2001] ECR I-8365 (para 25).

55 Case C-332/98 [2000] ECR I-4833 (paras 27–32).



59. At Community level, this means that the Commission can instruct the state to suspend the payment of aid or provisionally recover the aid until it reaches a decision on compatibility<sup>56</sup>. At national level, this means that a court may (1) order recovery of the aid, (2) declare unlawful the act instituting the aid and the implementing measures, and (3) order the competent authorities to make good any damage which may have been caused by the immediate payment of aid<sup>57</sup>.

60. In the present case, the parties submit that the procedural obligations laid down in art 93(3) of the Treaty are liable to paralyse the functioning of public services in the member states. They state that the procedure for examining aid is relatively long and that, for certain kinds of public services, it is difficult or even impossible to wait for the Commission's authorisation. They also state that, because of the number of measures concerned, the procedural obligations are liable to paralyse action by the Commission in the field of state aid.

61. The court previously had occasion to consider arguments of this type in the *France v Commission* case cited above. In that case the French government submitted that the obligation to suspend produces serious risks for the continuity of public services<sup>58</sup>. The court expressly rejected that argument, pointing out that the procedural obligations are the safeguard of the machinery for the review of aid in Community law<sup>59</sup>.

62. In any event, I consider that the fears expressed by the parties are unfounded. In my view, the procedural obligations are not liable to disturb the functioning of public services, for several reasons.

63. First, the procedural obligations do not apply to all state measures. They apply only to measures which satisfy the criteria of art 92(1) of the Treaty. In practice, this means that in certain essential fields state financing of public services is not caught by the procedural obligations. This applies *inter alia* to the following measures<sup>60</sup>:

—measures financing activities which are not of an economic nature<sup>61</sup>: this is the case of activities within the exercise of public powers of the state (such as

<sup>56</sup> See art 11 of Council Regulation (EC) 659/1999 (laying down detailed rules for the application of art 93 of the EC Treaty) (OJ 1999 L83 p 1).

<sup>57</sup> For a more detailed description of these consequences, see my opinion in *Belgium v European Commission* Case C-197/99 P [2003] ECR I-8461 (para 74 and the references cited).

<sup>58</sup> See paras 27–30.

<sup>59</sup> See footnote above (paras 31, 32). See also the reasons stated by Advocate General La Pergola in this case (paras 22–24 of his opinion).

<sup>60</sup> See also, on this point, A Alexis, cited in footnote 6, above (point A).

<sup>61</sup> To fall within the prohibition laid down in art 92(1) of the Treaty, state measures must of course favour certain undertakings or certain economic activities.

a security, justice, foreign relations, etc)<sup>62</sup>, compulsory social security schemes<sup>63</sup>, the field of compulsory education<sup>64</sup>, and other fields within the essential functions of the state;

—measures not liable to affect trade between member states: this is the case of the financing of certain local or regional public services (such as swimming pools, leisure centres, crèches, cultural centres or hospitals)<sup>65</sup>. This also applies

b where the amount of aid does not exceed the threshold of €100,000 fixed by the Commission in its regulation on de minimis aid<sup>66</sup>.

64. Second, for measures coming under art 92(1) of the Treaty, the Commission is subject to certain time limits.

c 65. Thus the Commission is obliged to carry out a preliminary examination of the aid within two months of its notification<sup>67</sup>. This time limit is strict and cannot be extended by the Commission unilaterally<sup>68</sup>. If no decision has been taken by the expiry of the time limit, the member state concerned may implement the aid, subject to informing the Commission beforehand<sup>69</sup>. In that case the aid is deemed to have been authorised<sup>70</sup>. It comes under the rules for existing aid<sup>71</sup> and may thus continue to be paid as long as the Commission does

d not find that it is incompatible with the common market<sup>72</sup>.

66. The parties appear to consider that even a period of two months might be too long for certain types of public services. Even assuming that this may be so<sup>73</sup>, certain mechanisms make it possible to take account of such exceptional situations.

e 67. Article 5 of the EC Treaty (now art 10 EC) imposes a duty of sincere co-operation between the Community institutions and the member states<sup>74</sup>. By

62 See *SAT Fluggesellschaft mbH v European Organisation for the Safety of Air Navigation (Eurocontrol)* Case C-364/92 [1994] ECR I-43 (para 30) and *Diego Cali & Figli Srl v Servizi Ecologici Porto Di Genova SpA (SEPG)* Case C-343/95 [1997] ECR I-1547 (paras 22, 23).

f 63 See *Poucet v Assurances Générales de France (AGF)*, *Pistre v Caisse Autonome Nationale de Compensation de L'Assurance Régionale des Artisans (CANCARA)* Joined cases C-159/91 and C-160/91 [1993] ECR 637 (para 18) and *Cisal di Battistello Venanzio & Co SAS v Istituto Nazionale per l'Assicurazione contro gli Infortuni sul Lavoro (INAIL)* Case C-218/00 [2002] ECR I-691 (para 46).

64 See Commission Decision 2001/C 333/03 (authorisation for state aid pursuant to arts 87 and 88 of the EC Treaty (public grants to professional sports clubs)) (OJ 2001 C333 p 6). The text of the decision is available on the internet at [http://europa.eu.int/comm/secretariat\\_general/sgb/state\\_aids/industrie/n118-00.pdf](http://europa.eu.int/comm/secretariat_general/sgb/state_aids/industrie/n118-00.pdf).

g 65 See Commission press release IP/00/1509.

66 See Commission Regulation (EC) 69/2001 (on the application of arts 87 and 88 of the EC Treaty to de minimis aid) (OJ 2001 L10 p 30). Under art 1(a) of the regulation, however, it does not apply to the transport sector.

67 See *Lorenz (Gebr) GmbH v Germany* Case 120/73 [1973] ECR 1471 (para 4) and art 4(5) of Regulation 659/1999.

h 68 See *Austria v European Commission* Case C-99/98 [2001] ECR I-1101 (paras 73–76).

69 See the *Lorenz* case, cited in footnote 67, above (para 4) and art 4(6) of Regulation 659/1999.

70 See art 4(6) of Regulation 659/1999.

71 See *Spain v EC Commission* Case C-312/90 [1992] ECR I-4117 (para 18).

i 72 See the *Banco Exterior de España* case, cited in footnote 27, above (para 20). Similarly, where the Commission opens the formal examination procedure, its final decision must be taken within 18 months from the opening of the procedure. On the expiry of that time limit the member state may require the Commission to take its decision on the basis of the information available to it (see art 7(6) and (7) of Regulation 659/1999).

73 It appears that, when the authorities of a member state organise a public service in a particular sector (for example, distribution of mail, an air link or a railway service), the periods needed for organising the service are generally compatible with the time limits imposed on the Commission for the examination of aid.

74 See the order in *Zwartveld* Case C-2/88 Imm [1990] ECR I-3365 (para 17).

virtue of that provision, the authorities of the member state and the Commission might thus be induced to give priority treatment to a case of particular urgency or find some other appropriate solution.

68. Third, it should be remembered that under art 93(3) of the Treaty the member states can notify aid schemes to the Commission. Aid schemes are national provisions under which, without further implementing measures being required, individual aid awards may be made to undertakings defined in a general and abstract manner<sup>75</sup>.

69. The advantage of this machinery is that member states obtain a single approval from the Commission on the basis of the general characteristics of the scheme. Member states thus avoid the obligation of subsequently notifying each individual case in which the scheme is applied. In its report for the Laeken European Council<sup>76</sup>, the Commission expressly accepted that the member states can notify 'compensation schemes' in the field of financing of public services.

70. Fourth, under art 94 of the EC Treaty (now art 89 EC), the Council may adopt regulations for exemptions by category in the field of state aid. The Council may also authorise the Commission to adopt such regulations<sup>77</sup>.

71. Regulations for exemption by category define the conditions under which certain categories of aid are to be regarded as compatible with the common market. Their main advantage lies in the fact that aid granted in accordance with the provisions of those regulations is exempted from the obligation to notify under art 93(3) of the Treaty. Member states can therefore implement their aid plans without waiting for individual authorisation from the Commission.

72. On this point, the Laeken European Council had already asked the Commission to set up a 'policy framework' for aid for public services<sup>78</sup>. In addition, the Barcelona<sup>79</sup> and Seville<sup>80</sup> European Councils expressly raised the possibility of the Commission submitting a regulation for exemption by category in that field. The Commission replied that it would start by setting up a Community framework, but would adopt an exemption regulation in so far as that was justified<sup>81</sup>. The Commission said that it would be able to draw up that framework in the course of 2002<sup>82</sup>. However, it suspended work pending the delivery of the court's judgment in the present case<sup>83</sup>.

73. It follows that, should the court decide to adopt the state aid approach in the present case, the Commission and the Council ought to be in a position to adopt a regulation for exemption by category within an acceptable period of

75 See art 1(d) of Regulation 659/1999.

76 Cited in footnote 4, above (point 26).

77 See, for example, Council Regulation (EC) 994/98 (on the application of arts 92 and 93 of the Treaty establishing the European Community to certain categories of horizontal state aid) (OJ 1998 L142 p 1).

78 See the Presidency conclusions, cited in footnote 4, above (point 26).

79 See the Presidency conclusions, cited in footnote 4, above (point 42).

80 See the Presidency conclusions, cited in footnote 4, above (point 54).

81 See the Commission's report on services of general interest for the Laeken European Council, cited in footnote 4, above (points 28, 29).

82 See footnote above (point 28).

83 See Commission report of 16 June 2002 on the status of work on the guidelines for state aid and services of general economic interest, cited in footnote 4, above (points 10, 16) and Commission report of 27 November 2002 on the state of play in the work on the guidelines for state aid and services of general economic interest, cited in footnote 4, above (point 3).



a time. In that case, state measures intended to offset the cost of public service obligations would quite simply be exempted from the obligation to notify. The member states would then be able to put their financing plans into practice without waiting for an individual exemption from the Commission. The situation would thus be the same as that which has been applied since 1969 in the field of public land transport services<sup>84</sup>.

b 74. Having regard to all the above factors, I consider that the fears expressed by the parties are unfounded. In my opinion, the state aid approach is not liable to upset the functioning of public services in the member states, nor to paralyse action by the Commission in the field of state aid.

c *D—The quid pro quo approach*

75. The second group of parties propose that the court adopt the quid pro quo approach developed by Advocate General Jacobs in his opinion in the GEMO case<sup>85</sup>.

d 76. Under that approach, the court would distinguish between two categories of situation. The first category would comprise cases in which there is a direct and manifest link between the state financing and clearly defined public service obligations. In those cases the sums paid by the state to the recipient undertaking constitute not aid within the meaning of art 92(1) of the Treaty but the consideration for the public service obligations assumed by the undertaking.

e 77. Conversely, the second category of situation would cover cases where there is no direct and manifest link between the state financing and the public service obligations, as well as cases where those obligations are not clearly defined. In those cases the sums paid by the public authorities constitute aid which as such is subject to the procedural obligations laid down in art 93(3) of the Treaty.

f 78. For my part, I consider that this approach raises essentially two series of difficulties.

79. First, the quid pro quo approach appears difficult to reconcile with the court's case law on state aid.

g 80. According to settled case law, the court considers that, to determine whether a state measure constitutes aid, only the effects of the measure are to be taken into consideration<sup>86</sup>.

81. The other elements characterising the measure are not relevant at the stage of determining the existence of aid. This applies to the form in which the aid is granted<sup>87</sup>, the legal status of the measure in national law<sup>88</sup>, the fact

h <sup>84</sup> See Council Regulation (EEC) 1191/69 (on action by member states concerning the obligations inherent in the concept of a public service in transport by rail, road and inland waterway) (OJ English Sp Edn 1969(I) p 276), as amended by Council Regulation (EEC) 1893/91 (OJ 1991 L169 p 1).

<sup>85</sup> Cited in footnote 3, above (paras 117–129).

i <sup>86</sup> See, inter alia, *Italy v EEC Commission* Case 173/73 [1974] ECR 709 (para 27), the *Deufil* case, cited in footnote 26, above (para 8), *Belgium v European Commission* Case C-56/93, cited in footnote 22, above (para 79), *France v European Commission* Case C-241/94 [1996] ECR I-4551 (para 20) and *Belgium v European Commission* Case C-5/01 [2002] ECR I-11991 (paras 45, 46).

<sup>87</sup> See *SA Intermills v EC Commission* Case 323/82 [1984] ECR 3809 (para 31), *Belgium v EC Commission* Case C-142/87, cited in footnote 18, above (para 13) and *Belgium v EC Commission* Case 40/85 [1986] ECR 2321 (para 12).

<sup>88</sup> See Commission Decision (EEC) 93/349 (concerning aid provided by the United Kingdom government to British Aerospace for its purchase of Rover Group Holdings over and above those

that the measure is part of an aid scheme<sup>89</sup>, the reasons for the measure<sup>90</sup>, the objectives of the measure<sup>91</sup> and the intentions of the public authorities and the recipient undertaking<sup>92</sup>. These elements are of no relevance because they are not liable to affect competition. They may, on the other hand, become relevant at a later stage of the analysis, in order to assess the compatibility of the aid from the point of view of the derogating provisions of the Treaty<sup>93</sup>.

82. The quid pro quo approach amounts to introducing such elements into the actual definition of aid.

83. The first criterion suggested consists in examining whether there is a 'direct and manifest link' between the state funding and the public service obligations. In practice, this amounts to requiring the existence of a public service contract awarded after a public procurement procedure<sup>94</sup>. Similarly, the second criterion suggested consists in examining whether the public service obligations are 'clearly defined'. In practice, this amounts to verifying that there are laws, regulations or contractual provisions which specify the nature and content of the undertaking's obligations<sup>95</sup>.

84. In those circumstances, the quid pro quo approach departs from the court's case law on state aid. It amounts to defining aid no longer by reference solely to the effects of the measure, but by reference to criteria of a purely formal or procedural nature. At theoretical level, it means that the same measure may be classified as aid or 'non-aid' depending on whether a contract (of public service) or a legal instrument (defining the public service obligations) exists, although it produces identical effects on competition.

85. Second, the quid pro quo approach does not appear to be capable of guaranteeing a sufficient degree of legal certainty.

86. The principal criterion underlying this approach is defined in a vague and imprecise fashion. It is clear that this is deliberate and is intended to provide the flexibility needed to comprehend a wide range of situations<sup>96</sup>. Nevertheless, it is extremely difficult to know what is covered by the expression 'direct and manifest link'. Moreover, apart from the case of a public service contract concluded after an award procedure, none of the parties was able to provide a single specific example of this kind of link between state financing and public service obligations<sup>97</sup>.

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authorised in Commission Decision (EEC) 89/58 authorising a maximum aid to this operation subject to certain conditions) (OJ 1993 L143 p 7) point IX.

89 See the *Cityflyer Express* case, cited in footnote 20, above (para 94).

90 See the judgments cited in footnote 86, above.

91 As above.

92 See Commission Decision (EEC) 92/11 (concerning aid provided by the Derbyshire County Council to Toyota Motor Corporation, an undertaking producing motor vehicles) (OJ 1992 L6 p 36) point V.

93 Thus certain categories of aid are compatible with the common market only if they take a particular form (see, for example, Commission Notice 97/C 238/02 on Community guidelines on state aid for rescuing and restructuring firms in difficulty (OJ 1997 C283 p 2) point 3.1, first indent).

94 See the opinion of Advocate General Jacobs in the *GEMO* case, cited in footnote 3, above (para 119).

95 See footnote above (para 120).

96 See the opinion of Advocate General Jacobs in the *GEMO* case, cited in footnote 3, above (para 129), and the opinion of Advocate General Stix-Hackl in the *Enirisorse* case, cited in footnote 5, above (para 157).

97 In fact, the sole concrete and 'operational' criterion which can be set in the context of the quid pro quo approach is the requirement of a public service contract concluded after an award procedure. The various parties concur, however, in admitting that such a requirement is disproportionate (see also the opinion of Advocate General Jacobs in the *GEMO* case, cited in footnote 3 (para 129), and the opinion of Advocate General Stix-Hackl in the *Enirisorse* case, cited in footnote 5, above

a 87. In those circumstances, the expression 'direct and manifest link'—and hence the very concept of state aid—will be likely to receive widely differing interpretations. These interpretations may also vary according to the cultural (or even personal) attitudes of the various bodies responsible for applying the Treaty rules on state aid.

b 88. At practical level, such a divergence of interpretation may have considerable repercussions.

c 89. Member states will no longer be able to identify with precision the measures which must be notified to the Commission<sup>98</sup>. Nor will undertakings know whether they can rely on the lawfulness of the state financing. National courts too will have difficulty in knowing whether to apply the court's case law on the direct effect of art 93(3) of the Treaty. The Commission, finally, will no longer be able to determine with certainty whether it can start a procedure against an instance of state financing.

d 90. In short, the only way to define the term 'direct and manifest link' will be on a case-by-case basis. It will necessarily have to be refined by the court in the course of the cases brought before it. That is not a satisfactory outcome either for the political institutions of the Union or for the court itself.

e 91. First, one of the main concerns expressed by the European Councils of Nice<sup>99</sup>, Laeken<sup>100</sup> and Barcelona<sup>101</sup> is to ensure increased legal certainty in the field of the application of the law on aid to services in the general interest. Again, it is known that the Commission has suspended its work in this field until the court gives judgment in the present case<sup>102</sup>. So it will not be adequate to adopt a solution which necessarily has to be defined casuistically by judicial decisions. In my opinion, it is essential to adopt a clear and precise position, so as to allow the institutions to define Community policy in the field of state financing of public services, and thus to ensure the legal certainty which is needed in such a sensitive field.

f 92. Second, a case-by-case solution will inevitably have the effect of placing national courts in a position of 'dependence' as against the court. As the concept of a 'direct and manifest link' (or any other similar expression) will have to be defined more precisely in the case law, national courts will necessarily have to use the preliminary ruling procedure to interpret the concept of aid. Such an outcome appears hard to reconcile with the purpose of the procedure set up by art 177 of the EC Treaty (now art 234 EC)<sup>103</sup>. In any event, there is a risk that it will lead to an unnecessary growth in the number of references to the court for preliminary rulings.

h (para 157)). Furthermore, it must be noted that, in its present state, Council Directive (EEC) 92/50 (relating to the co-ordination of procedures for the award of public service contracts) (OJ 1992 L209 p 1) does not apply to public service concessions. It is therefore difficult to lay down such a judge-made requirement in the context of the Treaty provisions concerning state aid.

98 Member states might even be tempted to rely on the *quid pro quo* approach to justify a failure to notify financing measures to the Commission (see, to that effect, C Rizza, cited in footnote 6, above (p 11)).

99 See the Presidency conclusions, cited in footnote 4, above (point 47 and Annex II).

100 See the Presidency conclusions, cited in footnote 4, above (point 26).

i 101 See the Presidency conclusions, cited in footnote 4, above (point 42).

102 See the Commission report of 16 June 2002 on the status of work on the guidelines for state aid and services of general economic interest, cited in footnote 4, above (points 10, 16), and Commission report of 27 November 2002 on the state of play in the work on the guidelines for state aid and services of general economic interest, cited in footnote 4, above (point 3).

103 See, on this point, the opinion of Advocate General Jacobs in *Proceedings brought by Danner* Case C-136/00 [2002] STC 1283, [2002] ECR I-8147.



93. The state aid approach, for its part, makes it possible to avoid these drawbacks. a

94. As I have said, this approach consists in considering that the financial advantages granted by the authorities of a member state to offset the cost of the public service obligations they impose on an undertaking constitute aid within the meaning of art 92(1) of the Treaty. In that it sets out a clear and precise principle, this approach enables all those concerned (public authorities, private operators, national courts, Community institutions) to identify with precision the measures which fall within the scope of the Treaty rules on state aid. b

95. Moreover, the principles which underlie the state aid approach can be stated by the court in a single judgment. This approach is not therefore likely to entail an increased number of references to the court for preliminary rulings. c

96. In view of the above factors, the state aid approach makes it possible to ensure increased legal certainty and transparency in the field of state financing of public services. d

### III—CONCLUSION

97. Having regard to all the above considerations, and to those which I set out in my earlier opinion, I therefore propose that the court rule as follows:

(1) Financial advantages granted by the authorities of a member state to offset the cost of the public service obligations they impose on an undertaking constitute state aid within the meaning of art 92(1) of the EC Treaty (now, after amendment, art 87(1) EC). e

(2) Measures instituting the advantages referred to in point 1 above are subject to the notification and suspension obligations laid down in art 93(3) of the EC Treaty (now art 88(3) EC). f

(3) Article 90(2) of the EC Treaty (now art 86(2) EC) must be interpreted as not having direct effect in the field of state aid.

24 July 2003. **The COURT OF JUSTICE** delivered the following judgment.

1. By order of 6 April 2000, received at the court on 14 July 2000, the Bundesverwaltungsgericht (Federal Administrative Court) referred to the Court of Justice of the European Communities for a preliminary ruling under art 234 EC (formerly art 177 of the EC Treaty) a question on the interpretation of art 92 of the EC Treaty (now, after amendment, art 87 EC), art 77 of the EC Treaty (now art 73 EC), and Council Regulation (EEC) 1191/69 (on action by member states concerning the obligations inherent in the concept of a public service in transport by rail, road and inland waterway) (OJ English Sp Edn 1969 (I) p 276), as amended by Council Regulation (EEC) 1893/91 (OJ 1991 L169 p 1). g

2. The question arose in proceedings between Altmark Trans GmbH (Altmark Trans) and Nahverkehrsgesellschaft Altmark GmbH (Nahverkehrsgesellschaft) concerning the grant to the former by Regierungspräsidium Magdeburg (Magdeburg regional government, the Regierungspräsidium) of licences for scheduled bus transport services in the Landkreis of Stendal (Germany) and public subsidies for operating those services. h  
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**a** LEGAL CONTEXT*Community law*

3. Article 92(1) of the EC Treaty provides:

‘Save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, insofar as it affects trade between Member States, be incompatible with the common market.’

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4. Article 74 of the EC Treaty (now art 70 EC), which appears in Title IV of Part Three, on transport, provides that the objectives of the Treaty are, in matters governed by that Title, to be pursued by the member states within the framework of a common transport policy.

5. Article 77 of the EC Treaty, which appears in the said Title IV, provides that aids which meet the needs of co-ordination of transport or represent reimbursement for the discharge of certain obligations inherent in the concept of a public service are compatible with the Treaty.

6. Regulation 1191/69 is divided into six sections, the first of which contains general provisions (arts 1 and 2), the second concerns common principles for the termination or maintenance of public service obligations (arts 3 to 8), the third deals with the application to passenger transport of transport rates and conditions imposed in the interests of one or more particular categories of persons (art 9), the fourth concerns common compensation procedures (arts 10 to 13), the fifth concerns public service contracts (art 14), and the sixth contains final provisions (arts 15 to 20).

7. Article 1 of the regulation provides:

‘1. This Regulation shall apply to transport undertakings which operate services in transport by rail, road and inland waterway.

Member States may exclude from the scope of this Regulation any undertakings whose activities are confined exclusively to the operation of urban, suburban or regional services.

2. For the purposes of this Regulation:

—urban and suburban services means transport services meeting the needs of an urban centre or conurbation, and transport needs between it and surrounding areas,

—regional services means transport services operated to meet the transport needs of a region.

3. The competent authorities of the Member States shall terminate all obligations inherent in the concept of a public service as defined in this Regulation imposed on transport by rail, road and inland waterway.

4. In order to ensure adequate transport services which in particular take into account social and environmental factors and town and country planning, or with a view to offering particular fares to certain categories of passenger, the competent authorities of the Member States may conclude public service contracts with a transport undertaking. The conditions and details of operation of such contracts are laid down in Section V.

5. However, the competent authorities of the Member States may maintain or impose the public service obligations referred to in Article 2 for urban, suburban and regional passenger transport services. The conditions and details of operation, including methods of compensation, are laid down in Sections II, III and IV ...

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6. Furthermore, the competent authorities of a Member State may decide not to apply paragraphs 3 and 4 in the field of passenger transport to the transport rates and conditions imposed in the interests of one or more particular categories of person.' a

8. Article 6(2) of Regulation 1191/69 reads as follows:

'Decisions to maintain a public service obligation or part thereof, or to terminate it at the end of a specified period, shall provide for compensation to be granted in respect of the financial burdens resulting therefrom; the amount of such compensation shall be determined in accordance with the common procedures laid down in Articles 10 to 13.' b

9. Article 9(1) of that regulation provides: c

'The amount of compensation in respect of financial burdens devolving upon undertakings by reason of the application to passenger transport of transport rates and conditions imposed in the interests of one or more particular categories of person shall be determined in accordance with the common procedures laid down in Articles 11 to 13.' d

10. Article 17(2) of the regulation provides:

'Compensation paid pursuant to this Regulation shall be exempt from the preliminary information procedure laid down in Article 93(3) of the Treaty establishing the European Economic Community.

Member States shall promptly forward to the Commission details, classified by category of obligation, of compensation payments made in respect of financial burdens devolving upon transport undertakings by reason of the maintenance of the public service obligations set out in Article 2 or by reason of the application to passenger transport of transport rates and conditions imposed in the interests of one or more particular categories of person.' e  
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#### *National legislation*

11. The Verordnung zur Festlegung des Anwendungsbereiches der Verordnung (EWG) Nr 1191/69 in der Fassung der Verordnung (EWG) Nr 1893/91 im Straßenpersonenverkehr (Regulation determining the scope of Regulation (EEC) 1191/69 as amended by Regulation (EEC) 1893/91 in passenger transport by road) of the Federal Minister for Transport of 31 July 1992 (BGBl 1992 I, p 1442), in the version as amended on 29 November 1994 (BGBl 1994 I, p 3630), excludes in general until 31 December 1995 the application of Regulation 1191/69 to undertakings whose activity is confined exclusively to the operation of urban, suburban or regional services. g  
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12. The provisions of para 2(1) in conjunction with para 1(1) of the Personenbeförderungsgesetz (Law on passenger transport, the PBefG) provide that the transport of passengers by road vehicles on scheduled services is subject in Germany to the grant of a licence. That licence requires the operator to charge only the fares authorised by the authority which issues the licence, to comply with the timetable which has been approved, and to observe his statutory obligations in respect of operation and transport. i

13. Until 31 December 1995 the conditions for the grant of a licence for a scheduled bus transport service were determined solely by para 13 of the PBefG. That provision imposes conditions inter alia as to the financial solvency and the reliability of the transport undertaking and states that an application



- a for a licence is to be refused if the service in question would affect the public interest in transport. If several undertakings wish to provide the same transport services, the authorities must, under para 13(3), take reasonable account of the circumstance that those services have been operated properly for many years by one of those undertakings.
- b 14. By para 6(116) of the Eisenbahnneuordnungsgesetz (Law on reorganisation of the railways) of 27 December 1993 (BGBl 1993 I, p 2378), the German legislature introduced with effect from 1 January 1996 a distinction between transport operated on a commercial basis and transport operated in the public interest for the purpose of granting licences for urban, suburban and regional scheduled public transport services.
- c 15. The first sentence of para 8(4) of the PBefG lays down the principle that urban, suburban and regional public transport services must be provided commercially.
16. The second sentence of that subparagraph defines commercially operated transport services as those whose costs are covered by operating receipts, income under statutory rules on compensation and reimbursement in connection with fares and timetables, and other income of the undertaking as defined in commercial law. The conditions for granting licences for commercially operated services are defined in para 13 of the PBefG, as stated in para 13, above.
- d 17. The third sentence of para 8(4) of the PBefG provides that Regulation 1191/69 in the version in force from time to time must be referred to where an adequate transport service cannot be provided commercially. The conditions for granting licences for transport services provided in the public interest under that regulation are defined in para 13a of the PBefG.
- e 18. According to that provision, a licence must be granted where this is necessary for the implementation of a transport service on the basis of an act of the authorities or a contract within the meaning of Regulation 1191/69 and is the solution which entails the least cost to the community.
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#### THE MAIN PROCEEDINGS

19. The main proceedings concern the grant by the Regierungspräsidium to Altmark Trans of licences for scheduled bus transport services in the Landkreis of Stendal.
- g 20. Licences had originally been granted to Altmark Trans for the period from 25 September 1990 to 19 September 1994. By decision of 27 October 1994, it was granted new licences to run to 31 October 1996.
21. According to the order for reference, the Regierungspräsidium at the same time rejected the applications by Nahverkehrsgesellschaft for licences to operate those services. As grounds for its decision, the Regierungspräsidium stated that Altmark Trans satisfied the conditions for grant of a licence in points 1 and 2 of para 13(1) of the PBefG. As a long-standing operator, Altmark Trans enjoyed the protection of acquired status under para 13(3). That protection implies that the operation of a scheduled transport service by the existing operator may constitute a better offer of transport than an offer from a new applicant. In fact, there was no such new offer. With a shortfall of DEM 0.58 per timetabled kilometre, Altmark Trans required the lowest additional financing from the public authorities.
- h 22. Following a complaint by Altmark Trans, the Regierungspräsidium extended the licences to 31 October 2002, by decision of 30 July 1996.
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23. Nahverkehrsgesellschaft brought a complaint against the decision of 27 October 1994, submitting that Altmark Trans did not satisfy the requirements of para 13 of the PBefG. It was not an economically viable undertaking, since it was unable to survive without public subsidies. The licences granted to it were therefore unlawful. It was also not correct that Altmark Trans needed the least subsidy. By decision of 29 June 1995, the Regierungspräsidium rejected the complaint. a

24. Nahverkehrsgesellschaft brought proceedings against the decisions of 27 October 1994 and 30 July 1996 before the Verwaltungsgericht Magdeburg (Administrative Court, Magdeburg) (Germany), which dismissed the action. b

25. On appeal, the Oberverwaltungsgericht Sachsen-Anhalt (Higher Administrative Court of Saxony-Anhalt) (Germany) allowed Nahverkehrsgesellschaft's application and therefore set aside the issue of licences to Altmark Trans. It considered in particular that at the time when the decision of 30 July 1996 was taken the financial solvency of Altmark Trans was no longer guaranteed, as it needed subsidies from the Landkreis of Stendal for operating the services licensed. It further held that those subsidies were not compatible with Community law on state aid, in particular Regulation 1191/69. c

26. On this point, the Oberverwaltungsgericht observed that the Federal Republic of Germany had made use of the possibility allowed by Regulation 1191/69 of excluding undertakings whose activities are confined exclusively to the operation of urban, suburban or regional transport services from the scope of the regulation only up to 31 December 1995. It therefore held that after that date the public subsidies in question were authorised only if the conditions laid down by that regulation were satisfied. Among those conditions was the need to impose public service obligations either by contract or by an act of the competent authorities. Since the Landkreis of Stendal had neither concluded a contract with Altmark Trans nor adopted an administrative act in accordance with the provisions of the regulation, the Oberverwaltungsgericht considered that, from 1 January 1996, the Landkreis had no longer been authorised to subsidise Altmark Trans to operate the services covered by the licences granted. d

27. Altmark Trans appealed on a point of law (Revision) to the Bundesverwaltungsgericht against the decision of the Oberverwaltungsgericht. The Bundesverwaltungsgericht considers that the provisions of para 8(4) of the PBefG raise the question whether the operation of urban, suburban or regional scheduled transport services which cannot be operated profitably on the basis of operating income and therefore necessarily depend on public subsidies may, in national law, be regarded as commercial, or whether it must be regarded as operation in the public interest. e

28. In this respect, the Bundesverwaltungsgericht considers that the public subsidies in question may be covered by the expression 'other income of the undertaking as defined in commercial law' in the second sentence of para 8(4) of the PBefG. Having recourse to the normal methods of interpreting national law, it reaches the conclusion that the fact that public subsidies are necessary does not exclude the possibility that the transport services are provided commercially. f

29. However, that court expresses doubt as to whether arts 77 and 92 of the Treaty and Regulation 1191/69 necessarily lead to the interpretation of the second sentence of para 8(4) of the PBefG consistent with Community law followed by the Oberverwaltungsgericht. In view of the complexity of the g

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- a system of prohibitions, exceptions and exceptions to the exceptions, it considers that the point needs to be clarified by the court.

#### THE QUESTION REFERRED FOR A PRELIMINARY RULING

- b 30. Since it considered that, in the case before it, the extent of the Community rules was uncertain and that a preliminary ruling was needed for it to give judgment in the main proceedings, the Bundesverwaltungsgericht decided to stay the proceedings and refer the following question to the Court of Justice for a preliminary ruling:

- c 'Do Articles [77 and 92 of the EC Treaty], read in conjunction with Regulation (EEC) No 1191/69, as amended by Regulation (EEC) No 1893/91, preclude the application of a national provision which permits licences for scheduled services in local public transport to be granted in respect of services which are necessarily dependent on public subsidies without regard being had to Sections II, III and IV of that regulation?'

- d 31. The Bundesverwaltungsgericht specified that the question was to be understood as comprising the following three parts:

- e '(1) Are subsidies to compensate for deficits in local public transport subject at all to the prohibition on aid contained in Article [92(1) of the EC Treaty] or are they incapable from the outset of affecting trade between Member States on account of their regional significance? Does this possibly depend on the specific location and significance of the relevant local transport area?

- f (2) Does Article [77 of the EC Treaty] generally enable the national legislature to permit public subsidies to compensate for deficits in local public transport without regard being had to Regulation (EEC) No 1191/69?

- g (3) Does Regulation (EEC) No 1191/69 enable the national legislature to permit the operation of a scheduled service in local public transport which is necessarily dependent on public subsidies without regard being had to Sections II, III and IV of that regulation, and to require application of those provisions only where adequate transport provision is otherwise impossible? Does the ability of the national legislature to do so derive in particular from the fact that under the second subparagraph of Article 1(1) of Regulation (EEC) No 1191/69, as amended in 1991, it has the right to exclude local public transport undertakings completely from the scope of the regulation?'

#### h PRELIMINARY OBSERVATIONS

- i 32. In the main proceedings, the grant of licences to Altmark Trans is challenged only to the extent that that company needed public subsidies to discharge the public service obligations deriving from those licences. The dispute thus relates essentially to the question whether the public subsidies thus received by Altmark Trans were lawfully granted.

33. Having found that the payment of subsidies to Altmark Trans for the commercial operation of the licences at issue in the main proceedings was not contrary to national law, the Bundesverwaltungsgericht considers the compatibility of those subsidies with Community law.

34. The main provisions of the Treaty governing public subsidies are those on state aid, namely art 92 et seq of the EC Treaty. Article 77 of the EC Treaty



creates an exception in the field of transport to the general rules applicable to state aid, by providing that aids which meet the needs of co-ordination of transport or represent reimbursement for the discharge of certain obligations inherent in the concept of a public service are compatible with the Treaty.

35. Regulation 1191/69 was adopted by the Council of the European Communities on the basis of arts 75 of the EC Treaty (now, after amendment, art 71 EC) and 94 of the EC Treaty (now art 89 EC), that is, on the basis both of the Treaty provisions relating to the common transport policy and of those relating to state aid.

36. Regulation 1191/69 establishes a system of Community rules applicable to public service obligations in the field of transport. However, under the second subparagraph of art 1(1) of the regulation, member states may exclude from its scope any undertakings whose activities are confined exclusively to the operation of urban, suburban or regional services.

37. In those circumstances, the first point to examine is whether Regulation 1191/69 is applicable to the transport services at issue in the main proceedings. Only if that is not the case will the application of the general provisions of the Treaty on state aid to the subsidies at issue in the main proceedings have to be considered. The third part of the national court's question should therefore be answered first.

#### THE THIRD PART OF THE QUESTION REFERRED FOR A PRELIMINARY RULING

38. By the third part of the question referred for a preliminary ruling, the national court essentially asks whether Regulation 1191/69, and more particularly the second subparagraph of art 1(1) thereof, may be interpreted as allowing a member state not to apply the regulation to the operation of urban, suburban or regional scheduled transport services which necessarily depend on public subsidies, and to limit its application to cases where the provision of an adequate transport service is not otherwise possible.

#### *Observations submitted to the court*

39. Altmark Trans, the Regierungspräsidium and Nahverkehrsgesellschaft submit that it cannot be deduced from Regulation 1191/69 that public subsidies for transport undertakings are consistent with Community law only if public service obligations within the meaning of that regulation have been imposed or a public service contract has been concluded in accordance with that regulation.

40. They observe in particular that the German legislature has drawn a distinction between transport services operated commercially and those operated in the public interest. By virtue of para 8(4) of the PBefG, Regulation 1191/69 applies only to transport services operated in the public interest. Transport services operated on a commercial basis do not therefore fall within the scope of the regulation.

41. Although since 1 January 1996 the German legislature no longer makes general use of the power to derogate provided for in the second subparagraph of art 1(1) of Regulation 1191/69, it has indirectly made an exception to the application of that regulation for the benefit of urban, suburban and regional transport services which are provided commercially. Since that regulation authorises a general derogation, it was also open to the legislature to provide for a partial derogation. The principle that he who can do more, can do less applies in this case.

- a 42. The Commission of the European Communities submits that, where urban, suburban and regional transport services have not been excluded from the scope of Regulation 1191/69 under the second subparagraph of art 1(1), the national legislature must regulate the operation of a scheduled service either by imposing public service obligations, in accordance with Sections II to IV of the regulation, or by means of contracts providing for those obligations and complying with the provisions of Section V of the regulation.
- b

*Findings of the court*

43. To answer this part of the question, it must first be determined whether Regulation 1191/69 imposes binding rules which the member states must comply with when they consider imposing public service obligations in the land transport sector.
- c
44. It is clear both from the preamble and from the body of that regulation that it does indeed impose binding rules on the member states.
45. According to the first recital in the preamble to Regulation 1191/69, one of the objectives of the common transport policy is to eliminate disparities resulting from obligations inherent in the concept of a public service imposed on transport undertakings by member states which are liable to cause substantial distortion to conditions of competition. The second recital states that it is therefore necessary to terminate the public service obligations defined in the regulation, although in certain cases it may be essential to maintain them in order to ensure the provision of adequate transport services.
- d
46. Article 1(3) of Regulation 1191/69 states that the competent authorities of the member states are to terminate all obligations inherent in the concept of a public service, as defined in the regulation, imposed on transport by rail, road and inland waterway. Under art 1(4), in order to ensure adequate transport services, taking into account in particular social and environmental factors and town and country planning, or with a view to offering particular fares to certain categories of passenger, those authorities may conclude public service contracts with a transport undertaking, in accordance with the conditions and details of operation laid down in Section V of the regulation. Article 1(5) then states, however, that the authorities may maintain or impose public service obligations for urban, suburban and regional passenger transport services, in accordance with the conditions and details of operation, including methods of compensation, laid down in Sections II to IV of the regulation.
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47. Consequently, in so far as the licences at issue in the main proceedings impose public service obligations and are accompanied by subsidies to help finance the performance of those obligations, the grant of those licences and subsidies was subject in principle to the provisions of Regulation 1191/69.
- h
48. However, the second subparagraph of art 1(1) of the regulation authorises member states to exclude from the scope of the regulation any undertakings whose activities are confined exclusively to the operation of urban, suburban or regional transport services.
49. Originally, until 31 December 1995, the Federal Republic of Germany made use of the derogation in the second subparagraph of art 1(1) of Regulation 1191/69 by expressly excluding in national legislation the application of that regulation to urban, suburban and regional transport undertakings.
- i
50. Since 1 January 1996, the German legislation no longer expressly provides for such a derogation. On the contrary, the regulation was declared applicable to the grant of licences for bus transport in Germany operated in the public

interest by the third sentence of para 8(4) and para 13a of the PBefG. However, the German legislation does not expressly determine whether the regulation also applies to the grant of licences for bus transport operated commercially.

51. It must be examined whether the fact that Regulation 1191/69 does not apply to commercially operated services—assuming that to be the case—is contrary to that regulation.

52. Altmark Trans, the Regierungspräsidium und Nahverkehrsgesellschaft submit that, since the second subparagraph of art 1(1) of Regulation 1191/69 allows the application of that regulation to be excluded for an entire category of transport services, that provision must a fortiori allow a limited part of those services to be excluded from the application of the regulation.

53. It is to be remembered that, as explained in paras 44–47, above, Regulation 1191/69 establishes a system which the member states must comply with when they consider imposing public service obligations on undertakings in the land transport sector.

54. However, member states may, with respect to undertakings which operate urban, suburban or regional services, introduce a derogation from the provisions of Regulation 1191/69, under the second subparagraph of art 1(1) of the regulation. The German legislature made general use of this derogation until 31 December 1995.

55. In those circumstances, it must be concluded that the amendment to the PBefG which took effect on 1 January 1996 contributes to the implementation of the objectives pursued by Regulation 1191/69.

56. By that amendment, the German legislature introduced a distinction, as regards the grant of licences for passenger transport by bus, between commercial operation and operation in the public interest. By virtue of para 13a of the PBefG, Regulation 1191/69 became applicable to the grant of licences for operation in the public interest. That amendment to the PBefG thus cut down the scope of the derogation provided for in the second subparagraph of art 1(1) of the regulation. The German legislation thus came closer to the objectives pursued by that regulation.

57. It follows from those considerations that a member state may legitimately, on the basis of the power to derogate provided for in the second subparagraph of art 1(1) of Regulation 1191/69, not only exclude urban, suburban or regional scheduled services completely from the scope of that regulation, but may also apply that derogation in a more limited way. In other words, that provision in principle allows the German legislature to provide that, for transport services provided on a commercial basis, public service obligations may be imposed and subsidies granted without complying with the conditions and details of operation laid down in that regulation.

58. The national legislation must, however, clearly delimit the use made of that option of derogation, so as to make it possible to determine the situations in which the derogation applies and those in which Regulation 1191/69 applies.

59. As the court has consistently held, it is particularly important, in order to satisfy the requirement of legal certainty, that individuals should have the benefit of a clear and precise legal situation enabling them to ascertain the full extent of their rights and, where appropriate, to rely on them before the national courts (see *EC Commission v Germany* Case 29/84 [1985] ECR 1661 (para 23), *EC Commission v Italy* Case 363/85 [1987] ECR 1733 (para 7), *EC Commission v Germany* Case C-59/89 [1991] ECR I-2607 (para 18) and *EC Commission v Greece* Case C-236/95 [1996] ECR I-4459 (para 13)).



- a 60. The order for reference contains a number of points which suggest that those requirements of clarity may not have been complied with in the present case.
- b 61. Thus according to the order for reference, first, the commercial system of operation may apply also to undertakings which need public subsidies to operate licensed transport services. The national court stated, second, that—  
‘this right to choose, which was conferred on the operator by the legislature, [is] removed in practice in the case of scheduled services in local public transport which are largely in deficit, the need for public subsidies automatically resulting in such services being classified as in the public interest.’
- c 62. It appears to follow from the above that licences for transport services which need public subsidies for their operation may be subject to either the commercial or the public interest rules. If that were indeed the case, the provisions of the national legislation concerned would not determine
- d clearly and precisely the situations in which such licences fall within one or other category. In so far as Regulation 1191/69 does not apply to commercial operations, any uncertainty as to the dividing line between that and operations in the public interest would extend also to the scope of that regulation in Germany.
- e 63. It is for the national court to ascertain whether the application by the German legislature of the derogation provided for in the second subparagraph of art 1(1) of Regulation 1191/69 satisfies the requirements of clarity and precision needed to comply with the principle of legal certainty.
- f 64. The answer to the third part of the question referred for a preliminary ruling must therefore be that Regulation 1191/69, and more particularly the second subparagraph of art 1(1) thereof, must be interpreted as allowing a member state not to apply the regulation to the operation of urban, suburban or regional scheduled transport services which necessarily depend on public subsidies, and to limit its application to cases where the provision of an adequate transport service is not otherwise possible, provided however that the principle of legal certainty is duly observed.
- g 65. It must further be stated that, should the national court decide that the principle of legal certainty was not complied with in the main proceedings, it will have to consider that Regulation 1191/69 is fully applicable in Germany, and thus applies also to commercial operations. In that event, it will have to be ascertained whether the licences at issue in the main proceedings were granted in conformity with that regulation and, if so, whether the subsidies at issue in
- h the main proceedings were granted in conformity with it. Where those licences and subsidies do not satisfy the conditions laid down by the regulation, the national court will have to conclude that they are not compatible with Community law, without it being necessary to consider them from the point of view of the provisions of the Treaty.
- i 66. Consequently, it is only to the extent that the national court concludes that Regulation 1191/69 does not apply to commercial operations and that the use made by the German legislature of the option to derogate provided for by that regulation complies with the principle of legal certainty that it will have to consider whether the subsidies at issue in the main proceedings were granted in conformity with the provisions of the Treaty relating to state aid.

## THE FIRST PART OF THE QUESTION REFERRED FOR A PRELIMINARY RULING

67. By the first part of the question referred for a preliminary ruling, the national court essentially asks whether subsidies intended to compensate for the deficit in operating an urban, suburban or regional public transport service come under art 92(1) of the Treaty in all circumstances, or whether, having regard to the local or regional character of the transport services provided and, if appropriate, to the significance of the field of activity concerned, such subsidies are not liable to affect trade between member states.

*Observations submitted to the court*

68. Altmark Trans, the Regierungspräsidium and Nahverkehrsgesellschaft submit that the subsidies at issue in the main proceedings have no effect on trade between member states within the meaning of art 92(1) of the Treaty, since they concern local services only and, in any event, the amount is so small that they have no perceptible effect on such trade.

69. The Commission, by contrast, submits that since 1995 eight member states have voluntarily opened certain urban, suburban or regional transport markets to competition from undertakings from other member states and that there are a number of examples of transport undertakings from one member state pursuing activities in another member state. That opening up of the market in certain member states shows that intra-Community trade is not only a possibility but already a reality.

70. It should be recalled that the court decided, by order of 18 June 2002, to reopen the oral procedure in the present case to give the parties to the main proceedings, the member states, the Commission and the Council an opportunity to submit observations on the possible consequences of the judgment of 22 November 2001 in *Ferring SA v Agence Centrale des Organismes de Sécurité Sociale (ACOSS)* Case C-53/00 [2001] ECR I-9067 as regards the answer to be given to the national court's question in the present case.

71. At the second hearing, on 15 October 2002, Altmark Trans, the Regierungspräsidium and Nahverkehrsgesellschaft and the German and Spanish governments proposed essentially that the court should confirm the principles it stated in the *Ferring* judgment. They therefore consider that state financing of public services constitutes aid within the meaning of art 92(1) of the Treaty only if the advantages conferred by the public authorities exceed the cost incurred in discharging the public service obligations.

72. On this point, they submit principally that the concept of aid in art 92(1) of the Treaty applies only to measures which provide a financial advantage for one or more undertakings. A state subsidy which does no more than offset the cost of discharging public service obligations which have been imposed does not confer any real advantage on the recipient undertaking. Moreover, in such a case competition is not distorted, since any undertaking can benefit from the public subsidy if it provides the public transport services imposed by the state.

73. At the second hearing, the Danish, French, Netherlands and United Kingdom governments submitted essentially that the court should adopt the approach of Advocate General Jacobs in his opinion of 30 April 2002 in *Ministre de l'Economie, des Finances et de l'Industrie v GEMO SA* Case C-126/01 [2004] 1 CMLR 259. Under that approach, a distinction should be drawn between two categories of situation. Where there is a direct and manifest link between state financing and clearly defined public service obligations, the sums paid by the public authorities do not constitute aid within the meaning of art 92(1) of the

a Treaty. On the other hand, where there is no such link or the public service obligations are not clearly defined, the sums paid by the authorities constitute aid.

b *Findings of the court*

b 74. To answer the first part of the question, the various elements of the concept of state aid in art 92(1) of the Treaty must be considered. It is settled case law that classification as aid requires that all the conditions set out in that provision are fulfilled (see *Belgium v EC Commission* Case C-142/87 [1990] ECR I-959 (para 25), *Spain v EC Commission* Joined cases C-278–280/92 [1994] ECR I-4103 (para 20) and *France v EC Commission* Case C-482/99 [2003] All ER (EC) 330, [2002] ECR I-4397 (para 68)).

c 75. Article 92(1) of the Treaty lays down the following conditions. First, there must be an intervention by the state or through state resources. Second, the intervention must be liable to affect trade between member states. Third, it must confer an advantage on the recipient. Fourth, it must distort or threaten to distort competition.

d 76. The national court's question concerns more particularly the second of those conditions.

e 77. In this respect, it must be observed, first, that it is not impossible that a public subsidy granted to an undertaking which provides only local or regional transport services and does not provide any transport services outside its state of origin may none the less have an effect on trade between member states.

f 78. Where a member state grants a public subsidy to an undertaking, the supply of transport services by that undertaking may for that reason be maintained or increased with the result that undertakings established in other member states have less chance of providing their transport services in the market in that member state (see, to that effect, *France v EC Commission* Case 102/87 [1988] ECR I-4067 (para 19), *Italy v EC Commission* Case C-305/89 [1991] ECR I-1603 (para 26) and *Spain v Commission* (para 40)).

g 79. In the present case, that finding is not merely hypothetical, since, as appears in particular from the observations of the Commission, several member states have since 1995 started to open certain transport markets to competition from undertakings established in other member states, so that a number of undertakings are already offering their urban, suburban or regional transport services in member states other than their state of origin.

h 80. Next, the Commission notice of 6 March 1996 on the de minimis rule for state aid (OJ 1996 C68 p 9), as its fourth paragraph states, does not concern transport. Similarly, Commission Regulation (EC) 69/2001 (on the application of arts 87 and 88 of the EC Treaty to de minimis aid) (OJ 2001 L10 p 30), in accordance with the third recital in the preamble and art 1(a), does not apply to that sector.

i 81. Finally, according to the court's case law, there is no threshold or percentage below which it may be considered that trade between member states is not affected. The relatively small amount of aid or the relatively small size of the undertaking which receives it does not as such exclude the possibility that trade between member states might be affected (see *Belgium v Commission* Case C-142/87 (para 43) and *Spain v Commission* Joined cases C-278–280/92 (para 42)).

82. The second condition for the application of art 92(1) of the Treaty, namely that the aid must be capable of affecting trade between member states,



does not therefore depend on the local or regional character of the transport services supplied or on the scale of the field of activity concerned. a

83. However, for a state measure to be able to come under art 92(1) of the Treaty, it must also, as stated in para 75, above, be capable of being regarded as an advantage conferred on the recipient undertaking.

84. Measures which, whatever their form, are likely directly or indirectly to favour certain undertakings (see *Costa v ENEL* Case 6/64 [1964] ECR 585 at 595) or are to be regarded as an economic advantage which the recipient undertaking would not have obtained under normal market conditions (see *Syndicat Français de l'Express International (SFEI) v La Poste* Case C-39/94 [1996] All ER (EC) 685, [1996] ECR I-3547 (para 60) and *Spain v European Commission* Case C-342/96 [1999] ECR I-2459 (para 41) are regarded as aid. b

85. Mention should, however, be made of the court's decision in a case concerning an indemnity provided for by Council Directive (EEC) 75/439 (on the disposal of waste oils) (OJ 1975 L194 p 23). That indemnity was able to be granted to waste oil collection and/or disposal undertakings as compensation for the collection and/or disposal obligations imposed on them by the member state, provided that it did not exceed the annual uncovered costs actually recorded by the undertakings taking into account a reasonable profit. The court held that an indemnity of that type did not constitute aid within the meaning of arts 92 et seq of the Treaty, but rather consideration for the services performed by the collection or disposal undertakings (see *Procureur de la République v Association de Défense des Brûleurs d'Huiles Usagées* Case 240/83 [1985] ECR 531 (para 3, last sentence, and para 18)). c

86. Similarly, the court has held that, provided that a tax on direct sales imposed on pharmaceutical laboratories corresponds to the additional costs actually incurred by wholesale distributors in discharging their public service obligations, not assessing wholesale distributors to the tax may be regarded as compensation for the services they provide and hence not state aid within the meaning of art 92 of the Treaty. The court said that, provided there was the necessary equivalence between the exemption and the additional costs incurred, wholesale distributors would not be enjoying any real advantage for the purposes of art 92(1) of the Treaty, because the only effect of the tax would be to put distributors and laboratories on an equal competitive footing (see the *Ferring* case (para 27)). d

87. It follows from those judgments that, where a state measure must be regarded as compensation for the services provided by the recipient undertakings in order to discharge public service obligations, so that those undertakings do not enjoy a real financial advantage and the measure thus does not have the effect of putting them in a more favourable competitive position than the undertakings competing with them, such a measure is not caught by art 92(1) of the Treaty. e

88. However, for such compensation to escape classification as state aid in a particular case, a number of conditions must be satisfied.

89. First, the recipient undertaking must actually have public service obligations to discharge, and the obligations must be clearly defined. In the main proceedings, the national court will therefore have to examine whether the public service obligations which were imposed on Altmark Trans are clear from the national legislation and/or the licences at issue in the main proceedings. f

90. Second, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent g

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a manner, to avoid it conferring an economic advantage which may favour the recipient undertaking over competing undertakings.

b 91. Payment by a member state of compensation for the loss incurred by an undertaking without the parameters of such compensation having been established beforehand, where it turns out after the event that the operation of certain services in connection with the discharge of public service obligations was not economically viable, therefore constitutes a financial measure which falls within the concept of state aid within the meaning of art 92(1) of the Treaty.

c 92. Third, the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations. Compliance with such a condition is essential to ensure that the recipient undertaking is not given any advantage which distorts or threatens to distort competition by strengthening that undertaking's competitive position.

d 93. Fourth, where the undertaking which is to discharge public service obligations, in a specific case, is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.

e 94. It follows from the above considerations that, where public subsidies granted to undertakings expressly required to discharge public service obligations in order to compensate for the costs incurred in discharging those obligations comply with the conditions set out in paras 89–93, above, such subsidies do not fall within art 92(1) of the Treaty. Conversely, a state measure which does not comply with one or more of those conditions must be regarded as state aid within the meaning of that provision.

f 95. The answer to the first part of the question referred for a preliminary ruling must therefore be that the condition for the application of art 92(1) of the Treaty that the aid must be such as to affect trade between member states does not depend on the local or regional character of the transport services supplied or on the scale of the field of activity concerned.

g However, public subsidies intended to enable the operation of urban, suburban or regional scheduled transport services are not caught by that provision where such subsidies are to be regarded as compensation for the services provided by the recipient undertakings in order to discharge public service obligations. For the purpose of applying that criterion, it is for the national court to ascertain that the following conditions are satisfied:

h —first, the recipient undertaking is actually required to discharge public service obligations and those obligations have been clearly defined;

i —second, the parameters on the basis of which the compensation is calculated have been established beforehand in an objective and transparent manner;

—third, the compensation does not exceed what is necessary to cover all or part of the costs incurred in discharging the public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations;

—fourth, where the undertaking which is to discharge public service obligations is not chosen in a public procurement procedure, the level of compensation needed has been determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations. a  
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#### THE SECOND PART OF THE QUESTION REFERRED FOR A PRELIMINARY RULING

96. By the second part of the question referred for a preliminary ruling, the national court essentially asks whether art 77 of the Treaty may be applied to public subsidies which compensate for the additional costs incurred in discharging public service obligations without taking into account Regulation 1191/69. c

#### *Observations submitted to the court*

97. Altmark Trans submits that the option available to the national legislature to authorise public subsidies intended to compensate for deficits resulting from the operation of urban, suburban or regional public transport without regard being had to Regulation 1191/69 exists independently of art 77 of the Treaty. d

98. The Regierungspräsidium submits for its part that art 77 of the Treaty does not confer power on the national legislature to authorise public subsidies without having regard to Regulation 1191/69. e

99. Nahverkehrsgesellschaft says that, in so far as the public subsidies at issue in the main proceedings fall under the prohibition in art 92 of the Treaty, art 77 excludes that application, since those subsidies meet the conditions laid down by the latter article. That being so, it submits that in this case Regulation 1191/69 does not preclude the grant of such subsidies. f

100. The Commission takes the view that, under art 77 of the Treaty, the national legislature has power to grant public subsidies intended to compensate for deficits incurred in the field of urban, suburban or regional public transport without having regard to Regulation 1191/69, but that those subsidies are then subject entirely to the prior notification procedure laid down in art 93(3) of the EC Treaty (now art 88(3) EC) concerning the examination of state aid. g

#### *Findings of the court*

101. Article 77 of the EC Treaty provides that aids which meet the needs of co-ordination of transport or represent reimbursement for the discharge of certain obligations inherent in the concept of a public service are compatible with the Treaty. h

102. In para 37, above, it was stated that, if there were no regulation applicable to the case in the main proceedings, it would have to be examined whether the subsidies at issue in the main proceedings fell within the provisions of the Treaty concerning state aid. i

103. It follows from paras 65 and 66, above that Regulation 1191/69 could be applicable to the case in the main proceedings to the extent that the German legislature has not excluded the application of that regulation to commercial operations or has not done so in compliance with the principle of legal certainty. If that proves to be the case, the provisions of that regulation will



a apply to the subsidies at issue in the main proceedings, and the national court will not have to consider whether they are consistent with the provisions of primary law.

b 104. If, however, Regulation 1191/69 were not applicable to the case in the main proceedings, it follows from the answer to the first part of the question that, in so far as the subsidies at issue in the main proceedings are to be regarded as compensation for the transport services provided in order to discharge public service obligations and satisfy the conditions set out in paras 89–93, above, those subsidies would not come under art 92 of the Treaty, so that there would be no need to rely on the exception to that provision under art 77 of the Treaty.

c 105. Consequently, the provisions of primary law concerning state aid and the common transport policy would be applicable to the subsidies at issue in the main proceedings only in so far as, first, those subsidies did not come under the provisions of Regulation 1191/69 and, second, where they were granted to compensate for the additional costs incurred in discharging public service obligations, the conditions set out in paras 89–93, above were not all satisfied.

d 106. However, even if the subsidies at issue in the main proceedings were to be tested against the Treaty provisions on state aid, the exception provided for in art 77 could not be applied as such.

e 107. On 4 June 1970 the Council adopted Regulation (EEC) 1107/70 (on the granting of aids for transport by rail, road and inland waterway) (OJ English Sp Edn 1970 (II) p 360). Article 3 of that regulation provides that—

f '[w]ithout prejudice to the provisions of... Regulation (EEC) No 1192/69 ... and of ... Regulation (EEC) No 1191/69 ... Member States shall neither take co-ordination measures nor impose obligations inherent in the concept of a public service which involve the granting of aids pursuant to Article 77 of the Treaty except in the following cases or circumstances.'

It follows that member states are no longer authorised to rely on art 77 of the Treaty outside the cases referred to in secondary Community legislation.

g 108. So, to the extent that Regulation 1191/69 does not apply in the present case and the subsidies at issue in the main proceedings fall within art 92(1) of the Treaty, Regulation 1107/70 lists exhaustively the circumstances in which the authorities of the member states may grant aids under art 77 of the Treaty.

h 109. Accordingly, the answer to the second part of the question referred for a preliminary ruling must be that art 77 of the Treaty cannot be applied to public subsidies which compensate for the additional costs incurred in discharging public service obligations without taking into account Regulation 1191/69.

#### COSTS

i 110. The costs incurred by the German, Danish, Spanish, French, Netherlands and United Kingdom governments and by the Commission, which have submitted observations to the court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds, the Court of Justice, in answer to the question referred to it by the Bundesverwaltungsgericht by order of 6 April 2000, hereby rules:

(1) Council Regulation (EEC) 1191/69 (on action by member states concerning the obligations inherent in the concept of a public service in transport by rail, road and inland waterway), as amended by Council Regulation (EEC) 1893/91, and more particularly the second subparagraph of art 1(1) thereof, must be interpreted as allowing a member state not to apply the regulation to the operation of urban, suburban or regional scheduled transport services which necessarily depend on public subsidies, and to limit its application to cases where the provision of an adequate transport service is not otherwise possible, provided however that the principle of legal certainty is duly observed. a  
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(2) The condition for the application of art 92(1) of the EC Treaty (now, after amendment, art 87(1) EC) that the aid must be such as to affect trade between member states does not depend on the local or regional character of the transport services supplied or on the scale of the field of activity concerned. c

However, public subsidies intended to enable the operation of urban, suburban or regional scheduled transport services are not caught by that provision where such subsidies are to be regarded as compensation for the services provided by the recipient undertakings in order to discharge public service obligations. For the purpose of applying that criterion, it is for the national court to ascertain that the following conditions are satisfied: d

—first, the recipient undertaking is actually required to discharge public service obligations and those obligations have been clearly defined;

—second, the parameters on the basis of which the compensation is calculated have been established beforehand in an objective and transparent manner; e

—third, the compensation does not exceed what is necessary to cover all or part of the costs incurred in discharging the public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations;

—fourth, where the undertaking which is to discharge public service obligations is not chosen in a public procurement procedure, the level of compensation needed has been determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations. f  
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(3) Article 77 of the EC Treaty (now art 73 EC) cannot be applied to public subsidies which compensate for the additional costs incurred in discharging public service obligations without taking into account Regulation 1191/69, as amended by Regulation 1893/91. h

**<sup>a</sup> R (on the application of Mayer Parry Recycling Ltd) v Environment Agency**  
**<sup>b</sup> (Case C-444/00)**

COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES (FIFTH CHAMBER)

JUDGES WATHELET (PRESIDENT), TIMMERMANS (RAPPORTEUR), JANN, VON BAHR AND ROSAS

**<sup>c</sup> ADVOCATE GENERAL ALBER**

18 APRIL, 4 JULY 2002, 19 JUNE 2003

**<sup>d</sup> *European Community – Environment – Waste – Packaging waste – Definition of packaging waste recycling operation – Whether reprocessing of ferrous scrap metal packaging waste into secondary raw material constituting packaging waste recycling operation – Council Directive (EEC) 75/442 – Council Directive (EC) 94/62, art 3(7).***

**<sup>e</sup> The claimant company collected scrap metal (including packaging waste, from industrial and other sources), which it inspected, tested for radiation, sorted, cleaned, cut, separated and shredded (thereby transferring ferrous scrap metal into material which met the ‘Grade 3B’ specification designated by the industry), before selling it to steelmakers, who used it to produce ingots, sheets or coils of steel. It brought judicial review proceedings in relation to a decision refusing to grant it accreditation, under national law, as a reprocessor entitled to issue packaging waste recovery notes to packaging waste producers, thus enabling such producers to confirm to the competent national authorities that the packaging waste which they had produced had been recovered or recycled.**

**<sup>f</sup> The national court decided to stay the proceedings and refer questions for preliminary ruling under art 234 EC (formerly art 177 of the EC Treaty) to the Court of Justice of the European Communities concerning: (i) the meaning of ‘recycling’ for the purposes of art 3(7)<sup>a</sup> of Council Directive (EC) 94/62 (on packaging and packaging waste) in order to determine whether recycling took place when metal packaging waste was transferred into a secondary raw material (such as Grade 3B material), or only when it was used to produce ingots, sheets or coils of steel; and (ii) whether the answer to that first question would be different if the concepts of recycling and waste referred to in Council Directive (EEC) 75/442 (on waste) were taken into account.**

**<sup>g</sup> *Held* – (1) For the purposes of art 3(7) of Directive 94/62, metal packaging waste was ‘recycled’ when it was used to produce ingots, sheets or coils of steel, but not when it was transformed into a secondary raw material. Although art 3(7) did not specify that the waste to be recycled had to be packaging waste, it was clear from the context of the directive that only such waste was referred to. To be ‘recycled’, packaging waste had to undergo reprocessing in a production process designed to produce new material, or a new product, possessing characteristics comparable to those of the material from which it was derived, in order to be used again for the production of**

<sup>a</sup> Article 3(7) of Directive 94/62 is set out at judgment para 14, below



metal packaging or for other purposes of any kind, so long as the reprocessing did not take the form of energy recovery. That definition was consonant with the directive's environmental protection objectives and the requirements of clarity and uniformity regarding the proper functioning of the internal market, particularly the avoidance of obstacles to trade and distortion of competition. It was only at the stage identified by the definition of recycling that the ecological advantages of reducing the consumption of energy and primary raw materials were achieved, and it was only at that stage that the materials at issue in the main proceedings ceased to be packaging waste. Further, the definition removed any ambiguity as to the point at which packaging waste was to be regarded as having been recycled. Obstacles to trade could arise if different concepts of recycling were applied in different member states and, since all businesses involved in the production, use, import and distribution of packaging and packaged products were responsible under the 'polluter pays' principle, the concept of recycling had to be applied uniformly in order that those businesses were in an equal position in the internal market with regard to competition. Applying the definition to the materials at issue in the main proceedings, Grade 3B material contained various impurities (such as oil, paint, non-metallic materials and undesirable chemical elements), which remained to be removed when the material was used to produce steel. Therefore, it could not be used directly for the manufacture of new metal packaging and, accordingly, it was not to be regarded as recycled packaging waste. By contrast, the use of Grade 3B material in the production of ingots, sheets or coils of steel might be regarded as being a packaging waste recycling operation, since the production process resulted in the manufacture of new products which possessed characteristics comparable to those of the material of which the metal packaging waste incorporated in the Grade 3B material was initially composed and which might be used for a purpose identical to the original purpose of the material from which it had been derived (see judgment paras 65, 67–69, 73–79, 83–86, 88, below).

(2) For the purposes of Directive 75/442, metal packaging waste was 'recycled' when it was used to produce ingots, sheets or coils of steel. Packaging waste within the meaning of Directive 94/62 had to be regarded as waste within the meaning of Directive 75/442. In any event, although Directive 75/442 was the framework legislation on waste and was relevant when interpreting and applying Directive 94/62, the latter directive had to be regarded as special legislation, whose provisions prevailed over those of Directive 75/442 in the situations which it specifically sought to regulate (see judgment paras 53, 57, 90–93, below).

## Notes

For the meaning of 'waste', see 38 *Halsbury's Laws* (4th edn reissue) para 173.

## Cases cited

- Abfall Service AG (ASA) v Bundesminister für Umwelt, Jugend und Familie* Case C-6/00 [2002] QB 1073, [2002] 3 WLR 665, [2002] ECR I-1961, EC].
- ARCO Chemie Nederland Ltd v Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer, Vereniging Dorpsbelang Hees v Directeur van de dienst Milieu en Water van de provincie Gelderland* Joined cases C-418/97 and C-419/97 [2003] All ER (EC) 237, [2002] QB 646, [2002] 2 WLR 1240, [2000] ECR I-4475, EC].

- a Evangelischer Krankenhausverein Wien v Abgabenberufungskommission Wien, Wein & Co Handelsgees mbH v Oberösterreichische Landesregierung* Case C-437/97 [2001] All ER (EC) 735, [2000] ECR I-1157, ECJ.
- Inter-Environnement Wallonie ASBL v Région Wallonie* Case C-129/96 [1998] All ER (EC) 155, [1997] ECR I-7411, ECJ.
- b Palin Granit Oy (Application by)* Case C-9/00 [2003] All ER (EC) 366, [2002] 1 WLR 2644, [2002] ECR I-3533, ECJ.
- Tombesi (Criminal proceedings against)* Joined cases C-304/94, C-330/94, C-342/94 and C-224/95 [1997] All ER (EC) 639, [1997] ECR I-3561, ECJ.
- Union Royale Belge des Sociétés de Football Association ASBL v Bosman, Royal Club Liégeois SA v Bosman, Union des Associations Européennes de Football v Bosman* Case C-415/93 [1996] All ER (EC) 97, [1995] ECR I-4921, ECJ.
- c Vessoso (Criminal proceedings against)* Joined cases C-206/88 and C-207/88 [1990] ECR I-1461, ECJ.

## Reference

- By order of 9 November 2000, the High Court of Justice of England and Wales, Queen's Bench Division (Administrative Court), referred to the Court of Justice of the European Communities for a preliminary ruling under art 234 EC (formerly art 177 of the EC Treaty) two questions on the interpretation of Council Directive (EEC) 75/442 (on waste), as amended by Council Directive (EEC) 91/156 and Commission Decision (EC) 96/350 (adapting Annexes IIA and IIB to Directive 75/442 on waste), and of European Parliament and Council Directive (EC) 94/62 (on packaging and packaging waste). Those questions were raised in proceedings between Mayer Parry Recycling Ltd and the Environment Agency concerning the latter's refusal to grant Mayer Parry's application for accreditation as a reprocessor, which is defined as a person who carries out the activities of waste recovery or recycling. Written observations were submitted on behalf of: Mayer Parry Recycling Ltd by M Fordham and T de la Mare, Barristers, instructed by Denton Wilde Sapte, Solicitors; the Environment Agency by R Navarro, acting as agent, and J Howell QC; Corus (UK) Ltd by R Singh and J Simor, Barristers, instructed by J Maton, Solicitor; the United Kingdom government by G Amodeo, acting as agent, and P Sales and M Hoskins, Barristers; the Danish government by J Molde, acting as agent; the Netherlands government by HG Sevenster, acting as agent; the Austrian government by C Pesendorfer, acting as agent; the Commission of the European Communities by RB Wainwright and H Støvlbaek, acting as agents. Oral observations were made on behalf of: Mayer Parry Recycling Ltd, represented by M Fordham; the Environment Agency, represented by J Howell; Corus (UK) Ltd, represented by R Singh; the United Kingdom government, represented by G Amodeo and P Sales; the Netherlands government, represented by J van der Oosterkamp, acting as agent; and the Commission, represented by RB Wainwright. The language of the case was English. The facts are set out in the opinion of the Advocate General.

4 July 2002. **The Advocate General (S Alber)** delivered the following opinion<sup>1</sup>.

## I—INTRODUCTION

1. In the present proceedings, the High Court of Justice in London seeks a preliminary ruling from the Court of Justice of the European Communities on

<sup>1</sup> Original language: German.

the interpretation of Council Directive (EEC) 75/442 (on waste)<sup>2</sup> (the Waste Directive) and European Parliament and Council Directive (EC) 94/62 (on packaging and packaging waste)<sup>3</sup> (the Packaging Directive). The point at issue is essentially whether the treatment (sorting, cleaning, cutting, crushing, separating and/or baling) by the claimant in the main proceedings, Mayer Parry Recycling Ltd (MPR), of packaging waste made of metal amounts to complete recycling so that, after its processing, the scrap metal is no longer to be classified as waste.

2. MPR would like to be accredited as a reprocessor entitled to issue Packaging Waste Recovery Notes (PRNs) (as to the significance of PRNs, see para 19, below). That right has been granted by one of the defendants in the main proceedings, the Environment Agency, which has competence for England and Wales, to the steelmakers which melt down the material processed by MPR and produce ingots, sheets or coils from it.

## II—LEGAL CONTEXT

### A—Community law

#### (1) *The Waste Directive*

3. Article 1 of the Waste Directive provides:

‘For the purposes of this Directive:

(a) “waste” means any substance or object in the categories set out in Annex I which the holder discards or intends or is required to discard.’

4. Annex I to the Waste Directive specifies, under point Q5: ‘Materials contaminated or soiled as a result of planned actions (e.g. residues from cleaning operations, packing materials, containers, etc.)’. The annex also contains two sweep-up points: Q1 ‘Production or consumption residues not otherwise specified below’ and Q16 ‘Any materials, substances or products which are not contained in the above categories’.

5. For the concept of recovery, art 1(f) refers to the operations provided for in Annex IIB. That annex lists, under point R3, ‘recycling/reclamation of metals and metal compounds’.

6. Article 3(1) of the Waste Directive sets the following objectives for the member states:

‘(a) firstly, the prevention or reduction of waste production and its harmfulness ...

(b) secondly:

(i) the recovery of waste by means of recycling, re-use or reclamation or any other process with a view to extracting secondary raw materials, or  
(ii) the use of waste as a source of energy.’

#### (2) *The Packaging Directive*

7. Article 3 of the Packaging Directive contains, inter alia, the following definitions:

‘2. “packaging waste” shall mean any packaging or packaging material covered by the definition of waste in Directive 75/442/EEC, excluding production residues ...

<sup>2</sup> Council Directive (EEC) 75/442 (on waste) (OJ 1975 L194 p 39), as amended by Council Directive (EEC) 91/156 (OJ 1991 L78 p 32) and by Commission Decision (EC) 96/350 (adapting Annexes IIA and IIB to Directive 75/442 on waste) (OJ 1996 L135 p 32).

<sup>3</sup> OJ 1994 L365 p 10.



a 6. "recovery" shall mean any of the applicable operations provided for in Annex II.B to Directive 75/442/EEC;

7. "recycling" shall mean the reprocessing in a production process of the waste materials for the original purpose or for other purposes including organic recycling but excluding energy recovery ...'

b 8. Article 6(1) of the Packaging Directive imposes the following obligation for the recovery of packaging waste:

'In order to comply with the objectives of this Directive, Member States shall take the necessary measures to attain the following targets covering the whole of their territory;

c (a) no later than five years from the date by which this Directive must be implemented in national law, between 50% as a minimum and 65% as a maximum by weight of the packaging waste will be recovered;

d (b) within this general target, and with the same time limit, between 25% as a minimum and 45% as a maximum by weight of the totality of packaging materials contained in packaging waste will be recycled with a minimum of 15% by weight for each packaging material ...'

9. In accordance with art 8, in order to achieve the recovery rate the member states must set up systems for the return and/or collection and also the recovery of packaging waste.

e (3) *Divergences between the various language versions*

10. At the heart of these proceedings is the concept of recycling within the meaning of the Packaging and Waste Directives. It is accordingly necessary at this early stage to point out some terminological differences in the various language versions of both directives.

f 11. The term 'recycling' is used in the English version of both art 3(1)(b)(i) of the Waste Directive and art 3(7) of the Packaging Directive. In the Romance languages and Dutch, words cognate with the word 'recycling' ('recyclage', 'reciclado', 'riciclo' and so forth) are likewise to be found in both provisions. In other languages, words not cognate with 'recycling', but which are the same in both directives, are chosen.

g 12. Only in the German, Swedish and Finnish versions do different terms appear in the foregoing provisions of the Waste and Packaging Directives. Thus, in German the Waste Directive refers to 'Rückführung' and the Packaging Directive to 'stoffliche Verwertung'. In the German version of the Commission of the European Communities' proposal for the Packaging Directive, the word 'Recycling' was added in brackets after the term 'stoffliche Verwertung', but it was dropped in the subsequent legislative process.

h 13. Finally, in Directive (EC) 2000/53 of the European Parliament and of the Council of the European Communities (on end-of-life vehicles) (Directive 2000/53)<sup>4</sup>, which admittedly is not directly relevant to the present case but is referred to by some parties for the purpose of comparison, the German version too speaks of 'recycling'.

i 14. Since only a small proportion of the language versions thus contain different terms in the two directives, it cannot be concluded from the difference in choice of words in those versions alone that the terms have different meanings. In the remainder of this opinion, the terms 'stoffliche Verwertung',

<sup>4</sup> OJ 2000 L269 p 34.

'Rückführung' and 'Recycling' are therefore understood linguistically as synonyms. That does not preclude, however, that 'recycling' for the purpose of the Waste Directive and for the purpose of the Packaging Directive have different meanings in accordance with their respective definitions, as remains to be examined. a

#### *B—National rules* b

15. Article 6(1) of the Packaging Directive was transposed into national law by the Producer Responsibility Obligations (Packaging Waste) Regulations 1997, SI 1997/648 (the regulations). The regulations require producers of packaging waste to recycle or recover by other means specific quantities of such waste. 'Recovery' and 'recycling' have the same definitions in the regulations as in the Packaging Directive. c

16. Under the regulations producers must be registered, take steps to recover and recycle specified quantities of packaging waste and furnish certificates of compliance in respect of their recovery and recycling obligations. It is a criminal offence to contravene those requirements.

17. Producers may also, and in practice generally do, satisfy their obligations by being a member of a registered scheme. d

18. The British environment agencies have issued guidance in 'Producer Responsibility Obligations 1997: Guidance on evidence of compliance and voluntary accreditation of reprocessors', which is known as 'the Orange Book'. The Orange Book document sets out in greater detail the requirements of the environment agencies with regard to evidence that producers have complied with their recovery and recycling obligations and provides for a voluntary system of accreditation for reprocessors entitled to issue PRNs. e

19. A reprocessor certifies in a PRN the amount of packaging waste from the United Kingdom accepted by him, whether it is to be recycled or recovered and which recovery operations are to be applied to the material. Through the submission of PRNs, a producer can demonstrate to the Environment Agency that the packaging waste which he has delivered (or had delivered on his behalf) to an accredited reprocessor has been duly recycled or recovered. PRNs are tradeable and have an economic value (£10 to £15 per tonne in 2000 in the case of the metal packaging waste at issue here). f

20. The Environment Agency accredits the businesses listed in para 3 of Annex D to the Orange Book; for metals (aluminium and steel), businesses producing ingots, sheets or coils from packaging waste are accredited as reprocessors. g

21. Accreditation is thus granted in respect of the point in the materials cycle at which a new product is made that is indistinguishable from one made from primary raw materials. That is intended to facilitate the administrative process and ensure that PRNs are not issued twice in the course of the processing of the same material. h

#### *III—FACTS OF THE MAIN PROCEEDINGS*

22. MPR obtains—generally against payment—scrap metal, including packaging waste, from industrial and other sources. It processes the scrap so that it meets the Grade 3B specification developed by the industry. That essentially requires the following processing steps: visual inspection, radiation testing, shredding into fist-sized pieces, several sorting processes to separate out foreign substances (for example plastics, non-ferrous metals, glass or stones), and further visual inspection. Around 4.1% of Grade 3B material is i

a metal from packaging waste. MPR then sells the Grade 3B material to steelworks, which produce ingots, sheets or coils of steel from it. Grade 3B material is highly efficient because of its high iron content, its high density and its large surface area. It sells for around £60 per tonne.

b 23. The parties to the main proceedings disagree as to the extent to which the Grade 3B material produced by MPR still contains organic and inorganic impurities; the figures range from 2–3% (MPR—non-free contaminants) up to 7% (the Environment Agency). The impurities include remaining surface coatings such as paint or oil, non-metallic materials and undesirable chemical elements. Because of its potential pollutant content, Grade 3B material is required to be kept under cover or on a hard standing with drainage to a sump. The impurities are not removed until the steel production stage.

c 24. Steel producers are subject to the integrated pollution control regime laid down by the Environmental Protection Act 1990. Under that regime, the processes used by them must meet certain environmental standards and require authorisation. On the other hand, they are exempt from licensing under national waste management legislation.

d 25. In November 1998 MPR applied for accreditation as a reprocessor entitled to issue PRNs. By letter dated 15 November 1999, the Environment Agency refused that application. MPR then commenced proceedings before the High Court, seeking, *inter alia*, annulment of that decision and a declaration that it performs recovery and recycling within the meaning of the Packaging Directive.

#### e IV—ORDER FOR REFERENCE

26. By order of 9 November 2000 (see [2001] Env LR 630), the High Court stayed proceedings and referred the following questions to the Court of Justice for a preliminary ruling:

f 'Where an undertaking deals with packaging materials including ferrous metals, which (when received by that undertaking) constitute waste within the meaning of Article 1(a) of Council Directive 75/442/EEC on waste, as amended by Council Directive 91/156/EEC and Commission Decision 96/350/EC, by means of sorting, cleaning, cutting, crushing, separating and/or baling so as to render those materials suitable for use as a feedstock in a furnace in order to produce ingots, sheets or coils of steel:

g (1) Have those materials been recycled, and do they cease to be waste, for the purposes of Council Directive 75/442, when they have been:

(a) rendered suitable for use as a feedstock, or  
(b) used by a steelmaker so as to produce ingots, sheets or coils of steel?

h (2) Have those materials been recycled for the purposes of European Parliament and Council Directive 94/62/EC on packaging and packaging waste when they have been:

(a) rendered suitable for use as a feedstock, or  
(b) used by a steelmaker so as to produce ingots, sheets or coils of steel?'

#### i V—ARGUMENTS OF THE PARTIES

27. Observations have been submitted to the court by the following parties: MPR; the Environment Agency; Corus UK Ltd (Corus), a steel producer which has intervened in the main proceedings in support of the Environment Agency's position; the United Kingdom, Netherlands, Danish and Austrian governments; and the Commission.



*A—Mayer Parry Recycling Ltd*

28. MPR puts interpretation of the Waste Directive to the fore and argues in summary as follows: it recovers packaging waste and produces Grade 3B ferrous scrap, which is not waste but a secondary raw material; the Packaging Directive must be interpreted consistently with the Waste Directive; since Grade 3B scrap is not waste, the processing by MPR must also be regarded as complete recycling for the purposes of the Packaging Directive.

29. With regard to the Community law framework, MPR explains that four principal common features of the Waste Directive and the Packaging Directive can be identified.

30. First, the terms 'waste', 'recovery' and 'recycling' have the same meaning in both directives, recycling being a particular form of recovery. Recovery operations for the purposes of the directives can only be carried out on waste. Second, the decisive factor for the definition of waste is that the person holding the material discards it. Third, the directives pursue the objective of conserving raw materials through waste recovery. Fourth, a distinction is drawn between physical recovery and energy recovery.

31. MPR also explains the economic significance of eligibility to issue PRNs, a right enjoyed by the person who carries out the recycling. Since MPR's processing of the scrap metal enables it to be used by steel producers in the same way as a primary raw material, MPR's Grade 3B material is not waste but a secondary raw material. The steel producers therefore do not recover any waste and if only for that reason cannot be regarded as recyclers.

32. In its observations on the first question referred for a preliminary ruling, MPR derives the following guiding principles from the case law of the court or the opinions of Advocates General. It is for the national court to determine in the light of all the circumstances whether material is waste<sup>5</sup>. In deciding whether it is waste, the decisive factor is whether the holder discards it<sup>6</sup>. Waste recovery is to be distinguished from normal industrial treatment of products<sup>7</sup>. Recovery has been completed if the recovered substance can be used directly in a production process as a secondary raw material<sup>8</sup>.

33. MPR contests, on the other hand, the approach put forward by the Environment Agency, according to which recovery is not completed until later, that is to say when one can no longer tell whether a product has been made from waste or from primary raw materials. That argument, which is based on the definition of recycling in the Packaging Directive, is not tenable. The Packaging Directive is subordinate to the Waste Directive and cannot define the concept of recovery in a manner that diverges from the Waste Directive.

<sup>5</sup> MPR refers to the opinions of Advocate General Jacobs in *Criminal proceedings against Tombesi* joined cases C-304/94, C-330/94, C-342/94 and C-224/95 [1997] All ER (EC) 639, [1997] ECR I-3561 (para 56) and *Inter-Environnement Wallonie ASBL v Région Wallonie* Case C-129/96 [1998] All ER (EC) 155, [1997] ECR I-7411 (paras 69, 70), and to the judgment in *ARCO Chemie Nederland Ltd v Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer, Vereniging Dorpsbelang Hees v Directeur van de dienst Milieu en Water van de provincie Gelderland* joined cases C-418/97 and C-419/97 [2003] All ER (EC) 237, [2000] ECR I-4475 (paras 51, 65–71, 73, 88, 97).

<sup>6</sup> See the opinion in the *Inter-Environnement Wallonie* case, cited in footnote 5, above (paras 26, 27, 60), opinion in *Tombesi's* case, cited in footnote 5, above (paras 50, 51) and judgment in the *ARCO Chemie* case, cited in footnote 5, above (paras 34, 36, 46, 47).

<sup>7</sup> See the judgment in the *Inter-Environnement Wallonie* case, cited in footnote 5, above (para 33).

<sup>8</sup> See the opinion in *Tombesi's* case, cited in footnote 5 (paras 53, 54), opinion in the *Inter-Environnement Wallonie* case, cited in footnote 5, above (para 78) and judgment in the *ARCO Chemie* case, cited in footnote 5, above (paras 93, 94).

- a 34. In art 3(7) of the Packaging Directive which defines recycling, the focus placed on reprocessing in a production process serves to distinguish recycling from energy recovery. The process applied by MPR constitutes a production process in any event, in that a secondary raw material, namely Grade 3B scrap, is produced. That material is not waste because it has an economic value and there would be no risk of its being discarded.
- b 35. MPR suggests the following factors in particular for distinguishing a secondary raw material from waste: the substance's suitability for reutilisation with or without further pre-treatment, its economic value and the environmental hazards posed by it. In MPR's view, it is for the referring court to determine the extent to which those criteria are met.
- c 36. Should the court none the less wish to consider the matter, MPR contends that Grade 3B material meets the criteria for secondary raw materials. It can be used directly for steel production, just as iron ore, without further treatment. No special environmental protection measures are required either for its storage and transportation or when it is used to produce steel.
- d 37. MPR submits with regard to the second question that materials which have been completely recovered and are no longer waste for the purposes of the Waste Directive are also to be regarded as recycled for the purposes of the Packaging Directive.

#### *B—The Environment Agency*

- e 38. The Environment Agency agrees with MPR that the same understanding of the terms 'waste' and 'recovery' underlies both directives. It takes the view, however, in contrast to MPR, that the treatment carried out by MPR does not amount to complete recycling. It is not until the Grade 3B material has been melted down and the steelmaker has produced ingots, sheets or coils of steel that recycling is completed and waste ceases to be present.
- f 39. With regard to the relationship between the two questions referred for a preliminary ruling, the Environment Agency states that the two directives must be interpreted together. The Packaging Directive merely makes clearer what is to be understood by recycling as a particular form of recovery. Article 2(2) of the Waste Directive expressly allows special directives for particular categories of waste such as packaging waste. Since both directives pursue the objective of encouraging waste recovery, the same definition of 'recovery' is to be used as a basis.
- g After complete recycling for the purposes of the Packaging Directive, the recovered material can equally no longer be regarded as waste for the purposes of the Waste Directive.
- h 40. With regard to the first question, the Environment Agency stresses first of all that the court should answer the question itself. The assessment as to when waste has been completely recovered cannot be left to the member states, as MPR submits, since that runs counter to the objective of harmonisation of laws throughout the Community. The concepts of waste and recovery are sufficiently specific to be of direct application without being further defined by national law.
- i 41. The Environment Agency also refers to the case law stating that the concept of waste is to be interpreted broadly<sup>9</sup> and to the objectives of the Waste Directive, namely to avoid waste, encourage recovery and prohibit the uncontrolled disposal of waste.

<sup>9</sup> See the judgment in the *ARCO Chemie* case, cited in footnote 5, above (paras 34–40).

42. The Waste Directive does not lay down when material ceases to be waste. a  
In any event, that does not happen simply because waste comes into the possession of the person who wishes to recover material or carry out some other treatment. The fact that waste is subjected to one of the recovery operations specified in Annex IIB to the Waste Directive may mean that it ceases to be waste, but that is not necessarily the case, as the court has held<sup>10</sup>.

43. MPR does not carry out recycling, but only pre-processing in that it sorts the waste and changes its composition. MPR is consequently a waste producer within the meaning of art 1(b) of the Waste Directive. The treatment carried out by MPR is not reprocessing in a production process under art 3(7) of the Packaging Directive. Equally, in Directive 2000/53 the corresponding treatment of end-of-life cars is regarded as pre-treatment and not as recycling. b

44. The Environment Agency contests MPR's argument that Grade 3B scrap constitutes a secondary raw material and has therefore been recycled. Recovery does not always have the aim of extracting secondary raw materials. Nor, under the court's case law, does a material cease to be waste by being transformed into a secondary raw material. Its suitability for use as a raw material does not preclude its classification as waste. c

45. In addition, the Environment Agency disputes MPR's assertion that no special environmental protection controls are required when dealing with Grade 3B material. Steel producers who process Grade 3B scrap are subject to integrated pollution control. d

46. Moreover, the court, in contrast to certain Advocates General, has regarded the environmental protection requirements for dealing with a material or the environmental hazards posed by the material as likewise not determining whether it is classified as waste<sup>11</sup>. e

47. On the basis of its answer to the first question, the Environment Agency suggests in answer to the second question that the packaging waste has been recycled only when ingots, sheets or coils of steel have been produced. f

#### *C—Corus UK Ltd*

48. In Corus's submission, only the second question need be answered. In that connection, it is for the member state to select the point at which materials may be regarded as completely recycled and decide whether or not they are still waste, in so far as the objectives of the Packaging Directive are thereby g observed.

49. The United Kingdom has settled on a correct and perfectly justifiable point in time for completion of recycling by focusing on the production of ingots, sheets and coils by the steelmaker. Grade 3B scrap, on the other hand, is to be regarded as waste.

50. The question whether material has been recycled is to be decided on the basis of the Packaging Directive alone. The answer turns on whether the material can be used again in the manufacture of packaging or for other production purposes. This requirement is met only by Corus's products, and not MPR's upstream products. In the absence of Community provisions, the mode of proof of recycling can be laid down by the member states. h

<sup>10</sup> See the judgment in the *ARCO Chemie* case, cited in footnote 5, above (paras 89, 95–97).

<sup>11</sup> The Environment Agency refers in particular to the judgments in the *Inter-Environnement Wallonie* case, cited in footnote 5, above (para 30), and in the *ARCO Chemie* case, cited in footnote 5, above (paras 64–69). i



- a 51. Income from the issue of PRNs is used by the undertakings carrying out the recycling to expand capacity. This helps to increase the recycling rate for metal packaging waste which is still very low. MPR, on the other hand, has no corresponding commercial interest in the recovery of packaging waste as such waste forms only a very small part of its throughput. If MPR were entitled to issue PRNs, there would be a risk that it would process large amounts of Grade 3B scrap and then only store it.
- b

D—*The Danish government*

- c 52. The Danish government essentially agrees with the submissions of the Environment Agency. The concept of waste is, in its view, to be interpreted broadly in order to ensure that the waste stream and waste disposal and recovery are monitored. As soon as material ceases to be waste it is no longer subject to corresponding controls. In particular, Council Regulation (EEC) 259/93 (on the supervision and control of shipments of waste within, into and out of the European Community)<sup>12</sup> ceases to apply. In accordance with the case law, the economic value of material or its recoverability is irrelevant to the definition of waste.
- d

53. The scrap metal processed by MPR is waste. The 'reprocessing' referred to in the definition of recycling presupposes an alteration in the material's composition which makes it immediately usable again. That precondition is not met until the steelmaker makes its products.

- e 54. In Denmark, gathering and sorting are taken to be not recovery but pre-treatment. Corresponding pre-treatment may or must also take place in some circumstances before waste is disposed of, as shown by, for example, art 6 of Council Directive (EC) 1999/31 (on the landfill of waste)<sup>13</sup> and art 6 of Directive (EC) 2000/76 of the European Parliament and of the Council of 4 December 2000 on the incineration of waste<sup>14</sup>.

- f 55. If not even complete recovery necessarily deprives material of its classification as waste, as the court has held<sup>15</sup>, a fortiori pre-treatment does not lead to that result.

E—*The Netherlands government*

- g 56. The Netherlands government states with regard to the first question that the point in time at which material is recycled coincides with the point in time at which it ceases to be waste. In the *ARCO Chemie* case (at paras 36–41), the court laid stress on the importance of the idea of discarding to the concept of waste<sup>16</sup>. That concept must be interpreted in a manner consistent with the objectives of the Waste Directive and therefore broadly.

- h 57. Under the Waste Directive, there recycling takes place not only where waste is used in a production process but also in the case of recovery with the objective of extracting secondary raw materials. Whether a secondary raw material with the same characteristics as a primary raw material has been created from the waste depends on whether the holder of the material produced discards it.

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<sup>12</sup> OJ 1993 L30 p 1.

<sup>13</sup> OJ 1999 L182 p 1.

<sup>14</sup> OJ 2000 L332 p 91.

<sup>15</sup> See the judgment in the *ARCO Chemie* case, cited in footnote 5, above (para 96).

<sup>16</sup> Cited in footnote 5, above.

58. In that regard, account is to be taken of the following cumulative criteria: a  
the material's composition must be such as to enable it to be used in the same  
way as the corresponding primary raw material; it must not contain more  
impurities than the primary raw material; it must be capable of being used  
without further pre-treatment; its use must not give rise to any higher  
environmental risk than use of the primary raw material; the use must not b  
consist merely of a recovery process; and the material must not have a negative  
economic value.

59. The answer to the first question should therefore be that packaging waste  
that includes metals is recycled for the purpose of the Waste Directive and no  
longer waste when the criteria set out above are met and the material is thus  
suitable for use as a raw material.

60. The Netherlands government submits with regard to the second question c  
that 'recycling' in the Packaging Directive has a different meaning from  
'recycling' in the Waste Directive. Waste is not recycled within the meaning of  
the Packaging Directive until it has been re-used in a production process, hence  
in the present case on the production of ingots, sheets and coils of steel. The  
objectives of saving energy and raw materials are achieved only through actual d  
use in a production process. Furthermore, that is the only way of ensuring that  
no double-counting occurs in relation to meeting the recycling rates under art 6  
of the Packaging Directive.

#### *F—The Austrian government*

61. In its examination of the first question the Austrian government points e  
out that recycling is defined not in the Waste Directive but in the Packaging  
Directive. Directive 2000/53 also contains a definition in similar terms. Those  
definitions focus on use in a production process and are narrower than the  
concept of recovery under the Waste Directive.

62. With regard to the concept of waste, the Austrian government refers to f  
the findings of the court in the *ARCO Chemie* case (at paras 40, 41, 97)<sup>17</sup>. The  
point at which recovery is completed is determined by the following criteria:  
the material is normally used for the purpose in question and there is a market  
for it; quality criteria exist which take account of its characteristics as waste; it  
does not give rise to any higher environmental risk than comparable raw  
materials.

63. The Austrian government adds in relation to the second question that g  
recycling need not be effected in one step. At every step it must be examined  
whether there is, or perhaps only appears to be, recovery.

64. In summary, MPR carries out waste recovery, but only as a step  
preliminary to recycling within the meaning of the Packaging Directive. h

#### *G—The United Kingdom government*

65. The United Kingdom government states that only the second question  
needs to be answered in order to dispose of the main proceedings and it  
therefore focuses its observations on that question.

66. It points out that packaging waste can be recycled only once, even though i  
this might occur in a number of stages. It is necessary to avoid recovery  
operations in respect of the same material being taken into account more than  
once for the purposes of the recycling rate under art 6(1)(b) of the Packaging  
Directive. Recycling is carried out in the present case by the steel producers.

<sup>17</sup> Cited in footnote 5, above.

a 67. MPR's treatment of the waste does not correspond to the definition of recycling in art 3(7) of the Packaging Directive. Sorting, cleaning, crushing and baling do not constitute production processes.

b 68. Nor is reprocessing involved, since the waste retains its essential characteristics and does not become a new product. Reprocessing presupposes a use similar to the original use, that is to say melting down in the place of the primary raw material and the production of ingots, sheets and coils of steel. The pre-treatment carried out by MPR for that use is not itself reprocessing. Only this view meets the objective laid down in art 6(2) of the Packaging Directive of manufacturing packaging or other products from recycled packaging material where possible.

c 69. The United Kingdom government underpins that view by drawing a comparison with Directive 2000/53, which contains provisions similar to those of the Packaging Directive.

d 70. It contests the interpretation put forward by MPR under which the Packaging and Waste Directives are read as one. The Waste Directive does not establish any definitions which are to apply to all other legislation in this field; on the contrary, the definitions in art 1 of the Waste Directive are expressly stated to be for the purposes of that directive.

e 71. When the Community legislature wishes to use in other legal measures the same definitions as in the Waste Directive, it does so by express reference. The Packaging Directive contains some such references; as for the remainder, the terms used in it are to be interpreted autonomously.

f 72. Article 2(2) of the Waste Directive expressly envisages the adoption of special rules, such as the Packaging Directive. The Packaging Directive contains independent definitions of the terms 'recycling' and 'recovery'. Article 3(6), which defines 'recovery', refers only to the 'applicable operations' provided for in Annex IIB to the Waste Directive<sup>18</sup>.

g 73. It is apparent from Annex IIB to the Waste Directive that waste can pass through several recovery steps. Metallic waste could for example be stored first of all (R12) and the metal could later be reclaimed (R3). Recycling, on the other hand, is possible only once, for the reasons stated. Only such operations listed in Annex IIB to the Waste Directive as constitute recycling can be applicable operations within the meaning of art 3(6) of the Packaging Directive.

h 74. The Packaging Directive contains independent definitions of the terms 'recycling', 'energy recovery' and 'organic recycling' (art 3(7), (8) and (9)). Other forms of recovery are not mentioned. Only the types of recovery expressly mentioned are applicable operations under the Packaging Directive. Of those, only recycling is applicable to metals.

i 75. It is not sufficient for MPR to carry out a recovery operation under Annex IIB to the Waste Directive; rather, it must carry out an applicable operation under the Packaging Directive, namely recycling.

76. In order to ensure that the recovery of packaging waste is recorded in accordance with uniform standards throughout the Community, it is necessary to have a clearly definable criterion determining when material is completely recovered. To that extent the member states are left with no discretion. The most suitable point in time is when the scrap metal is melted down again.

<sup>18</sup> The language versions diverge. While the German version and some others, for example the Spanish version, refer generally to the operations provided for in Annex IIB to the Waste Directive ('die Maßnahmen', 'cualquiera de las operaciones'), other language versions have a restriction added (for example 'applicable operations', 'opérations applicables', 'pertinenti operazioni', 'toepasselijke handelingen').



77. The Packaging Directive has the objective of actual reprocessing. As long as packaging waste has only been prepared for reprocessing, actual use, namely the melting down, is not ensured. a

78. A substance is to be regarded as recycled packaging material for the purposes of art 6(1)(b) of the Packaging Directive if two conditions are met: the packaging material must have been packaging waste and it must have been recycled. It is irrelevant whether the material has ceased at any point in time to be waste within the meaning of the Waste Directive. b

79. The United Kingdom government concludes from all the foregoing considerations that it is inappropriate to read the two directives together in the absence of appropriate references in the Packaging Directive.

80. The United Kingdom government makes further observations on the first question in the alternative only. Unlike the Packaging Directive, the Waste Directive allows the member states a margin of appreciation in determining what constitutes a recovery operation<sup>19</sup>. It cannot be concluded from the fact that material has been recovered within the meaning of the Waste Directive that it has undergone an applicable recovery operation under the Packaging Directive. c

81. The court has confirmed that the concept of recovery under the Waste Directive needs to be defined more precisely by national implementing legislation<sup>20</sup>. The Packaging Directive, on the other hand, allows only three types of recovery (recycling, energy recovery and organic recycling) and to that extent confers no margin of appreciation on the member states. d

82. Nor can the Packaging Directive have retroactively altered the meaning of the Waste Directive which was enacted first. It would be contrary to the principle of legal certainty to wish to ascribe to the Waste Directive a new and different meaning following adoption of the Packaging Directive. e

#### *H—The Commission* f

83. The Commission is essentially of the same view as the Environment Agency. The terms 'waste' and 'recovery' have the same meaning in the Waste Directive and the Packaging Directive. The special definition of recycling in the Packaging Directive takes account of the objectives of that directive (priority of recycling over energy recovery).

84. It is true that MPR's activity is a step in the material's recovery, but recovery is not completed until the material is processed in the furnace. Only then is there no longer waste. Nor is that conclusion in any way altered by the fact that MPR's products have an economic value. A processed substance can still be waste even after complete recovery. That applies a fortiori where recovery consists of mere sorting and pre-treatment for subsequent use as a secondary raw material. g

85. The Commission deduces from the arguments of the parties before the national court that Grade 3B scrap still contains impurities which are not removed until it is melted down and that special environmental protection precautions are required for handling the material. This shows that it is waste. h

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<sup>19</sup> The United Kingdom government refers to the opinion in *Tombesi's* case, cited in footnote 5, above (para 56).

<sup>20</sup> See the judgments in the *Inter-Environnement Wallonie* case, cited in footnote 5, above (para 33) and in the *ARCO Chemie* case, cited in footnote 5, above (para 70).

- a 86. Finally, the Commission stresses the importance of a clear definition of waste for, by way of example, the application of Regulation 259/93, even if that regulation is not of direct relevance to the present case.

#### VI—LEGAL ASSESSMENT

- b A—*The relationship between the Waste Directive and the Packaging Directive*

87. The parties hold differing views as to the relationship between the two directives and between the terms 'waste', 'recovery' and 'recycling' used in them.

- c 88. A majority is of the opinion that the directives are to be read together and that the respective terms have the same meaning in each. Most of the proponents of this view therefore consider it necessary to answer both questions referred for a preliminary ruling. Since, in their submission, the same understanding of the relevant terms underlies both directives, the answers proposed by them to both questions correspond. With the exception of MPR, they consider that MPR's activity constitutes not complete recycling but pre-treatment or some other recovery operation and that the Grade 3B scrap  
d produced is waste. MPR arrives at the opposite result.

89. The United Kingdom government and Corus, on the other hand, are of the view that the Packaging Directive is to be interpreted and applied independently and that only the second question referred for a preliminary ruling is relevant to the decision in the main proceedings.

- e 90. In that regard, it must be stated first of all that the Waste Directive introduced in 1975 the first basic rules for harmonisation of national laws in the field of waste disposal. In this area of the law which was then just beginning to develop the Community confined itself in the directive to a few vague framework provisions.

- f 91. Above all, what is actually waste was not laid down precisely. It is true that the Waste Directive was substantially reformulated in 1991<sup>21</sup>. However, the definition of waste remained almost unchanged. The definition has time and again confronted the court with difficult questions of interpretation, to which it has not always been possible to find satisfactory answers.

- g 92. In 1991 art 2(2) was also introduced, which expressly envisages the laying down in further directives of specific rules concerning particular instances, or of supplementary rules, for the management of individual categories of waste. The Packaging Directive constitutes such special supplementary legislation.

- h 93. It is true that art 2(2) reads like an enabling power. However, such a power is not actually required. The power to adopt directives in the field of waste management arises directly from the EC Treaty, in the case of the Packaging Directive from art 100a (now, after amendment, art 95 EC). Even  
i without art 2(2) of the Waste Directive it would have been open to the Community to adopt further special directives relating to waste.

94. There is accordingly no order of precedence as between the provisions of the two directives in the sense of the Waste Directive ranking above the Packaging Directive. On the contrary, they are equal-ranking measures of secondary legislation which are directly founded on the Treaty. At the same time the Packaging Directive forms a special legislative measure for the category of waste covered by it which overrides the Waste Directive if their provisions conflict.

21 See footnote 2, above.

95. That of course does not mean that the Waste Directive is irrelevant to the handling of packaging waste. First, the Packaging Directive refers on numerous occasions to the Waste Directive. Through reference to them, definitions in the Waste Directive are also applicable to the matters covered by the Packaging Directive. In that way, account is taken of the objective, set out in the third recital in the preamble of Directive 91/156 amending the Waste Directive<sup>22</sup>, of having a basis of common terminology for Community waste law. a

96. Corresponding references appear in relation to the definition of packaging waste in art 3(2) of the Packaging Directive and of recovery in art 3(6). On the other hand, recycling is defined in art 3(7) without any reference to the Waste Directive. b

97. Second, packaging waste is simultaneously waste within the meaning of the Waste Directive, as is in any event clear from the definition in art 3(2) of the Packaging Directive. In so far as the Packaging Directive contains no divergent provisions, all other relevant waste law provisions therefore also apply to packaging waste. The Community did not wish, by the Packaging Directive, to establish a self-contained set of rules for packaging waste and to take this category of waste outside the scope of other provisions of waste law. c

98. Thus, the Packaging Directive contains detailed provisions on the recovery of packaging waste but not, for example, on its disposal or its transfrontier shipment. Articles 4 and 5 of the Waste Directive and Regulation 259/93 are consequently also to be observed when handling packaging waste. d

99. Finally, the principles of the Waste Directive are to be observed when interpreting the Packaging Directive in so far as the overall Community strategy for waste management finds expression in the former<sup>23</sup>. The Packaging Directive itself also fits into that overall strategy. e

100. Both directives thus essentially pursue the same objectives, namely, first, the prevention and reduction of waste production<sup>24</sup> and, second, the recovery of waste instead of its disposal<sup>25</sup>. This ultimately assists in the prudent and rational utilisation of natural resources, as required by the third indent of art 174(1) EC (formerly art 130r(1) of the EC Treaty). f

101. Of course, the Packaging Directive goes further than the Waste Directive in so far as it sets quantitative objectives for the proportion of packaging waste that is to be recovered and recycled. g

#### *B—The relationship between the concept of waste and recycling*

102. The relationship between classification as waste and the carrying out of a recycling operation is of crucial importance for deciding the case. It is not in dispute that the material which MPR processes is packaging waste. If the material were to cease to be packaging waste as a result of the recycling, that would turn exclusively on the interpretation of the Packaging Directive, which constitutes special legislation for the recycling of packaging waste. h

103. In the view of the court, a complete recovery operation under Annex IIB does not necessarily deprive a substance of its classification as i

<sup>22</sup> Cited in footnote 2, above.

<sup>23</sup> See the seventh recital in the preamble to the Packaging Directive.

<sup>24</sup> See in particular art 3(1)(a) of the Waste Directive and art 1(2) of the Packaging Directive.

<sup>25</sup> See in particular art 3(1)(b) of the Waste Directive and art 1(2) of the Packaging Directive.



a waste<sup>26</sup>. Rather, that fact is only one of the factors to be taken into consideration for the purpose of determining whether the substance constitutes waste. However, this finding cannot automatically be applied to the case of recycling.

b 104. It is true that, theoretically, it cannot be ruled out that a substance obtained by a recycling operation also constitutes waste. If, for instance, there were no demand for the recycled material in the foreseeable future and the storage costs exceeded the proceeds which might be obtained later, it would be conceivable that the recycling undertaking would wish to discard its products. In practice, however, it would probably be extremely rare for a holder of material recycled at considerable expense to intend to discard it again.

c 105. It would also be inconsistent with the spirit and purpose of the Packaging Directive to accept that recycled packaging waste is still waste. The central concern of the Packaging Directive is the attainment of quantitative recovery objectives. If packaging waste did not as a rule cease to be waste upon being recycled, it could undergo a recovery operation again. The same material would then be recovered twice and double-counted with regard to achievement d of the recovery rate.

e 106. A majority of the parties submit that the two directives should be read 'together' and also consider that waste ceases to be waste after recycling has been carried out. Proceeding on that basis, MPR in particular judges the recovery operation carried out on the basis of whether the processed material continues or ceases to be waste. The definition of recycling is thus determined by the recycling's outcome.

f 107. This approach fails to take into account that for the definition of recycling the Packaging Directive is special legislation vis-à-vis the Waste Directive. Regard would not be had to that relationship if the question whether recycling has been carried out were determined on the basis of whether or not a material is waste. On the view put forward in this opinion as to the relationship between the two directives, it must, quite to the contrary, be examined first and foremost whether a recycling operation has been carried out. If that is the case, it is to be concluded as a rule that the recovered material has ceased to be waste.

g 108. In this connection, it should be remembered that, in accordance with settled case law, the question whether a substance is waste cannot be answered on the basis of certain characteristics of the substance itself, but that the crucial factor is the conduct of the holder of the waste, that is to say whether or not he intends to discard the substance<sup>27</sup>. The court has thus refused to make classification of a material as waste dependent on its economic value, its fitness for re-use<sup>28</sup> or the environmental hazards posed by it<sup>29</sup>.

h 109. The holder's conduct can be appraised only with regard to his intentions, a fact which causes the body applying the law considerable difficulties. The court solves this problem by inferring an intention to discard

i 26 See the judgment in the *ARCO Chemie* case, cited in footnote 5, above (paras 94, 95).

27 See the judgments in the *Inter-Environnement Wallonie* case, cited in footnote 5, above (para 26) and in *Application by Palin Granit Oy* Case C-9/00 [2003] All ER (EC) 366, [2002] ECR I-3533 (para 22).

28 See the judgments in *Criminal proceedings against Vessoso* Joined cases C-206/88 and C-207/88 [1990] ECR I-1461 (para 9) and in *Tombesi's* case, cited in footnote 5, above (para 52).

29 See the *ARCO Chemie* case, cited in footnote 5, above (para 66).

the substance from objective indicators; in so doing it has regard both to all the factual circumstances and to the aim of the Waste Directive<sup>30</sup>. a

110. In determining whether Grade 3B scrap is to be classified as waste, all circumstances which suggest the discarding of a substance, or no such discarding, would accordingly be relevant. In this context, a crucial factor is whether the material has already undergone recycling. If it has not, a further indicator can be whether it is to be subjected to such a recovery process. Assessment of the processes carried out by MPR or the steel producers in the light of art 3(7) of the Packaging Directive is thus an issue preliminary to the classification of Grade 3B scrap as waste and not vice versa. b

111. The court has found that it may not be inferred from the mere fact that an operation referred to in Annex IIA or IIB to the Waste Directive is carried out that the holder of the material intends to discard it since it is often difficult to distinguish between waste disposal or recovery operations and the treatment of other products<sup>31</sup>. c

112. However, those findings do not preclude the approach put forward here. In contrast to the position in the judgments cited, the material to be recovered was (at any rate originally) packaging waste. The issue is solely that of determining whether it is still waste. Classification of the operations which have already been carried out or are still to be carried out has, in this case, a significance different from that in cases where it is first to be established whether the material to be dealt with is waste at all. d

113. Moreover, it is to be inferred that material is waste from the carrying out not of a recovery operation under Annex IIB to the Waste Directive but of a recycling operation, which is more precisely defined in art 3(7) of the Packaging Directive than the operations in Annex IIB. e

114. Nor is the concept of waste retroactively altered by the approach put forward here. Rather, the classification of a substance under the Waste Directive has always depended on whether the holder intends to dispose of it. The Waste Directive does not lay down the criteria to be applied in determining the holder's intention<sup>32</sup>. As already stated, that depends on the overall circumstances in each case. In this connection, not only factual circumstances but also the wider legislative context may be relevant, even if the pertinent legislation was not adopted until after the Waste Directive. f

*C—The order in which the two questions referred for a preliminary ruling should be dealt with* g

115. It follows from the observations set out in A and B, above that the question as to which operation constitutes complete recycling of steel from packaging waste does not turn on whether the materials arising from the process in question are still to be classified as waste within the meaning of the Waste Directive. On the contrary, the very characterisation of the operation carried out determines whether they cease to be waste. h

116. It therefore appears unnecessary, having regard to the questions of law to be decided in the main proceedings, to answer the first question submitted for a preliminary ruling. In any event, the second question is to be dealt with first. i

<sup>30</sup> See the judgment in the *Palin Granit* case, cited in footnote 27, above (paras 24, 25).

<sup>31</sup> See the judgments in the *ARCO Chemie* case, cited in footnote 5, above (paras 51, 82) and in the *Palin Granit* case, cited in footnote 27, above (para 27).

<sup>32</sup> See the judgment in the *Palin Granit* case, cited in footnote 27, above (para 25).

*a D—The second question referred for a preliminary ruling*

117. Article 3(7) of the Packaging Directive defines recycling for the purposes of that directive. This provision forms the basis for answering the second question submitted for a preliminary ruling. It would appear that hitherto the court has not adopted a view on the concept of recycling. Before interpreting the provision on the basis of its wording, brief consideration must be given to the Community law context, the meaning of the term 'recycling' in the light of the objectives of the Packaging Directive and the evolution of that concept in the legislative process which led to the adoption of the Packaging Directive.

*(1) Preliminary remarks**c (a) Recycling in Community law*

118. The Packaging Directive contains the first detailed definition of the concept of recycling, which—in simple terms—consists in recovery of the materials from which the packaging has been produced in order to re-use them. This method of recovering packaging waste has two merits. First, the recycled material no longer needs to be disposed of as waste. Secondly, energy and raw materials are conserved.

119. Essentially this approach may be found in a series of older legislative measures. Thus, in the Waste Directive—if not also in the German language version—the term 'recycling' is likewise referred to in art 3(1)(b)(i). MPR places substantial reliance on that provision, where, in its submission, the aspect of recycling highlighted is the extraction of secondary raw materials. The national court too refers, in alternative (a) in its questions, to the obtaining of secondary raw materials ('a feedstock').

120. The idea of recycling had already appeared in art 2(e) of Council Directive (EEC) 85/339 (on containers of liquids for human consumption)<sup>33</sup> which was replaced by the Packaging Directive<sup>34</sup>. In addition, art 3 of Council Directive (EEC) 75/439 (on the disposal of waste oils)<sup>35</sup> should be mentioned.

121. Apart from the fact that those special legislative measures can have little bearing on the sphere of packaging waste, they also provide no further pointers as to the concept of recycling. That is equally true of the legislative measures following the Packaging Directive which took up its definition of recycling<sup>36</sup>.

*(b) Recycling in the Packaging Directive's legislative context*

122. Article 3(7) of the Packaging Directive cannot be looked at in isolation. On the contrary, in interpreting that provision regard is to be had to the objectives of the directive and of related legislation.

123. It is to be noted that the Packaging Directive aims, on the one hand, to prevent any impact of packaging waste on the environment or to reduce such impact, thus providing a high level of protection, and, on the other hand, to ensure the functioning of the internal market<sup>37</sup>.

<sup>33</sup> OJ 1985 L176 p 18.

<sup>34</sup> See art 23 of the Packaging Directive.

<sup>35</sup> OJ 1975 L194 p 23.

<sup>36</sup> See in particular art 2(7) of Directive 2000/53.

<sup>37</sup> See art 1(1) of the Packaging Directive and the first recital in its preamble.



(i) High level of environmental protection

124. The objective of attaining a high level of environmental protection accords with the requirements of art 174(2) EC (formerly art 130r(2) of the EC Treaty). Article 6 EC (formerly art 3c of the EC Treaty) requires environmental protection requirements to be integrated also when measures to harmonise laws are adopted. The court has deduced from that objective, which the Waste Directive also serves, that the concept of waste is to be interpreted broadly<sup>38</sup>.

125. Applied to the Packaging Directive, this means that the concept of recycling cannot be interpreted in such a way that a material ceases to be waste too quickly and consequently is no longer subject to waste controls at a time when those controls are still necessary in order to ensure a high level of environmental protection.

126. It is to be ensured in particular that used packaging does not pose an environmental hazard and that—in so far as it cannot be re-used—it is where possible recovered, avoiding disposal<sup>39</sup>.

127. Of the various forms of recovery, recycling is the one to be preferred<sup>40</sup>. It contributes to environmental protection by conserving energy and primary raw materials and reducing the amount of waste for ultimate disposal<sup>41</sup>.

(ii) No distortion of competition in the internal market

128. In contrast to the Waste Directive, the Packaging Directive sets specific recovery targets. Article 6(1)(b) thus imposes quantitative obligations on the member states with regard to the proportion of the total amount of packaging material that must as a minimum be recycled. The Packaging Directive, which is based on art 100a of the EC Treaty (now art 95 EC), is intended to standardise the provisions of the member states, and distortions of competition are intended to be avoided.

129. Even if, taking all factors into account, recycling can lead to savings in the national economy<sup>42</sup>, it represents a cost factor for the undertakings which must pay for recycling the packaging placed into circulation by them. Ultimately that expenditure makes their products more expensive and thus affects their prospects on the market.

130. The Community has to some extent accepted unequal burdens on industry in the member states by not laying down a specific minimum recovery rate but allowing a spread of rates. Greater imbalances could result if the member states take as a basis concepts of recycling which differ substantially from one another and the costs of meeting the recovery rates consequently differ.

131. The court should therefore lay down a definitive interpretation of the concept of recycling in order to ensure that the objective of harmonising laws is achieved. In addition, the interpretation must ensure that the same

38 See the judgment in the *ARCO Chemie* case, cited in footnote 5, above (para 40).

39 See art 1(2) of the Packaging Directive and the seventh recital in its preamble.

40 See the eighth recital in the preamble to the Packaging Directive. The priority accorded to recycling is, however, subject to a proviso as to adequate scientific and technological knowledge concerning recovery.

41 See the 11th recital in the preamble to the Packaging Directive.

42 The Commission estimates, on the basis of various studies, that the costs of recycling are roughly equal to the saved waste disposal costs. (See the explanatory memorandum for the Commission Proposal for a Directive of the European Parliament and of the Council amending Directive (EC) 94/62 on packaging and packaging waste, COM(2001) 729 final of 7 December 2001, p 17.)

a packaging material is not counted more than once in recycling rate calculations, as the United Kingdom government correctly points out.

(c) Evolution of the concept of recycling in the legislative process

b 132. The definition of recycling in the Commission proposal<sup>43</sup> differs from the version in force (see para 7, above), stating:

‘recycling means the recovery of the waste materials for the original purpose or for other purposes excluding energy recovery; recycling means also regeneration and composting.’

c 133. The definition is not considered in greater detail in the explanatory memorandum. It lacks some elements which are included in the version now in force. According to the German version of the proposal, simply ‘materials’ (‘Stoffe’) can undergo recycling; it is left open whether or not they must be waste. In addition, the process is characterised solely by the objective of re-use of the material for the original or other purposes. The draft does not contain a more detailed description of the process of recycling.

d 134. A version corresponding in essence to the current formulation first appears in Common Position (EC) 13/94 of the Council of 4 March 1994<sup>44</sup>. No reason is given for the amendment. Nor does it appear to be commented on by either the Commission or the Parliament in the subsequent procedure. It can merely be stated that the definition ultimately adopted describes the process of recycling more precisely and thus enables a clearer line to be drawn between recycling and other recovery operations, a fact which has significance with regard to the recovery rates in art 6(1).

(d) Subsequent evolution

f 135. Recycling has in the meantime acquired considerable importance and will in the future play an even more significant role in the recovery of packaging waste.

g 136. It is apparent from the interim report prescribed by art 6(3), which the Commission submitted in 1999<sup>45</sup>, that almost all the member states had already attained the minimum targets four years after the directive entered into force and some had clearly exceeded the maximum targets. The United Kingdom, with a recycling share of 30% by weight, occupied a place nearer the bottom of the list of member states; in the case of steel, the recycling rate reached an average of 26% by weight<sup>46</sup>.

h 137. In the meantime the Commission has submitted a proposal to amend the Packaging Directive<sup>47</sup>. The proposal envisages a significant increase in the recovery rates (between 60% and 75% by weight for recovery and between 55% and 70% by weight for recycling). Furthermore, the Commission follows a new approach of introducing separate rates for the recycling of various materials. Thus, the recycling rate for metals should reach 50% by weight in the future.

43 COM(92) 278 final, also reproduced without the statement of reasons at OJ 1992 C263 p 1.

i 44 OJ 1994 C137 p 65.

45 COM(1999) 596 final.

46 See Table III.5 of the 1999 interim report (cited in footnote 45, above), which reproduces figures for the United Kingdom for 1997.

47 See the Commission Proposal for a Directive of the European Parliament and of the Council amending Directive (EC) 94/62 on packaging and packaging waste (COM(2001) 729 final, also reproduced without the explanatory memorandum at OJ 2002 C103E p 17).

138. In particular with regard to plastics, a distinction is, moreover, drawn *a*  
between mechanical, chemical and feedstock recycling. Those further  
definitions could be illuminating if taken as sub-categories of recycling.  
However, doubts are engendered by use of a Commission proposal for the  
amendment of the Packaging Directive in order to draw conclusions as to  
the interpretation of the directive in the version in force. *b*

*(2) Interpretation of art 3(7) of the Packaging Directive*

139. The definition of recycling in art 3(7) of the Packaging Directive  
contains three elements of relevance here: recycling is undergone by 'waste  
materials' (*a*); the waste materials are reprocessed for the original or another  
purpose (*b*); and the reprocessing occurs in a production process (*c*). The  
inclusion of organic recycling and exclusion of energy recovery are irrelevant  
to the present case. *c*

*(a) Waste materials*

140. MPR submits that the steel producers do not carry out any recycling if *d*  
only because the starting material supplied by MPR, Grade 3B scrap, is already  
no longer waste.

141. In the definition of recycling, however, the term used is not 'waste' but  
'waste materials' which is not to be found anywhere else in the Packaging  
Directive, or in the Waste Directive. It could be concluded from this choice of  
words that the materials which can undergo recycling derive from (packaging) *e*  
waste but at the time of recycling do not necessarily still have to be waste  
within the meaning of the Waste Directive. Classification of the steel  
producers' activity would then no longer depend on whether or not the Grade  
3B scrap melted down by them is still waste.

142. This must be prefaced by the observation that some language versions *f*  
of the Packaging Directive simply use the term corresponding to 'waste' in  
art 3(7) too (as the French, Spanish, Portuguese and Finnish versions do). The  
majority of the language versions, on the other hand, parallel the English  
version where 'waste materials' appears (as the German, Danish, Swedish,  
Dutch and Italian versions do). It therefore cannot be ruled out that use of the  
term 'waste materials' was intended to indicate that not only waste may *g*  
undergo recycling.

143. A factor running counter to that interpretation is the function, already  
set out, of the definition of recycling in relation to achievement of the recovery  
targets. If material which derives from waste but is no longer waste could still  
be subjected to a recycling operation, there would be the risk that material  
which has already been recycled once would undergo recycling once again. *h*  
That could result in the same material being counted more than once when  
calculating the recovery rate.

144. Furthermore, the definition of packaging waste in art 3(2) of the  
Packaging Directive actually includes 'packaging material' in so far as it is  
covered by the definition of waste in the Waste Directive. In view of that, it is  
hardly possible to proceed on the basis that the term 'waste materials' was *i*  
intended to denote substances which are not waste.

145. One might, however, wonder whether materials which are subjected to  
recycling can be waste at all. Since recycling is described as use in a production  
process, it might be supposed that the element of discarding which is central to  
the definition of waste is missing.



a 146. That proposition is opposed, however, by the fact that all recovery constitutes a beneficial use of waste but the materials to be recovered do not cease to be waste for that reason. On the contrary, in accordance with the court's case law discarding of material takes place precisely when it is recovered or disposed of<sup>48</sup>. Since recycling is to be regarded as a special form of recovery<sup>49</sup>, material which is to be subjected to an appropriate production process cannot cease to be waste solely for that reason.

b 147. The term 'waste materials' emphasises on the contrary only the material-based starting point for recycling. Recycling is underlain by the idea that certain substances are recovered from waste and re-used, so that a materials cycle arises, as the word 'recycling' makes clear.

c 148. Starting out from that idea, the term 'waste materials' makes it clear that the various materials or substances joined together as packaging must be dealt with separately with regard to their recycling. Glass, metal, plastic, paper and so forth can be used only in specific production processes applicable to the material in question. That differentiates recycling, including organic recycling, from energy recovery, for which mixtures of substances can also be used.

d 149. It must therefore be concluded that it was not intended, by employing the term 'waste materials', to indicate that substances which undergo recycling no longer have to be waste. Rather, that term merely takes account of the fact that the materials must be recovered separately.

e (b) Reprocessing for the original purpose or another purpose

150. The concept of reprocessing means that the waste materials are, by their treatment, returned to a state in which they were before they became packaging waste. That process should make the materials re-usable for the original or another purpose.

f 151. The United Kingdom government has put forward the view, as Corus did at the hearing, that the term 'other purposes' must mean purposes similar to the production of new packaging. However, the directive's wording provides no basis for that interpretation. Nor is it even the issue. In accordance with the spirit and purpose of the directive, it is intended merely to preclude the recycling of material for the purpose of then treating it as waste again, that is to say carrying out further recovery operations or even disposing of it.

g

(c) Production process

h 152. The distinguishing feature of a production process is that, with some utilisation of means of production and the use of energy, one or more starting materials are transformed or joined together in such a way that in the end a new product is created. The starting materials can be raw materials or semi-finished products. The new product is characterised by a higher degree of processing than the starting material.

(3) *Classification of the operation carried out by MPR*

i 153. It must be examined whether, on the basis of the interpretation of art 3(7) of the Packaging Directive put forward in this opinion, MPR's activity is to be regarded as recycling.

<sup>48</sup> See the judgment in the *ARCO Chemie* case, cited in footnote 5, above (para 47).

<sup>49</sup> See the 11th recital in the preamble to the Packaging Directive.

154. The materials processed by MPR include a certain proportion of metal packaging waste which indisputably amounts to waste materials falling within the definition that has been elucidated. a

155. It is open to doubt, however, whether MPR carries out reprocessing for the original purpose or for other purposes. For that to be the case, MPR would have to return the material to a state in which it was before it became packaging or packaging waste. b

156. It cannot be reconverted into iron ore. Even if it is assumed that Grade 3B scrap has already been used in producing the packaging, MPR does not return the material to an identical state. Grade 3B scrap is a mixture containing, in addition to steel, a certain amount of foreign substances. The previously processed Grade 3B scrap and the Grade 3B scrap obtained by MPR from packaging waste do not have the same composition. Rather, the material does not attain a previous state until it is pure steel again. c

157. Nor can Grade 3B scrap be used directly for the original purpose of producing new packaging. At most, 'another purpose' is possible, namely use as material for stoking furnaces.

158. The aim of recycling is, however, to recover starting materials. As long as there are still mixtures of substances which must be cleaned and have foreign substances removed from them in further processes, reprocessing has not yet been completed. Rather, subsequent cleaning and separation processes are to be regarded as recovery operations. The production of a substance which must be subjected to further recovery operations cannot amount to 'another purpose' within the meaning of art 3(7) of the Packaging Directive. d

159. As is apparent from the order for reference, Grade 3B scrap contains impurities which must be removed before the steel is re-used. Those foreign substances are not separated from the steel by means of physical or chemical processes until the melting-down stage when they are removed with the slag which forms a sediment on the liquid metal or vaporise. e

160. Finally, the operations carried out by MPR cannot be regarded as a production process. It is true that MPR indisputably uses both machines and energy. The crushing could also be regarded as a kind of transformation. However, the process does not result in a product which displays a higher degree of processing than the starting material. Rather, MPR produces a secondary raw material. That material may admittedly meet the Grade 3B specification established by the industry and therefore be suitable for use in a production process. However, it is still a raw material which—as its appellation already indicates—is unprocessed. f

161. The wording in art 3(1)(b)(i) of the Waste Directive concerning the concept of recycling (see para 6, above) does not preclude that outcome. On MPR's reading of that provision, the objective of recycling is precisely to extract secondary raw materials. g

162. First, it is, however, not entirely clear whether the phrase 'with a view to extracting secondary raw materials' refers to the word 'recycling' or only to the final matter listed, namely 'any other process'. As the Environment Agency correctly points out, on 'reclamation' at any rate, which is also included in the list, no secondary raw material is extracted. h

163. Nor is the term 'recycling' included in art 1 of the Waste Directive where any other definitions applying to the Waste Directive are set out. It is therefore questionable whether the term 'recycling' should be defined at all at this point in the directive. i

a 164. Secondly, regard is to be had to the relationship between the two directives. On the interpretation of the Packaging Directive put forward in this opinion, when a secondary raw material is produced recycling within the meaning of the directive has not yet taken place. That is at any rate the case where the secondary raw material still contains foreign substances which must be removed in subsequent operations. If a different concept of recycling were  
b to underlie the Waste Directive in this regard, the Packaging Directive, as special legislation, would override it.

165. This interpretation also accords with the objectives of the Packaging Directive, in accordance with which recycling is to result in the saving of primary raw materials. Primary raw materials are not saved until steel is obtained from Grade 3B scrap instead of from iron ore.

c 166. Moreover, a narrow interpretation is required in order that the packaging waste processed by MPR does not cease to be waste at a time when it still needs to be controlled as waste. It is apparent from the order for reference that, even after processing by MPR, the material contains impurities which call for special storage precautions, as in the case of waste, in order to  
d avoid soil contamination. In addition, on the subsequent processing of the material the steel producers are subject to integrated pollution control.

167. MPR's treatment of packaging waste is thus not recycling within the meaning of the Packaging Directive because the metal is not completely recovered, foreign substances still requiring removal, and because there is no production process from which a new product comes into being.

e  
(4) *Classification of the operation carried out by the steel producers*

168. The Grade 3B scrap which the steel producers melt down should comprise waste materials derived from packaging. The material processed by MPR originally contained packaging waste. The fact that the operation carried  
f out by MPR is not to be classified as recycling is an indication that the material is still waste.

169. The only issue which might require consideration is whether MPR has recovered the material in another way and it has thereby ceased to be waste. The processing by MPR could for example involve 'recycling/reclamation of metals and metal compounds' in accordance with point R3 of Annex IIB to the  
g Waste Directive.

170. It is, however, to be remembered that the court has held that the carrying out of a complete recovery operation under Annex IIB does not necessarily deprive a substance of its classification as waste<sup>50</sup>. That applies a fortiori where pre-treatment such as sorting and grinding is involved which  
h does not purge the material of all unwanted foreign substances<sup>51</sup>.

171. Since the material is to undergo a further processing operation, in which the steel is rid of the final foreign substances, only when it reaches the steel producers, MPR's treatment has not caused the packaging material to cease to be waste. Regard is also to be had in this connection to the fact that the steel producers are subject to integrated pollution control when they process the  
i Grade 3B material.

50 See the judgment in the *ARCO Chemie* case, cited in footnote 5, above (paras 94, 95).

51 See the judgment in the *ARCO Chemie* case, cited in footnote 5, above (para 96); as to grinding, see the judgment in *Tombesi's* case, cited in footnote 5, above (para 53).



172. The fact that Grade 3B scrap has an economic value and is suitable for use as a raw material does not prevent it from continuing to be waste<sup>52</sup>. In the *Palin Granit* case, the court (at para 37) regarded the degree of likelihood that a substance will be re-used, without any further processing prior to its re-use, as a relevant criterion for determining whether it is waste for the purposes of the Waste Directive<sup>53</sup>.

173. In the present case, the precise likelihood that the Grade 3B material will be further processed by the steel producers immediately after being treated by MPR is unknown. There are, however, some indications that the Grade 3B scrap is used in the steelworks at once.

174. In the *Palin Granit* case, however, the issue to be decided was whether leftover stone which arises as a by-product from quarrying is waste in the first place. In answering that question, different criteria are to be applied from those in the present case, in which it is clear that the material at issue was waste. In order to take account of the protective aim of the Waste and Packaging Directives, it is to be presumed that the material continues to be waste at least until it has demonstrably been fully recovered. As a rule, material ceases to be waste upon being recycled<sup>54</sup>. That is not necessarily the case with other forms of recovery<sup>55</sup>.

175. The treatment by the steel producers also constitutes reprocessing for the original or another purpose. Through re-melting, pure steel is obtained and the material is thus again brought to a state in which it was before the packaging was produced. The ingots, sheets or coils of steel can be used to produce packaging again or other products.

176. Finally, the melting down also forms a production process. In the steelmaking process, using furnaces and energy, (semi-finished) products are made, from the Grade 3B scrap which have a higher degree of processing than the starting material.

177. The answer to the second question should therefore be that the materials have not already been recycled within the meaning of art 3(7) of the Packaging Directive when they have been rendered suitable for use as a feedstock but have been recycled only when they have been used by a steelmaker so as to produce ingots, sheets or coils of steel.

#### *E—The first question*

178. In view of the answer to the second question, it appears no longer necessary to answer the first question. The question whether packaging waste has been recycled is to be determined exclusively on the basis of the Packaging Directive.

179. The question whether and when it ceases to be waste is relevant in relation to recycling only in so far as waste materials form the starting material for recycling. In the absence of recycling by MPR, Grade 3B scrap has—as set out—not ceased to be waste and can be recycled by the steel producers.

<sup>52</sup> See the judgments in *Vessoso's* case, cited in footnote 28, above (paras 12, 13), in *Tombesi's* case, cited in footnote 5, above (para 54) and in the *Inter-Environnement Wallonie* case, cited in footnote 5, above (para 31).

<sup>53</sup> See the judgment in the *Palin Granit* case, cited in footnote 27, above.

<sup>54</sup> See paras 104 and 105, above.

<sup>55</sup> See the case law cited in footnote 26, above.

a 180. The first question might, however, also be understood as meaning that the High Court wishes to ascertain when other materials not covered by the Packaging Directive are to be regarded as recycled.

b 181. In accordance with settled case law, it is first of all solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court of Justice<sup>56</sup>.

c 182. Nevertheless, the court has held that it has no jurisdiction to give a preliminary ruling on a question submitted by a national court where it is quite obvious that the interpretation of Community law, or the decision as to validity of Community law, sought by that court bears no relation to the actual facts of the main action or its purpose or where the problem is hypothetical<sup>57</sup>.

d 183. The parties to the proceedings before the High Court are in dispute as to the entitlement to issue PRNs in respect of the recycling of packaging waste. The order for reference provides no indication at all that the question of when waste other than packaging waste has been recycled is relevant to the decision in the case pending before the High Court.

184. Accordingly, the question should not be answered.

#### VII—CONCLUSION

e 185. On the basis of the foregoing arguments, I propose the following answer to the second question referred for a preliminary ruling:

f Packaging waste made of steel has not already been recycled within the meaning of art 3(7) of European Parliament and Council Directive (EC) 94/62 (on packaging and packaging waste) when it has been rendered suitable for use as a feedstock but has been recycled only when it has been used by a steelmaker so as to produce ingots, sheets or coils of steel.

19 June 2003. **The COURT OF JUSTICE (Fifth Chamber)** delivered the following judgment.

g 1. By order of 9 November 2000, received at the Court of Justice of the European Communities on 30 November 2000, the High Court of Justice of England and Wales, Queen's Bench Division (Administrative Court), referred to the Court of Justice for a preliminary ruling under art 234 EC (formerly art 177 of the EC Treaty) two questions on the interpretation of Council Directive (EEC) 75/442 (on waste) (OJ 1975 L194 p 39), as amended by Council Directive (EEC) 91/156 (OJ 1991 L78 p 32) and Commission Decision (EC) 96/350 (adapting Annexes IIA and IIB to Directive 75/442 on waste) (OJ 1996 L135 p 32) (Directive 75/442), and of European Parliament and Council Directive (EC) 94/62 (on packaging and packaging waste) (OJ 1994 L365 p 10).

h 2. Those questions were raised in proceedings between Mayer Parry Recycling Ltd (Mayer Parry) and the Environment Agency concerning the

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<sup>56</sup> See in particular the judgment in *Union Royale Belge des Sociétés de Football Association ASBL v Bosman, Royal Club Liégeois SA v Bosman, Union des Associations Européennes de Football v Bosman* Case C-415/93 [1996] All ER (EC) 97, [1995] ECR I-4921 (para 59).

<sup>57</sup> See the judgments in *Bosman's* case, cited in footnote 56, above (para 61) and in *Evangelischer Krankenhausverein Wien v Abgabenberufungskommission Wien, Wein & Co Handelsges mbH v Oberösterreichische Landesregierung* Case C-437/97 [2001] All ER (EC) 735, [2000] ECR I-1157 (para 52).

latter's refusal to grant Mayer Parry's application for accreditation as a 'reprocessor', which is defined as a person who carries out the activities of waste recovery or recycling. a

## LEGAL CONTEXT

### *Community legislation* b

#### 3. Article 1 of Directive 75/442 states:

'For the purposes of this Directive:

(a) "waste" shall mean any substance or object in the categories set out in Annex I which the holder discards or intends or is required to discard.

The Commission, acting in accordance with the procedure laid down in Article 18, will draw up, not later than 1 April 1993, a list of wastes belonging to the categories listed in Annex I. This list will be periodically reviewed and, if necessary, revised by the same procedure; c

(b) "producer" shall mean anyone whose activities produce waste ("original producer") and/or anyone who carries out pre-processing, mixing or other operations resulting in a change in the nature or composition of this waste ... d

(c) "disposal" shall mean any of the operations provided for in Annex II, A;

(f) "recovery" shall mean any of the operations provided for in Annex II, B ...' e

4. The recovery operations specified in Annex IIB include, at point R3, '[r]ecycling/reclamation of metals and metal compounds'. The introductory note to Annex IIB explains that that annex is intended to list recovery operations as they occur in practice.

#### 5. Article 3(1) of Directive 75/442 provides: f

'Member States shall take appropriate measures to encourage:

(a) firstly, the prevention or reduction of waste production and its harmfulness, in particular by ...

(b) secondly:

(i) the recovery of waste by means of recycling, re-use or reclamation or any other process with a view to extracting secondary raw materials, or g

(ii) the use of waste as a source of energy.'

#### 6. Article 4 of Directive 75/442 provides:

'Member States shall take the necessary measures to ensure that waste is recovered or disposed of without endangering human health and without using processes or methods which could harm the environment ...' h

Member States shall also take the necessary measures to prohibit the abandonment, dumping or uncontrolled disposal of waste.'

#### 7. Article 8 of Directive 75/442 states:

'Member States shall take the necessary measures to ensure that any holder of waste: i

—has it handled by a private or public waste collector or by an undertaking which carries out the operations listed in Annex II A or B, or  
—recovers or disposes of it himself in accordance with the provisions of this Directive.'



a 8. The first subparagraph of art 9(1) of Directive 75/442 is worded as follows:

b 'For the purposes of implementing Articles 4, 5 and 7, any establishment or undertaking which carries out the operations specified in Annex II A must obtain a permit from the competent authority referred to in Article 6.'

9. Article 10 of Directive 75/442 states:

c 'For the purposes of implementing Article 4, any establishment or undertaking which carries out the operations referred to in Annex II B must obtain a permit.'

10. Article 12 of Directive 75/442 provides:

d 'Establishments or undertakings which collect or transport waste on a professional basis or which arrange for the disposal or recovery of waste on behalf of others (dealers or brokers), where not subject to authorization, shall be registered with the competent authorities.'

11. Article 13 of Directive 75/442 provides:

e 'Establishments or undertakings which carry out the operations referred to in Articles 9 to 12 shall be subject to appropriate periodic inspections by the competent authorities.'

12. Article 15 of Directive 75/442 states:

f 'In accordance with the "polluter pays" principle, the cost of disposing of waste must be borne by:

—the holder who has waste handled by a waste collector or by an undertaking as referred to in Article 9,  
and/or

—the previous holders or the producer of the product from which the waste came.'

13. Article 1 of Directive 94/62 states:

g '1. This Directive aims to harmonize national measures concerning the management of packaging and packaging waste in order, on the one hand, to prevent any impact thereof on the environment of all Member States as well as of third countries or to reduce such impact, thus providing a high level of environmental protection, and, on the other hand, to ensure the functioning of the internal market and to avoid obstacles to trade and distortion and restriction of competition within the Community.

h 2. To this end this Directive lays down measures aimed, as a first priority, at preventing the production of packaging waste and, as additional fundamental principles, at reusing packaging, at recycling and other forms of recovering packaging waste and, hence, at reducing the final disposal of such waste.'

i 14. Article 3 of Directive 94/62 provides:

'For the purposes of this Directive:

1. "packaging" shall mean all products made of any materials of any nature to be used for the containment, protection, handling, delivery and presentation of goods, from raw materials to processed goods, from the

producer to the user or the consumer. "Non-returnable items" used for the same purposes shall also be considered to constitute packaging ... a

2. "packaging waste" shall mean any packaging or packaging material covered by the definition of waste in Directive 75/442/EEC, excluding production residues ...

6. "recovery" shall mean any of the applicable operations provided for in Annex II.B to Directive 75/442/EEC; b

7. "recycling" shall mean the reprocessing in a production process of the waste materials for the original purpose or for other purposes including organic recycling but excluding energy recovery ...'

15. Article 6(1) of Directive 94/62 states:

'In order to comply with the objectives of this Directive, Member States shall take the necessary measures to attain the following targets covering the whole of their territory; c

(a) no later than five years from the date by which this Directive must be implemented in national law, between 50% as a minimum and 65% as a maximum by weight of the packaging waste will be recovered; d

(b) within this general target, and with the same time limit, between 25% as a minimum and 45% as a maximum by weight of the totality of packaging materials contained in packaging waste will be recycled with a minimum of 15% by weight for each packaging material;

(c) no later than 10 years from the date by which this Directive must be implemented in national law, a percentage of packaging waste will be recovered and recycled, which will have to be determined by the Council in accordance with paragraph 3(b) with a view to substantially increasing the targets mentioned in paragraphs (a) and (b).'e

16. The first subparagraph of art 7(1) of Directive 94/62 provides:

'Member States shall take the necessary measures to ensure that systems are set up to provide for: f

(a) the return and/or collection of used packaging and/or packaging waste from the consumer, other final user, or from the waste stream in order to channel it to the most appropriate waste management alternatives;

(b) the reuse or recovery including recycling of the packaging and/or packaging waste collected, g  
in order to meet the objectives laid down in this Directive.'

### *National legislation*

17. Section 93 of the Environment Act 1995 empowers the Secretary of State for the Environment, Transport and the Regions to make regulations imposing producer responsibility obligations on such persons, and in respect of such products or materials, as may be prescribed. That section was enacted to ensure implementation of art 6(1) of Directive 94/62. h

18. The Producer Responsibility Obligations (Packaging Waste) Regulations 1997, SI 1997/648 (the 1997 regulations) were adopted pursuant to ss 93-95 of the 1995 Act. i

19. The 1997 regulations use the definitions of recovery and recycling contained in art 3 of Directive 94/62 and define reprocessor as a person who, in the ordinary course of conduct of a trade, occupation or profession, carries out the activities of recovery or recycling.

- a* 20. Under the 1997 regulations, a waste producer must furnish to the Environment Agency a certificate of compliance stating that he has complied with his recovery and recycling obligations for the relevant year. It is a criminal offence to contravene this provision. In addition, under reg 22 a producer must provide the Environment Agency with information from his records, including the amount in tonnes of packaging waste provided to a reprocessor.
- b* 21. The 1997 regulations allow a producer to fulfil the foregoing obligations by being a member of a registered scheme throughout a relevant year. There is no requirement for the operator of the scheme to furnish the Environment Agency with a certificate of compliance, but he is required, under reg 24 of the 1997 regulations, to maintain records of, and supply the Environment Agency with, certain information, including the amount in tonnes of packaging waste provided to a reprocessor.
- c* 22. The Environment Agency and the Scottish Environment Protection Agency have issued a document called the Orange Book, which establishes a voluntary accreditation system. The system allows accredited reprocessors to issue Packaging Waste Recovery Notes (PRNs) as evidence of delivery of packaging waste to them by producers or registered schemes.
- d* 23. The accreditation system is intended to enable a producer to confirm to the Environment Agency or the Scottish Environment Protection Agency that the packaging waste which he has delivered to a reprocessor has been recovered or recycled, thereby permitting satisfactory monitoring of producers and registered schemes with regard to their obligations under the 1997 regulations. It is also intended to provide a means of establishing consistency with regard to the provision of documentary evidence of recovery and recycling.
- e* 24. Under the system established by the Orange Book, the Environment Agency accepts that PRNs issued by accredited reprocessors contain all the information which producers are normally obliged to supply to it pursuant to reg 22 of the 1997 regulations. Only accredited reprocessors are entitled to issue PRNs. PRNs are transferable and have an economic value. They are sold by accredited reprocessors to producers of packaging waste.
- f* 25. The Environment Agency's policy is to accredit those businesses specified in para 3 of Annex D to the Orange Book, which states that 'for metals (aluminium and steel), the reprocessor will be the business producing the ingots, sheets or coils of aluminium or steel from packaging waste'.
- g* 26. The point in the cycle in respect of which accreditation is granted generally corresponds to the point at which a new product is made that is indistinguishable from one made from materials which have never been waste. The scheme was set up so as to ensure that PRNs would not be issued twice in the course of the processing of the same materials and to reduce the possibility of fraud.
- h* 27. The integrated pollution control regime laid down by the Environmental Protection Act 1990 regulates pollution of the environment from certain prescribed processes, including those relating to the production of steel. Such processes may be carried out only if authorised by the Environment Agency.
- i* Activities which form part of a process subject to integrated pollution control are excluded from the national waste management licensing regime as established by the Waste Management Licensing Regulations 1994, SI 1994/1056, which implement Directive 75/442.



THE MAIN PROCEEDINGS AND THE QUESTIONS REFERRED FOR A PRELIMINARY RULING a

28. Mayer Parry is a company which specialises in the treatment of scrap metal so as to render it suitable for use by steelmakers for the purpose of producing steel.

29. Mayer Parry obtains scrap metal, which includes packaging waste, from industrial and other sources. The scrap metal has commercial value and Mayer Parry generally has to pay to obtain it. Mayer Parry collects, inspects, tests for radiation, sorts, cleans, cuts, separates and shreds (fragmentises) the scrap metal. Through this process, Mayer Parry transforms ferrous scrap metal into material which meets the specifications of Grade 3B (Grade 3B material). It sells the Grade 3B material to steelmakers, which use it to produce ingots, sheets or coils of steel. b

30. In November 1998, Mayer Parry applied to the Environment Agency for accreditation as a reprocessor entitled to issue PRNs under the voluntary scheme established by the Environment Agency and the Scottish Environment Protection Agency, as set out in the Orange Book. c

31. The Environment Agency refused the application by decision of 15 November 1999. Mayer Parry brought judicial review proceedings before the High Court of Justice of England and Wales, Queen's Bench Division (Administrative Court), seeking, inter alia, the annulment of that decision and a declaration that it carries out recovery and recycling within the meaning of Directive 94/62. Corus (UK) Ltd (Corus) and Allied Steel and Wire Ltd (ASW) have intervened in the High Court proceedings. d

32. The High Court states that, during the course of the proceedings before it, it has become apparent that it is necessary to establish whether the activities carried out by Mayer Parry do or do not constitute recycling within the meaning of Directive 94/62. In the light of the arguments of the parties, it is also necessary to consider certain issues arising with regard both to Directive 75/442 and to the relationship between that directive and Directive 94/62. e

33. The High Court also points out that there were earlier proceedings between Mayer Parry and the Environment Agency concerning the definition of 'waste', which gave rise to a first judgment of the High Court, dated 9 November 1998 (see [1999] Env LR 489). Following that judgment, the scrap metal treated by Mayer Parry so as to constitute Grade 3B material was not considered to be waste. f

34. Since the High Court of Justice of England and Wales, Queen's Bench Division (Administrative Court), considered that the case before it necessitated interpretation of the Community rules, it decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling: g

'Where an undertaking deals with packaging materials including ferrous metals, which (when received by that undertaking) constitute waste within the meaning of Article 1(a) of Council Directive 75/442/EEC on waste, as amended by Council Directive 91/156/EEC and Commission Decision 96/350/EC, by means of sorting, cleaning, cutting, crushing, separating and/or baling so as to render those materials suitable for use as a feedstock in a furnace in order to produce ingots, sheets or coils of steel: h

(1) Have those materials been recycled, and do they cease to be waste, for the purposes of Council Directive 75/442, when they have been: i

(a) rendered suitable for use as a feedstock, or

(b) used by a steelmaker so as to produce ingots, sheets or coils of steel?

*a* (2) Have those materials been recycled for the purposes of European Parliament and Council Directive 94/62/EC on packaging and packaging waste when they have been:

(a) rendered suitable for use as a feedstock, or

(b) used by a steelmaker so as to produce ingots, sheets or coils of steel?

*b* OBSERVATIONS SUBMITTED TO THE COURT

35. Mayer Parry contends that Directives 75/442 and 94/62 display four features of importance for the main proceedings. First, Directive 75/442 provides common terminology. Second, it is apparent from those directives that 'the discard rule' affects whether material is classified as waste in that Grade 3B material could be classified as 'waste' only if Mayer Parry were to discard it. Third, the objective of seeking to 'conserve natural resources' is achieved when secondary raw materials, such as the Grade 3B material, are obtained. Fourth, a distinction is drawn in the two directives between 'physical recovery' and 'energy recovery'.

*c* 36. Mayer Parry further contends that, under the court's case law, there are four guiding principles for determining when waste has been recycled. First, the question whether a substance is 'waste' is one for the national court and must be determined in the light of all the circumstances of the case, regard being had to the aim of Directive 75/442 and the need to ensure that its effectiveness is not undermined. Second, any substance is waste if its holder has discarded it or seeks to do so. Third, there is a distinction between 'waste recovery' and 'normal industrial treatment'. Fourth, recovery has been completed where the process has produced a secondary raw material for use in an industrial process. Once a secondary raw material has been produced for use of this kind, such as, in the main proceedings, the Grade 3B material produced by Mayer Parry, recovery and therefore recycling are considered to have been completed and the material is no longer waste.

*d* 37. The Environment Agency argues that the concept of recycling must be given the same meaning in Directive 75/442 and Directive 94/62 because they have the same objectives. Furthermore, since the concept of waste is the same in Directive 75/442 and Directive 94/62, the directives fall to be considered together. The Environment Agency also submits that the question submitted by the High Court concerns the interpretation of Community law and that the answer to such a question cannot be left to the national court.

*e* 38. With regard to determining when waste has been recycled, the Environment Agency argues, first, that a substance does not cease to be waste merely because it is in the possession of someone other than the original producer and that person does not himself intend, and is not required, to discard it. Second, although waste does not necessarily cease to be waste merely because it may be said to have undergone a recovery operation, the description of some of those operations may none the less enable the point at which material ceases to be waste to be determined. Thus, there is no reason to retain waste management controls over materials once they have been used to generate energy (see point R1 of Annex IIB to Directive 75/442) or have been reclaimed, regenerated, recycled, re-used or applied to land resulting in benefit to agriculture or ecological improvement (see points R2 to R10 of that annex), or once any wastes obtained from such operations have been used (see point R11 of the annex).

*f* 39. The Environment Agency contends that the activities of an undertaking such as Mayer Parry do not result in recycling because, as a producer, it carries

out only pre-processing or other operations resulting in a change in the nature or composition of the scrap metal which it handles. a

40. The United Kingdom government contends that, in order to decide the main proceedings, it is sufficient to establish whether Mayer Parry's activities constitute recycling within the meaning of Directive 94/62 and, accordingly, there is no need to consider Directive 75/442. In this connection it states, first, that under Directive 94/62 waste can be recycled only once. Second, Mayer Parry's activities do not satisfy the conditions of the definition of recycling in art 3(7) of Directive 94/62, because they do not constitute a production process and Mayer Parry does not carry out reprocessing in the sense of either a reconstitution of waste materials into some new item or use in a process similar to that in which the raw material is used. Third, art 6(2) of Directive 94/62 shows that recycling occurs only at the stage at which a steelmaker produces ingots, sheets or coils of steel. b  
c

41. The United Kingdom government also submits that, if it is necessary to examine the relationship between Directive 94/62 and Directive 75/442, the operation of the latter allows the member states a margin of appreciation in defining for themselves what constitutes a recovery operation, whereas Directive 94/62 does not. So far as concerns determination of the point at which material ceases to be waste, a different approach is required for each of the directives since they pursue different objectives. d

42. Corus is a steelmaker which uses Grade 3B material produced by Mayer Parry in the manufacture of ingots, coils and sheets of steel. It is accredited as a reprocessor by the Environment Agency and is one of the interveners in the main proceedings. Corus concurs with the observations of the United Kingdom government, stressing, first, that it is sufficient in the present case for the court to rule on Directive 94/62. Second, it submits that its activities constitute recycling for the purposes of Directive 94/62 because they enable the Grade 3B material to be used for production purposes. Third, the mode of proof of recycling is a matter falling within member state competence. e  
f

43. The Danish government indorses the arguments of the Environment Agency, emphasising that the concept of waste must be interpreted broadly in order to protect the environment. In interpreting that concept, weight must be attached to the question whether the waste has undergone such an alteration in its composition that it is possible to speak of a new product which need not be made subject to control by the member states on environmental grounds. It concludes that treatment such as that carried out by Mayer Parry does not constitute recycling within the meaning of Directives 75/442 and 94/62, so that the Grade 3B material produced by it remains waste. g

44. The Netherlands government submits that, for the purposes of Directive 75/442, the concept of recycling covers not only the use of waste in a production process, but also its processing in a recovery operation designed to obtain a secondary raw material. In order to determine whether such an operation has been completed and whether the material is consequently no longer waste, it is necessary to examine whether its holder is liable to 'discard' it within the meaning of art 1(a) of Directive 75/442. In this connection, it should be established whether the recovery operation has yielded material which has the same characteristics and properties as a raw material. h  
i

45. The Netherlands government argues that 'recycling' within the meaning of art 3(7) of Directive 94/62 must, on the other hand, be interpreted differently. It follows from that article that the recycling of packaging waste cannot be completed before the waste—qua secondary raw material—has been



a re-used in a 'production process'. In other words, recycling within the meaning of Directive 94/62 has not yet been completed at the moment when a secondary raw material is obtained, even if the material has, at that moment, ceased to be waste within the meaning of Directive 75/442. Only if the packaging waste is in fact used, as a secondary raw material, in a production process can there be a guarantee that the consumption of primary raw materials will be reduced. Consequently, the Grade 3B material produced by Mayer Parry has been recycled within the meaning of Directive 94/62 only once it has been used by a steelmaker for the production of ingots, sheets or coils of steel.

b  
c 46. The Austrian government contends, first, that the definitions set out in Directive 94/62 cannot deviate from those in Directive 75/442. Second, in order to determine whether waste which has undergone a recovery operation is no longer waste, it is necessary to balance the interests of environmental protection and protection of human health against the promotion of recycling. Third, the recovery of waste need not necessarily be effected in one step. At every individual step it is necessary to examine whether recovery occurs. Mayer Parry accordingly does not carry out recycling, but simply recovery of waste in order to have it undergo recycling within the meaning of Directive 94/62.

d  
e 47. The Commission of the European Communities contends that the definitions of recovery and of recycling, as a mode of recovery, in the context of Directive 75/442 must be interpreted in the same way as the definitions in Directive 94/62. Any divergent interpretation would mean that there is a danger of double-counting an operation for the purpose of achievement of the directives' goals. The Commission further submits that waste can be regarded as having been recycled only when the reprocessing has been completed and a new product created. The material produced by Mayer Parry cannot be regarded as having undergone recycling, that is to say as no longer being waste. The fact that the Grade 3B material produced by Mayer Parry has an economic value and is sold to steel producers does not detract from this conclusion.

f  
g 48. In addition, the Commission stresses that the designation of waste is crucial to the proper operation of waste management control mechanisms. It points out that art 2(a) of Council Regulation (EEC) 259/93 (on the supervision and control of shipments of waste within, into and out of the European Community) (OJ 1993 L30 p 1) incorporates by reference the definition of the term 'waste' contained in art 1(a) of Directive 75/442. Within that framework, substances which are potentially environmentally hazardous may not circulate within the Community and cross its borders without any supervisory or monitoring controls. Thus, scrap metal which has not yet been completely recycled or recovered cannot circulate uncontrolled within the Community.

#### THE COURT'S ANSWER

##### *Preliminary remarks*

i 49. It is necessary, as a preliminary point, to define the link between Directive 75/442 and Directive 94/62, given that the observations submitted to the court differ on this point and the questions relate to both directives.

50. Directive 75/442, in its initial version, was the first directive containing measures designed to harmonise national legislation of the member states with regard to preventing the generation of waste and to its disposal.

51. That directive was substantially amended by Directive 91/156, although its amendment did not fundamentally alter the concept of waste which still

covers substances or objects which the holder discards or intends or is required to discard. The new provisions introduced by Directive 91/156 include art 2(2), according to which specific rules for particular instances, or supplementary rules, on the management of particular categories of waste may be laid down by means of individual directives, thus making Directive 75/442 framework legislation. a

52. Directive 94/62 contains specific rules or rules supplementing Directive 75/442, within the meaning of art 2(2), for the management of a particular category of waste, namely packaging waste. b

53. Nevertheless, Directive 75/442 remains very important for the interpretation and application of Directive 94/62.

54. First, as stated in the seventh recital in its preamble, Directive 94/62 forms part of the Community strategy for waste management set out, *inter alia*, in Directive 75/442. c

55. Second, taking account of the objective, set down in the third recital in the preamble to Directive 91/156, of having common waste terminology, Directive 94/62 contains provisions which expressly refer to Directive 75/442, such as art 3(2) defining packaging waste. d

56. Third, since packaging waste is waste within the meaning of Directive 75/442, the latter remains applicable to such waste in so far as Directive 94/62 does not otherwise provide. That is so, for example, in the case of the requirements set out in arts 4 and 5 of Directive 75/442 as regards waste disposal.

57. Accordingly, Directive 94/62 must be considered to be special legislation (*a lex specialis*) vis-à-vis Directive 75/442, so that its provisions prevail over those of Directive 75/442 in situations which it specifically seeks to regulate. e

#### *Consideration of the questions referred for a preliminary ruling*

58. The main proceedings are concerned with the question whether Mayer Parry, in producing Grade 3B material, carries out a recycling operation enabling it to be accredited as a 'reprocessor' and, therefore, to issue PRNs. f

59. It is common ground between the parties to the main proceedings that the Grade 3B material is produced by Mayer Parry from metal packaging waste. Those proceedings thus relate, in the first place, to the concept of recycling with regard to packaging waste.

60. The second question, which relates to the recycling of packaging waste within the meaning of Directive 94/62, should therefore be answered first. g

#### *Question 2*

61. By its second question, the national court essentially seeks to ascertain whether 'recycling' within the meaning of art 3(7) of Directive 94/62 is to be interpreted as including the reprocessing of metal packaging waste when it has been transformed into a secondary raw material, such as Grade 3B material, or only when it has been used to produce ingots, sheets or coils of steel. h

62. In order to answer this question, it is necessary, first of all, to interpret the term 'recycling', as defined in art 3(7) of Directive 94/62, and secondly, to consider whether it is the production of Grade 3B material or the manufacture of ingots, sheets or coils of steel from metal packaging waste which must be classified as 'recycling'. i

63. It is apparent both from the preambles and from the provisions of Directives 75/442 and 94/62 that recycling is a form of recovery. It follows from art 3(1)(b) of Directive 75/442 and the fourth recital in its preamble that

- a the essential characteristic of a waste recovery operation is constituted by its principal objective that the waste serve a useful purpose in replacing other materials which would have had to be used for that purpose, thereby enabling natural resources to be conserved (see *Abfall Service AG (ASA) v Bundesminister für Umwelt, Jugend und Familie* Case C-6/00 [2002] QB 1073, [2002] ECR I-1961 (para 69)). Recycling as a form of recovery must accordingly pursue the same objective.

b 64. The definition of recycling in art 3(7) of Directive 94/62 sets out the elements which make up such an operation, namely the reprocessing of waste materials, in a production process, and for the original purpose or for other purposes excluding energy recovery.

- c 65. In accordance with that definition, the recycling process has at its base waste material which must be reprocessed. Although the definition does not specify that the waste must be packaging waste, it is clear from the context of Directive 94/62, which relates only to packaging and packaging waste, that only such waste is referred to. By virtue of art 3(2) of Directive 94/62 and art 1(a) of Directive 75/442, to which art 3(2) refers, packaging waste is defined as any packaging or packaging material, excluding production residues, which the holder discards or intends or is required to discard. Packaging waste thus derives from 'packaging' within the meaning of art 3(1) of Directive 94/62.

- d 66. According to the definition of recycling, the packaging waste must undergo 'reprocessing in a production process'. Such a process requires the packaging waste to be worked in order to produce new material or to make a new product. In this sense, recycling can be clearly distinguished from other recovery or waste processing operations referred to by the Community legislation, such as reclamation of raw materials and compounds of raw materials (points R3 to R5 of Annex IIB to Directive 75/442), pre-processing, mixing or other operations, which result only in a change in the nature or composition of the waste (see art 1(b) of Directive 75/442).

- e 67. Also, the waste may be regarded as recycled only if it has been reprocessed so as to obtain new material or a new product 'for the original purpose'. This means that the waste must be transformed into its original state in order to be useable, where appropriate, for a purpose identical to the original purpose of the material from which it was derived. In other words, metal packaging waste must be regarded as recycled where it has undergone reprocessing in the course of a process designed to produce new material or make a new product possessing characteristics comparable to those of the material of which the waste was composed, in order to be able to be used again for the production of metal packaging.

- f 68. The definition of recycling states in addition that the waste may be reprocessed in a production process for the original purpose 'or for other purposes'. It follows that the concept of recycling is not limited to the situation where the new material or new product, possessing characteristics comparable to those of the original material, is used for the same purpose of metal packaging. Use for other purposes also features in the concept.

- g 69. Those other purposes may be of any kind so long as the reprocessing of the packaging waste does not take the form of energy recovery, since that is expressly excluded by art 3(7) of Directive 94/62, and is not effected by means of disposal, a method which would run counter to the very concept of recycling as a form of waste recovery.

- i 70. The definition of recycling, as interpreted in paras 63–69 of this judgment, is consonant with the objectives of Directive 94/62.



71. As is apparent from the first recital in its preamble and art 1(1), Directive 94/62 is intended, first, to prevent and reduce the impact of packaging waste on the environment so as to provide a high level of environmental protection and, second, to ensure the proper functioning of the internal market.

72. Preserving the environment and achieving a high level of environmental protection constitute an objective reflecting the requirements of art 174(1) and (2) EC (formerly art 130r(1) and (2) of the EC Treaty). In order to attain that objective, the Community legislature has laid down minimum targets in art 6(1)(a) of Directive 94/62 in order to ensure that at least one-half by weight of packaging waste will be recovered. Recycling is to be regarded as constituting an important part of recovery in its various forms and, along with re-use, is a form to be given preference, as the eleventh and eighth recitals in the preamble to Directive 94/62 respectively state.

73. By interpreting the definition of recycling in art 3(7) of Directive 94/62 as meaning that the reprocessing of packaging waste must enable new material or a new product possessing characteristics comparable to those of the material from which the waste was derived to be obtained, a high level of environmental protection is ensured.

74. It is only at that stage that the ecological advantages which led the Community legislature to accord a degree of preference to this form of waste recovery are fully achieved, namely a reduction in the consumption of energy and of primary raw materials (see the 11th recital in the preamble to Directive 94/62).

75. Furthermore, it is also only at that stage that the materials at issue cease to be packaging waste and the various waste controls laid down by the Community legislature accordingly lose their rationale. Since the recycling involves the transformation of the packaging waste into new material or a new product possessing characteristics comparable to those of the material from which the waste was derived, the result of that transformation can no longer be classified as 'packaging waste'.

76. Finally, the interpretation of the concept of recycling which results from paras 63–69 of this judgment removes any ambiguity as to the point at which packaging waste must be regarded as recycled and thereby makes it possible to discount the risk of a number of processing operations in respect of the same waste each being taken into account as a recycling operation for the purpose of application of the percentages laid down in art 6(1) of Directive 94/62.

77. Such an interpretation is also consonant with the requirements of clarity and uniformity which flow from the purpose of Directive 94/62 regarding the proper functioning of the internal market, consisting, more specifically, in the avoidance of obstacles to trade and distortion of competition.

78. First, obstacles to trade could arise if different concepts of recycling were applied in the member states, so that the same material or product could be regarded as recycled in one member state—and would accordingly have ceased to be classified as packaging waste and been freed from all waste-specific controls—while that would not be the case in another member state.

79. Second, given that all businesses involved in the production, use, import and distribution of packaging and packaged products must take on the responsibility incumbent upon them under the 'polluter pays' principle (see the 29th recital in the preamble to Directive 94/62), the concept of recycling must be applied uniformly in order that those businesses are in an equal position in the internal market with regard to competition.

a 80. The concept of waste having thus been clarified, it is necessary, secondly, to consider whether Grade 3B material, such as that produced by Mayer Parry in the main proceedings, may be regarded as falling within that concept.

81. It is common ground between the parties to the main proceedings that the materials or objects forming the starting point for Mayer Parry's production of Grade 3B material are packaging waste.

b 82. Mayer Parry collects, inspects, tests for radiation, sorts, cleans, cuts, separates and shreds (fragmentises) metal packaging waste by means of a process as described by the national court in paras 34 and 35 of the order for reference. The national court has established that Mayer Parry, in producing Grade 3B material, reprocesses packaging waste in order to create a secondary raw material suitable for use in substitution for a primary raw material, such as iron ore. It therefore cannot be ruled out from the outset that Mayer Parry reprocesses ferrous metal packaging waste in a production process within the meaning of art 3(7) of Directive 94/62, namely in a process designed to produce new material or to manufacture a new product.

c 83. However, the production of Grade 3B material does not constitute reprocessing of metal packaging waste with the objective of returning that material to its original state, namely steel, and of re-using it in accordance with its original purpose, namely the manufacture of metal packaging, or for other purposes. In other words, the metal packaging waste reprocessed by Mayer Parry does not undergo reprocessing in a production process conferring on the Grade 3B material characteristics comparable to those of the material of which the metal packaging was composed.

d 84. Grade 3B material is a mixture which, apart from ferrous elements, contains impurities (ranging from 3–7% according to the various parties), such as paint and oil, non-metallic materials and undesirable chemical elements, which remain to be removed when the material is used to produce steel. Grade 3B material cannot therefore be used directly for the manufacture of new metal packaging.

e 85. It follows that Grade 3B material such as that produced by Mayer Parry cannot be regarded as recycled packaging waste.

f 86. It accordingly remains to consider whether the use of Grade 3B material in the production of ingots, sheets or coils of steel, in circumstances such as those of the main proceedings, may be regarded as a packaging waste recycling operation.

g 87. That is in fact the case, since the production process in question results in the manufacture of new products, namely ingots, sheets or coils of steel, which possess characteristics comparable to those of the material of which the metal packaging waste incorporated in the Grade 3B material was initially composed and which may be used for a purpose identical to the original purpose of the material from which that waste was derived, namely the metal packaging, or for other purposes.

h 88. It follows from all the foregoing considerations that the answer to the second question must be that 'recycling' within the meaning of art 3(7) of Directive 94/62 is to be interpreted as not including the reprocessing of metal packaging waste when it is transformed into a secondary raw material such as Grade 3B material, but as covering the reprocessing of such waste when it is used to produce ingots, sheets or coils of steel.

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*Question 1*

89. By its first question, the national court essentially seeks to ascertain whether the answer to the second question would be different if the concepts of 'recycling' and 'waste' referred to by Directive 75/442 were taken into account.

90. 'Packaging waste' is defined in art 3(2) of Directive 94/62 as any packaging or packaging material covered by the definition of the term 'waste' in Directive 75/442. 'Packaging waste' within the meaning of Directive 94/62 must therefore be regarded as 'waste' within the meaning of Directive 75/442.

91. First, it is apparent from paras 86 and 87 of this judgment that a manufacturer of ingots, sheets or coils of steel from Grade 3B material that derives from metal packaging waste carries out 'recycling' within the meaning of Directive 94/62. Second, it also follows from para 75 of this judgment that, once packaging waste has been recycled within the meaning of Directive 94/62, it is no longer to be regarded as packaging waste for the purposes of that directive or, therefore, of Directive 75/442. Accordingly, ingots, sheets or coils of steel manufactured from Grade 3B material which derives from metal packaging waste that has been recycled is no longer 'packaging waste' for the purposes of Directives 94/62 and 75/442.

92. Furthermore, recycling is not defined in Directive 75/442. Should that term, as envisaged by Directive 75/442, not have the same meaning as the term appearing in Directive 94/62, only the latter term would be applicable to packaging waste. As is clear from paras 53 and 57 of this judgment, even though Directive 75/442 is the framework legislation and is relevant when interpreting and applying Directive 94/62, that does not prevent the provisions of the latter, as special legislation, from prevailing over those of Directive 75/442.

93. The answer to the first question must therefore be that the answer to the second question would be no different if the concepts of 'recycling' and 'waste' referred to by Directive 75/442 were taken into account.

*COSTS*

94. The costs incurred by the United Kingdom, Danish, Netherlands and Austrian governments and the Commission, which have submitted observations to the court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds, the Court of Justice (Fifth Chamber), in answer to the questions referred to it by the High Court of Justice of England and Wales, Queen's Bench Division (Administrative Court), by order of 9 November 2000, hereby rules:

(1) 'Recycling' within the meaning of art 3(7) of European Parliament and Council Directive (EC) 94/62 (on packaging and packaging waste) is to be interpreted as not including the reprocessing of metal packaging waste when it is transformed into a secondary raw material such as material meeting the specifications of Grade 3B, but as covering the reprocessing of such waste when it is used to produce ingots, sheets or coils of steel.

(2) That interpretation would be no different if the concepts of 'recycling' and 'waste' referred to by Council Directive (EEC) 75/442 (on waste) were taken into account.



**R (on the application of Bidar) v  
Ealing London Borough Council and  
another**  
(Case C-209/03)

COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES (GRAND CHAMBER)

JUDGES SKOURIS (PRESIDENT), JANN, TIMMERMANS, ROSAS, LENAERTS  
(RAPPORTEUR) AND BORG BARTHET (PRESIDENTS OF CHAMBERS), PUISOCHET,  
SCHINTGEN, COLNERIC, ILEŠIČ, MALENOVSKÝ, KLUČKA AND LÖHMUS  
ADVOCATE GENERAL GEELHOED

28 SEPTEMBER, 11 NOVEMBER 2004, 15 MARCH 2005

*European Community – Discrimination – Discrimination on grounds of nationality –  
Provision of assistance with maintenance costs for students – Whether assistance  
outside prohibition on discrimination on grounds of nationality – Article 12 EC  
(formerly EC Treaty, art 6).*

B, a French national, had come to the United Kingdom where he had lived with his grandmother as her dependant. He had completed his secondary education in the United Kingdom without recourse to social assistance. He then started a tertiary education course. Under the Education (Student Support) Regulations 2001<sup>a</sup> a person was eligible for a student loan if he was ordinarily resident in England and Wales on the first day of the first academic year of the course and had been ordinarily resident throughout the preceding three-year period and his residence during that period had not been wholly or mainly for the purpose of receiving full-time education. Consequently, B's application for financial assistance in respect of his maintenance costs, in the form of a student loan, was refused on the grounds that he was not settled in the United Kingdom. B brought proceedings against that refusal, contending, inter alia, that by making the grant of a student loan conditional on settlement in the United Kingdom, the 2001 regulations had introduced discrimination prohibited by art 12 EC<sup>b</sup> (formerly art 6 of the EC Treaty). Article 3<sup>c</sup> of Council Directive (EEC) 93/96 (on the right of residence for students) provided that that directive did not establish any entitlement to the payment of maintenance grants by the host member state on the part of students benefiting from the right of residence. In those circumstances, the High Court of England and Wales decided to stay the proceedings and refer three questions to the Court of Justice of the European Communities. The first question related to whether, given developments in the law of the European Union and previous decisions of the Court of Justice, assistance with maintenance costs for students attending university courses, given by way of either (a) subsidised loans, or (b) grants, continued to fall outside the scope of the EC Treaty for the purposes of art 12 EC and the prohibition on discrimination on grounds of nationality? Secondly, if assistance with maintenance costs for students in the

<sup>a</sup> The regulations, so far as material, are set out at judgment paras 13–16, below

<sup>b</sup> Article 12 EC, so far as material, is set out at judgment para 3, below

<sup>c</sup> Article 3 of the directive is set out at judgment para 10, below

form of grants or loans now fell within the scope of art 12 EC, what was the criteria to be applied in determining whether the conditions governing eligibility for such assistance were based on objectively justifiable considerations not dependent on nationality? Finally, whether art 12 EC could be relied upon to claim entitlement to assistance with maintenance costs from a date prior to the date of the judgment of the Court of Justice in the present case and, if not, whether an exception should be made for those who initiated legal proceedings before that date? a  
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**Held** — (1) Assistance, whether in the form of subsidised loans or of grants, provided to students lawfully resident in the host member state to cover their maintenance costs fell within the scope of application of the EC Treaty for the purpose of the prohibition of discrimination as laid down in the first paragraph of art 12 EC. A national of a member state who lived in another member state where he pursued and completed his secondary education, without it being objected to that he did not have sufficient resources or sickness insurance, enjoyed a right of residence in that state. Article 3 of Directive 93/96 did not preclude a national of a member state who was lawfully resident in the territory of another member state where he intended to start or pursue higher education from relying during that residence on the fundamental principle of equal treatment enshrined in the first paragraph of art 12 EC (see judgment paras 36, 42, 46, 48, below); *Lair v Universität Hannover* Case 39/86 [1988] ECR 3161 and *Brown v Secretary of State for Scotland* Case 197/86 1989 SLT 402 distinguished. c  
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(2) The first paragraph of art 12 EC had to be interpreted as precluding national legislation which granted students the right to assistance covering their maintenance costs only if they were settled in the host member state, while precluding a national of another member state from obtaining the status of settled person as a student even if that national was lawfully resident and had received a substantial part of his secondary education in the host member state and had consequently established a genuine link with the society of that state. It was permissible for a member state to ensure that the grant of assistance to cover the maintenance costs of students from other member states did not become an unreasonable burden which could have consequences for the overall level of assistance which might be granted by that state. Although it was legitimate for a member state to grant assistance only to students who had demonstrated a certain degree of integration into the society of that state, a member state could not require students to establish a link with its employment market, as a student's situation was not comparable to that of an applicant for, inter alia, a jobseeker's allowance. The existence of a certain degree of integration might be regarded as established by a finding that the student in question had resided in the host member state for a certain length of time. It was common ground that the rules at issue in the main proceedings precluded any possibility of a national of another member state obtaining settled status as a student. They therefore made it impossible for such a national, whatever his actual degree of integration into the society of the host member state, to satisfy that condition and hence to enjoy the right to assistance to cover his maintenance costs. Such treatment could not be regarded as justified by the legitimate objective which those rules sought to secure as it prevented a student, in the position of B, from being able to pursue his studies under the same conditions as a student who was a national of that state and was in the same situation (see judgment paras 56–59, 61–63, below). f  
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- a** (3) There was no need to limit the temporal effects of the present judgment. In the instant case, the information provided by various member state governments was not capable of supporting their argument that if its effects were not limited in time, the judgment might entail significant financial consequences for the member states (see judgment paras 70, 71, below).
- b** **Notes**  
For admission to the United Kingdom under European law, see 4(2) *Halsbury's Laws* (4th edn 2002 reissue) para 225.
- Cases cited**
- c** *Administration des Douanes et Droits Indirects v Legros* Case C-163/90 [1992] ECR I-4625, ECJ.  
*Amministrazione delle Finanze dello Stato v Denkavit Italiana Srl* Case 61/79 [1980] ECR 1205, ECJ.  
*Baumbast v Secretary of State for the Home Dept* Case C-413/99 [2003] ICR 1347, [2002] ECR I-7091, ECJ.
- d** *Bernini v Minister van Onderwijs en Wetenschappen* Case C-3/90 [1992] ECR I-1071, ECJ.  
*Bickel (Criminal proceedings against)* Case C-274/96 [1998] ECR I-7637, ECJ.  
*Blaizot v University of Liège* Case 24/86 [1988] ECR 379, ECJ.  
*Brown v Secretary of State for Scotland* Case 197/86 1989 SLT 402, [1988] ECR 3205, ECJ.
- e** *Collins v Secretary of State for Work and Pensions* Case C-138/02 [2004] All ER (EC) 1005, ECJ.  
*D'Hoop v Office National de l'Emploi* Case C-224/98 [2003] All ER (EC) 527, [2002] ECR I-6191, ECJ.
- f** *Echternach v Netherlands Minister for Education and Science* Joined cases 389/87 and 390/87 [1989] ECR 723, ECJ.  
*European Commission v Italy* Case C-212/99 [2001] ECR I-4923, ECJ.  
*Garcia Avello v Belgium* Case C-148/02 [2004] All ER (EC) 740, [2003] ECR I-11613, ECJ.  
*Gravier v City of Liège* Case 293/83 [1985] ECR 593, ECJ.
- g** *Grzelczyk v Centre Public d'Aide Sociale d'Ottignies-Louvain-la-Neuve* Case C-184/99 [2003] All ER (EC) 385, [2001] ECR I-6193, ECJ.  
*Kaba v Secretary of State for the Home Dept* Case C-356/98 [2000] All ER (EC) 537, [2000] ECR I-2623, ECJ.  
*Lair v Universität Hannover* Case 39/86 [1988] ECR 3161, ECJ.
- h** *Leo (di) v Land Berlin* Case C-308/89 [1990] ECR I-4185, ECJ.  
*Martínez Sala v Freistaat Bayern* Case C-85/96 [1998] ECR I-2691, ECJ.  
*Meeusen v Hoofddirectie van de Informatie Beheer Groep* Case C-337/97 [1999] ECR I-3289, ECJ.  
*Meints v Minister van Landbouw, Natuurbeheer en Visserij* Case C-57/96 [1997] ECR I-6689, ECJ.
- j** *Ninni-Orasche v Bundesminister für Wissenschaft, Verkehr und Kunst* Case C-413/01 [2004] All ER (EC) 765, ECJ.  
*Raulin v Minister van Onderwijs en Wetenschappen* Case C-357/89 [1992] ECR I-1027, ECJ.  
*Sotgiu v Deutsche Bundespost* Case 152/73 [1974] ECR 153, ECJ.  
*Sürül v Bundesanstalt für Arbeit* Case C-262/96 [1999] ECR I-2685, ECJ.



*Trojani v Centre Public d'Aide Sociale de Bruxelles (CPAS)* Case C-456/02 [2004] All ER (EC) 1065, ECJ. a

## Reference

This reference for a preliminary ruling concerned the interpretation of the first paragraph of arts 12 and 18 EC (formerly arts 6 and 8a of the EC Treaty). The reference was made in the course of proceedings between Dany Bidar and the London Borough of Ealing and the Secretary of State for Education and Skills concerning the refusal of his application for a subsidised student loan to cover his maintenance costs. Observations were submitted on behalf of: Mr Bidar, by R Scannell and M Soorjoo, Barristers, and J Luqmani, Solicitor; the United Kingdom government, by R Caudwell, acting as agent, E Sharpston QC and C Lewis, Barrister; the Danish government, by J Molde, acting as agent; the German government, by C-D Quassowski and A Tiemann, acting as agents; the French government, by G de Bergues and C Bergeot-Nunes, acting as agents; the Netherlands government, by C M Wissels and H G Sevenster, acting as agents; the Austrian government, by E Riedl, acting as agent; the Finnish government, by T Pynnä, acting as agent; the Commission of the European Communities, by N Yerrell and M Condou, acting as agents. The language of the case was English. The facts are set out in the opinion of the Advocate General. b  
c  
d

11 November 2004. **The Advocate General (LA Geelhoed)** delivered the following opinion<sup>1</sup>. e

## I—INTRODUCTION

1. In its judgments of 21 June 1988 in *Lair v Universität Hannover* and *Brown v Secretary of State for Scotland*, the Court of Justice of the European Communities ruled that at the stage of development of Community law at the material time, financial assistance granted to students for maintenance costs and training, as opposed to assistance to cover costs related to access to education, fell in principle outside the scope of the EEC Treaty<sup>2</sup>. In view of the evolution of Community law since that time, the High Court of Justice of England and Wales, Queen's Bench Division (Administrative Court), in this preliminary reference essentially asks the Court of Justice whether such assistance with maintenance costs for students, in either the form of grants or loans, continues to fall outside the scope of the EC Treaty for the purposes of the application of art 12 EC (formerly art 6 of the EC Treaty) and if not, under which conditions the member states may restrict eligibility for such assistance. f  
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## II—RELEVANT PROVISIONS h

### A—Community law

2. The relevant provisions of Community law in this case are art 12 EC and art 18(1) EC (formerly art 8a(1) of the EC Treaty) (and art 3 of Council Directive (EEC) 93/96 (on the right of residence for students)<sup>3</sup> (hereinafter Directive 93/96); i

<sup>1</sup> Original language: English.

<sup>2</sup> Case 39/86 [1988] ECR 3161 (para 15 of the judgment) and Case 197/86 1989 SLT 402, [1988] ECR 3205 (para 18 of the judgment).

<sup>3</sup> OJ 1993 L317 p 59.

a

*Article 12*

Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited ...

b

*Article 18*

1. Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect.'

Preamble to Directive 93/96, seventh recital:

c

'Whereas, in the present state of Community law, as established by the case law of the Court of Justice, assistance granted to students, does not fall within the scope of the [EEC] Treaty within the meaning of Article 7 thereof [now art 12 EC].'

Article 3 of Directive 93/96:

d

'This Directive shall not establish any entitlement to the payment of maintenance grants by the host Member State on the part of students benefiting from the right of residence.'

*B—National law*

e

3. The national provisions concerned are laid down in the Education (Student Support) Regulations 2001, SI 2001/951 (hereinafter the Student Support Regulations). Under the Student Support Regulations, assistance with maintenance costs for students is provided by way of loans for living costs. The amount of the loan depends upon a number of factors such as whether the student lives at home with his or her parents and whether the student lives in London or elsewhere. A student is eligible automatically for 75% of the maximum amount of the loan available and the eligibility to receive the 25% depends upon the financial position of the student and the student's parents or partner. The loan is provided at an interest rate which is linked to the rate of inflation and the rate of interest is, therefore, below the rate which would normally be payable on a commercial loan. The loan is repayable after the student completes his or her course and providing that the student is earning in excess of £10, 000. If that is the case, the student pays 9% per annum of the income earned above £10, 000 until the loan is paid.

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4. Nationals of a member state are only eligible to receive a loan under the Student Support Regulations if:

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(1) they are settled in the United Kingdom within the meaning of the domestic law (the Immigration Act 1971), that is

—that they are ordinarily resident in the United Kingdom and are not subject to restrictions as to the period for which they may remain in the United Kingdom;

—and they are resident in England or Wales on the first day of the first academic year of the course

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—and they have been resident in the United Kingdom for the three years prior to the first day of the course;

or

(2) the student is an EEA migrant worker entitled to support by virtue of art 7(2) or (3) of Council Regulation (EEC) 1612/68 as extended by the EEA Agreement signed at Oporto on 2 May 1992.

A person is only regarded as being settled if he has resided in the United Kingdom for four years. Time spent for the purpose of receiving full-time education is not taken into consideration in calculating the period of residence. a

### III—FACTS, PROCEDURE AND PRELIMINARY QUESTIONS

5. Mr Dany Bidar is a French national, born in Paris in August 1983. It appears from the documents in the case file that in August 1998 he moved to the United Kingdom with his sister and mother, who was seriously ill at the time, to stay with Bidar's grandmother. Following the decease of his mother in December 1999, Bidar's grandmother became his legal guardian. Bidar attended a High School in London where he completed his secondary education in June 2001 and acquired the necessary qualifications to gain access to university in the United Kingdom. During that period he was supported financially by his grandmother and he never applied for social assistance. As he intended to begin a course of university studies in the academic year beginning in September 2001, Bidar applied to the London Borough of Ealing for funding for these studies. He was granted assistance with his tuition fees, but was refused a loan for maintenance costs as he was not 'settled' in the United Kingdom, not yet having fulfilled a period of residence of four years as required by the domestic provisions. In fact, as a student he would not be able to acquire that status given that the period spent attending full-time education is not recognised for that purpose. Bidar began his studies in economics in September 2001 at University College London. b  
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6. Bidar challenged the decision refusing him a student loan for maintenance costs claiming that the settlement requirement in the regulations constitutes a discrimination within the meaning of art 12 EC in conjunction with art 18 EC. The defendant in the main proceedings contends that assistance with maintenance costs falls outside the scope of art 12 EC, as was confirmed by the court in *Lair's* case and *Brown's* case. However, in view of the fact that Community law has developed since these judgments, most notably through the insertion of the provisions on citizenship and on education in the EC Treaty by the Treaty of Maastricht, which entered into force on 1 November 1993, the High Court decided to stay the proceedings ([2001] EWHC Admin 1177) and refer the following preliminary questions to the court under art 234 EC (formerly art 177 of the EC Treaty): e  
f

(1) Whether, given the decisions of the Court of Justice of the European Communities in ... *Lair* ... and ... *Brown* ... and developments in the law of the European Union, including the adoption of Article 18 EC and developments in relation to the competence of the European Union in the field of education, assistance with maintenance costs for students attending university courses, such assistance being given by way of either (a) subsidised loans or (b) grants, continues to fall outside the scope of the application of the EC Treaty for the purposes of Article 12 EC and the prohibition on discrimination on grounds of nationality? g  
h

(2) If either part of question (1) is answered in the negative, and if assistance with maintenance costs for students in the form of grants or loans [does] now fall within the scope of Article 12 EC, what criteria should the national court apply in determining whether the conditions governing eligibility for such assistance are based on objectively justifiable considerations not dependent on nationality? i

(3) If either part of question (1) is answered in the negative, whether Article 12 EC may be relied upon to claim entitlement to assistance with



a maintenance costs from a date prior to the date of the judgment of the Court of Justice in the present case and, if [not], whether an exception should be made for those who initiated legal proceedings before that date?

b 7. Written submissions under art 20 of the Statute of the Court of Justice were presented by the applicant in the main proceedings, the Austrian, Danish, Finnish, French, German, Netherlands and United Kingdom governments and by the Commission of the European Communities. Further observations were made by Bidar, by the United Kingdom and Netherlands governments and by the Commission at the oral hearing on 28 September 2004.

c 8. On 16 June 2004, the court addressed a series of written questions to the United Kingdom government aimed at elucidating the requirement that, in order to be eligible for a student loan, a person must be 'ordinarily resident' within the United Kingdom or the European Economic Area depending on his status as a non-worker or a worker respectively. The answers to these questions were received by the court on 21 July 2004.

d IV—GENERAL CONTEXT: THE LAW AS IT STANDS

A—Community law and assistance with study costs

e 9. In order to place the questions raised by the High Court in a broader perspective, it is useful to view them against the background of how eligibility of students for financial support with study costs by the host member state hitherto has been governed by Community law. In this respect two points of reference should be distinguished. The first of these is the object of the financial support, which concerns the scope *ratione materiae* of the EC Treaty. The second is the capacity in which persons may be eligible for financial support, the scope *ratione personae* of the EC Treaty.

f 10. The questions referred by the High Court focus mainly on whether grants or (subsidised) loans provided by the national authorities for covering students' maintenance costs, as distinct from assistance with tuition fees, now fall within the scope *ratione materiae* of the EC Treaty for the purposes of applying the prohibition of discrimination on grounds of nationality contained in art 12 EC. Since the court's judgment in *Gravier v City of Liège*<sup>4</sup>, it is well settled that, as access to education leading to professional qualifications is within the scope of the EC Treaty, nationals of the member states are entitled to equal treatment in respect of all conditions governing such access. The implication of this is that not only may no distinction be made between national students and students from other member states in respect of the level of enrolment fees and other access-related costs, any assistance provided to cover these costs must also be made available under equal conditions to students from all member states<sup>5</sup>. In accordance with this principle Bidar was indeed granted assistance with the tuition fees for his course of studies at University College London.

g 11. In the case law dealing explicitly with this issue, assistance with maintenance costs, by contrast, was considered as falling outside the scope *ratione materiae* of the E(EC) Treaty for persons who did not qualify as workers within the meaning of art 39 EC (formerly art 48 of the EC Treaty).  
i On the one hand, this subject was considered to be 'a matter of educational

4 Case 293/83 [1985] ECR 593.

5 See e.g. *Raulin v Minister van Onderwijs en Wetenschappen* Case C-357/89 [1992] ECR I-1027 (para 28 of the judgment).

policy, which is not as such included in the spheres entrusted to the Community institutions' and, on the other, it was regarded as 'a matter of social policy, which falls within the competence of the Member States in so far as it is not covered by specific provisions of the EEC Treaty'<sup>6</sup>. a

12. As the status enjoyed by a person under Community law, therefore, determines his entitlement to benefits and other social advantages in the host member state, it is necessary to distinguish between the various capacities in which nationals of member states intending to pursue a course of studies in another member state than their state of origin, may be resident in that member state. In this respect a broad distinction must be made between economically active persons (workers and self-employed persons) and their children, on the one hand, and economically inactive persons, on the other hand. b

13. Where a student enjoys the status of a worker within the meaning of art 39 EC, he is entitled under art 7(2) of Council Regulation (EEC) 1612/68<sup>7</sup> to social benefits provided by the host member state on an equal footing with nationals of that member state. The court has confirmed on various occasions that grants awarded for maintenance and training with the view to the pursuit of university studies leading to a professional qualification constitutes a social advantage within the meaning of art 7(2) of that regulation<sup>8</sup>. c

14. The cases in this field generally involved marking out what might be called the outer limits of the concept of a Community worker given the often rather marginal character of the work performed<sup>9</sup>. The court also considered the situation of a person who had terminated an employment relationship in order to take up a course of studies. Here the court ruled that a worker retains this status on taking up full-time education where there is continuity between the previous occupational activity and the course of study, unless the migrant worker has become involuntarily unemployed<sup>10</sup>. d

15. Under art 12 of Regulation 1612/68, the children of migrant workers similarly are entitled to equal treatment in respect of the social advantages accorded to nationals aimed at facilitating following education<sup>11</sup>. This applies even where the parent worker has returned to his country of origin and the child cannot continue his studies there because of a lack of co-ordination of school diplomas<sup>12</sup> and where the child intends to follow a course of studies in his home state if nationals of the host member state are eligible for financial support for studies outside that state<sup>13</sup>. e

6 See e.g. *Lair's case*, cited in footnote 2, above (para 15 of the judgment). f

7 On freedom of movement for workers within the Community (OJ English Sp Edn 1968 (II) p 475).

8 See *Lair's case*, cited in footnote 2, above (paras 23, 24, 28 of the judgment), *Brown's case*, cited in footnote 2, above (para 25 of the judgment) and *Bernini v Minister van Onderwijs en Wetenschappen* Case C-3/90 [1992] ECR I-1071 (para 23 of the judgment). g

9 See e.g. *Brown's case*, cited in footnote 2, above, *Raulin's case*, cited in footnote 5, above and *Bernini's case*, cited above.

10 See *Lair's case*, cited in footnote 2, above (para 37 of the judgment). h

11 See e.g. *Echternach v Netherlands Minister for Education and Science* Joined cases 389/87 and 390/87 [1989] ECR 723 and *Meeusen v Hoofdinspectie van de Informatie Beheer Groep* Case C-337/97 [1999] ECR I-3289. i

12 See *Echternach's case* (para 21 of the judgment).

13 See *di Leo v Land Berlin* Case C-308/89 [1990] ECR I-4185 (para 15 of the judgment).

a 16. As is apparent from the court's judgment in *Meeusen's* case<sup>14</sup>, these considerations apply mutatis mutandis to self-employed persons and their children.

b 17. Within the category of economically inactive students, a subdivision must be made between persons who move to another member state for the sole or primary purpose of following education in that member state and persons who move to a member state for other reasons and subsequently decide to take up their studies in the host member state.

c 18. The position of students of the first group who move to another member state in order to pursue a full course of studies has been regulated in Directive 93/96. This directive ensures that these students have a right of residence for the duration of their studies in accordance with the court's case law<sup>15</sup>. It also provides that member states may require of students who are nationals of a different member state and who wish to exercise the right of residence on their territory, first, that they satisfy the relevant national authority that they have sufficient resources to avoid becoming a burden on the social assistance system of the host member state during their period of residence, next, that they be enrolled in a recognised educational establishment for the principal purpose of following a vocational training course there and, lastly, that they be covered by sickness insurance in respect of all risks in the host member state<sup>16</sup>. Furthermore, in what may be regarded as a codification of the court's judgments in *Lair's* case and *Brown's* case, art 3 of Directive 93/96 lays down explicitly that the directive shall not establish any entitlement to the payment of maintenance grants on the part of students benefiting from the right of residence.

f 19. The second group of economically inactive persons consists of persons who have arrived in a member state, not as a worker or as a student intending to take up vocational training, but as an EU citizen making use of the right to move and reside guaranteed by art 18 EC and regulated in more detail in Council Directive (EEC) 90/364<sup>17</sup>. Unlike persons coming within the ambit of Directive 93/96, EU citizens making use of their right to move to another member state and to stay there retain their right of residence as long as they fulfil the conditions laid down in Directive 90/364. Their motives are immaterial in this respect.

g 20. Where persons in this second category decide to pursue their studies in the host member state, it is clear that, under the *Gravier* and *Raulin* case law, they are entitled to assistance with the costs of access to education. This is not disputed in the present case and, as was mentioned earlier, Bidar did receive financial support for this purpose. However, in the absence of a provision equivalent to art 3 of Directive 93/96 in Directive 90/364, the situation as to the entitlement of students, who are already resident in the host member state as EU citizens, to assistance with maintenance costs remains uncharted territory. In order to obtain some guidance for filling this gap in Directive 90/364 in respect of the legal position of EU citizens in this situation, it is

i 14 Cited in footnote 11, above (paras 27–29 of the judgment).

15 See *Raulin's* case cited in footnote 5, above (paras 33, 34 of the judgment).

16 See art 1 of the directive, as reproduced by the court in *Grzelczyk v Centre Public d'Aide Sociale d'Ottignies-Louvain-la-Neuve* Case C-184/99 [2003] All ER (EC) 385, [2001] ECR I-6193 (para 38 of the judgment).

17 On the right of residence (OJ 1990 L180 p 26) (hereinafter Directive 90/364).



necessary to have regard to the court's case law on EU citizenship under art 17 EC (formerly art 8 of the EC Treaty) and art 18 EC and social benefits. a

*B—Citizenship and social benefits: case law*

21. In various cases the court has had occasion to consider whether EU citizens could derive entitlement to social benefits of various kinds from art 18(1) EC. I refer in particular to *Martínez Sala*, *Grzelczyk*, *D'Hoop*, *Collins* and *Trojani*.<sup>18</sup> b

22. In its judgments in cases concerning art 18(1) EC, the court has repeatedly emphasised that Union citizenship is destined to be the fundamental status of nationals of the member states, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for.<sup>19</sup> Citizens lawfully resident in the territory of a member state can rely on art 12 EC in all situations which fall within the scope *ratione materiae* of Community law.<sup>20</sup> Those situations include those involving the exercise of the fundamental freedoms guaranteed by the EC Treaty and those involving the exercise of the right to move and reside freely in another member state as conferred by art 18(1) EC. This right to reside is, moreover, conferred directly on every citizen of the Union by a clear and precise provision of the EC Treaty, as the court held in *Baumbast v Secretary of State for the Home Dept*.<sup>21</sup> It can therefore be invoked by individuals in proceedings before the national courts. c

23. In its first judgment in this field, *Martínez Sala's* case, the court ruled— d

'that a citizen of the European Union ... lawfully resident in the territory of the host Member State, can rely on Article [12 EC] in all situations which fall within the scope *ratione materiae* of Community law, including the situation where that Member State delays or refuses to grant to that claimant a benefit that is provided to all persons lawfully resident in the territory of that State on the ground that the claimant is not in possession of a document which nationals of that same State are not required to have and the issue of which may be delayed or refused by the authorities of that State.'<sup>22</sup> e

As the child-raising allowance at issue in that case was covered by both Council Regulation (EEC) 1408/71<sup>23</sup> and Regulation 1612/68 and was therefore within the scope *ratione materiae* of the EC Treaty, Mrs Martínez Sala was entitled to that benefit on the same conditions as German nationals. f

24. *Grzelczyk's* case concerned a French student studying in Belgium who, after having managed to provide for himself in the first three years of his studies, in his fourth and final year applied for a minimum subsistence allowance (*minimex*), as the combination of work and studies would be too g

18 *Martínez Sala v Freistaat Bayern* Case C-85/96 [1998] ECR I-2691, *Grzelczyk's* case, cited in footnote 16, above, *D'Hoop v Office National de l'Emploi* Case C-224/98 [2003] All ER (EC) 527, [2002] ECR I-6191, *Collins v Secretary of State for Work and Pensions* Case C-138/02 [2004] All ER (EC) 1005 and *Trojani v Centre Public d'Aide Sociale de Bruxelles* (CPAS) Case C-456/02 [2004] All ER (EC) 1065.

19 See e.g. *Grzelczyk's* case, cited in footnote 16, above (para 31 of the judgment). i

20 See e.g. *Martínez Sala's* case cited in footnote 18, above (para 63 of the judgment).

21 Case C-413/99 [2003] ICR 1347, [2002] ECR I-7091 (para 84 of the judgment).

22 See para 63 of the judgment.

23 On the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended and updated by Council Regulation (EC) 118/97 (OJ 1997 L28 p 1).

a demanding at that stage of his course. This benefit was first granted and then withdrawn as he was not a worker, but a student, and he did not have Belgian nationality. Although recognising the conditions imposed by art 1 of Directive 93/96 on a student's right to reside in another member state and that under art 3 of that directive students are not entitled to maintenance grants by the host member state, the court observed that there are no provisions in  
b the directive that preclude those to whom it applies from receiving social security benefits<sup>24</sup>. Where this implied Grzelczyk becoming a burden on the social assistance system, thus no longer fulfilling one of the conditions of residence, the court pointed out that Directive 93/96 only requires students to make a declaration that they have sufficient resources at the beginning of their stay in the host member state and that their financial position may change for  
c reasons beyond their control. The fact that the directive aims at preventing students from becoming an 'unreasonable' burden on the public finances of the host member state means that the directive 'accepts a certain degree of financial solidarity between nationals of a host member state and nationals of other member states, particularly if the difficulties which a beneficiary of the right of residence encounters are temporary'<sup>25</sup>. As it had been established in  
d earlier case law that the minimex was within the scope *ratione materiae* of the EC Treaty and the conditions governing eligibility were contrary to art 12 EC, Grzelczyk was entitled to this benefit.

25. In *D'Hoop's* case, a Belgian student was refused a tideover allowance (an unemployment benefit granted to young people who have just completed their  
e studies and are seeking their first employment) by the Belgian authorities on the sole ground that she had completed her secondary education in France. Here, the court considered that making eligibility for this allowance conditional on the school diploma having been obtained in Belgium places certain of its nationals at a disadvantage simply because they have exercised their freedom to move in order to pursue education in another member state.  
f 'Such inequality of treatment is contrary to the principles which underpin the status of citizen of the Union, that is, the guarantee of the same treatment in law in the exercise of the citizen's freedom to move.'<sup>26</sup> The court did accept, however, that in view of the aim of the tideover allowance to facilitate for young people the transition from education to the employment market, it is legitimate for the national legislature to wish to ensure that there is a real link  
g between the applicant for that allowance and the geographic employment market concerned. A single condition concerning the place where the diploma of completion of secondary education was obtained was, however, too general and exclusive in nature<sup>27</sup>.

26. *Collins'* case arose from an Irish national, who had gone to the United  
h Kingdom in order to find work there, being refused a jobseeker's allowance on the ground that he was not habitually resident in the United Kingdom. Although arts 2 and 5 of Regulation 1612/68 do not refer to financial benefits assisting persons seeking access to the employment market, the court

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24 See *Grzelczyk's* case, cited in footnote 16, above (para 39 of the judgment).

25 See footnote above (para 44 of the judgment).

26 See *D'Hoop's* case, cited in footnote 18, above (para 35 of the judgment).

27 See footnote above (paras 38 and 39 of the judgment).

considered that these provisions<sup>28</sup> 'should be interpreted in the light of other provisions of Community law, in particular art [12 EC] of the Treaty'.<sup>29</sup> It went on to state that—

'[i]n view of the establishment of citizenship of the Union and the interpretation in the case law of the right to equal treatment enjoyed by citizens of the Union, it is no longer possible to exclude from the scope of art [39(2) EC] of the Treaty—which expresses the fundamental principle of equal treatment, guaranteed by art [12 EC] of the Treaty—a benefit of a financial nature intended to facilitate access to employment in the labour market of a member state.'<sup>30</sup>

As in *D'Hoop's* case, the court recognised that the member states may lay down conditions in order to ensure that there is a genuine link between an applicant for an allowance in the nature of a social advantage within the meaning of art 7(2) of Regulation 1612/68 and the geographical employment market in question. A residence requirement could be considered to be appropriate for this purpose, but must not go beyond what is necessary to attain that objective. In particular, its application must rest on clear criteria which are made known in advance and provision must be made for judicial protection<sup>31</sup>.

27. Finally, in *Trojani's* case, a French national working at a Salvation Army hostel in Belgium in return for board and lodging and some pocket money was refused the Belgian minimex benefit on the same grounds as *Grzelczyk's* case: he did not have Belgian nationality and could not benefit from the application of Regulation 1612/68. In this case the court found, that the applicant could not derive a right of residence from art 18(1) EC in conjunction with Directive 90/364 due to his lack of resources. However, as he was in possession of a residence permit and was lawfully resident in Belgium, he was entitled to benefit from the fundamental principle of equal treatment as laid down in art 12 EC. The court therefore concluded that, in so far as national legislation does not grant a social assistance benefit to EU citizens from other member states, who reside lawfully within its territory even though they satisfy the conditions required of nationals of that member state, this constitutes discrimination on grounds of nationality prohibited by art 12 EC<sup>32</sup>.

#### *C—Citizenship and social benefits: overall picture*

28. If these judgments are viewed together, a number of principles emerge in relation to EU citizenship as such and, subsequently, to the entitlement of EU citizens to non-contributory benefits of a social nature. By placing emphasis on the fundamental character of EU citizenship, the court makes clear that this is not merely a hollow or symbolic concept, but that it constitutes the basic status of all nationals of EU member states, giving rise to certain rights and privileges in other member states where they are resident. In particular, EU citizenship entitles nationals of other member states to equal treatment with nationals of the host member state in respect of situations coming within the substantive scope of Community law. Pursuing studies in

<sup>28</sup> The court in para 60 of its judgment uses the term 'this principle', though it appears from the context that arts 2 and 5 are the subject of this consideration.

<sup>29</sup> See *Collins' case*, cited in footnote 18, above (para 60 of the judgment).

<sup>30</sup> See footnote above (para 63 of the judgment).

<sup>31</sup> See footnote 29, above (paras 67–72 of the judgment).

<sup>32</sup> See *Trojani's case*, cited in footnote 18, above (para 44 of the judgment).



a another state than that of which the EU citizen is a national cannot of itself deprive him of the possibility of relying on art 12 EC<sup>33</sup>. As the cases described above make clear, various social benefits which member states previously granted to its nationals and to economically active persons under Regulations 1612/68 or 1408/71 now have been extended to EU citizens who are lawfully resident in the host member state. I refer to the child-raising benefit in *Martinez Sala's* case, the minimex benefit in *Grzelczyk's* case and *Trojani's* case and the tideover allowance in *D'Hoop's* case. In these cases the benefits were covered by existing Community regulations and therefore clearly were within the scope *ratione materiae* of the Treaty.

c 29. In contrast, it is interesting to note that in *Collins's* case, the court did not place the jobseeking allowance claimed by the applicant explicitly within the scope *ratione materiae* of the Treaty. Rather, in the context of interpreting the provisions in Regulation 1612/68 on access to employment in other member states, it used the concept of citizenship to draw it within the scope of the Treaty:

d '... in view of the establishment of citizenship of the Union and the interpretation in the case law of the right to equal treatment enjoyed by citizens of the Union, it is no longer possible to exclude from the scope of art [39(2) EC] ... a benefit of a financial nature intended to facilitate access to employment in the labour market of a member state.'

e In other words, it would appear that citizenship itself may imply that certain benefits can be brought within the scope of the Treaty, if these allowances are provided for purposes which coincide with objectives pursued by the primary or secondary Community legislation.

f 30. It is also clear from the case law that entitlement by lawfully resident EU citizens to social benefits in these situations is not absolute and that the member states may subject eligibility to these benefits to certain objective, ie non-discriminatory, conditions in order to protect their legitimate interests. In the two cases involving benefits which were aimed at assisting the beneficiary to gain access to the employment market, *D'Hoop's* case and *Collins's* case, the court recognised that the member states may impose requirements to ensure that the applicant has a real link with the relevant geographical employment market. These requirements must be applied in such a way that they comply with the basic Community principle of proportionality.

g 31. As indicated, an EU citizen must also be lawfully resident in the host member state in order to be eligible for social benefits. Under Directives 90/364 and 93/96, the EU citizen or student must possess sufficient resources to avoid becoming a burden on the public finances of the host member state and he must be adequately insured against sickness costs. Here, too, these limitations and conditions must be applied in compliance with the general principles of Community law, in particular the principle of proportionality<sup>34</sup>. In *Grzelczyk's* case the court thus held that the condition that an EU citizen must not become an unreasonable burden on the public finances of the host member state did not preclude him, in the given circumstances, from being entitled to a social benefit. Neither, for that matter, did the fact that art 3 of Directive 93/96 excludes students from entitlement to maintenance grants preclude him from receiving the minimex benefit. The notion of 'unreasonable

33 See *Grzelczyk's* case, cited in footnote 16, above (para 36 of the judgment).

34 See *Baumbast's* case, cited in footnote 21, above (para 91 of the judgment).

burden' is apparently flexible and, according to the court, implies that Directive 93/96 accepts a degree of financial solidarity between the member states in assisting each other's nationals residing lawfully on their territory. As the same principle is at the basis of the conditions imposed by Directive 90/364, there is no reason to presume that this same financial solidarity does not apply in that context, too.

32. The question arises as to what is meant by the term 'a degree' of financial solidarity. Clearly the court does not envisage the member states opening up the full range of their social assistance systems to EU citizens entering and residing within their territory. To accept such a proposition would amount to undermining one of the foundations of the residence directives. It would seem to me that this is a further reference to the observance of the principle of proportionality in applying the national requirements in respect of eligibility for social assistance. On the one hand, the member states are entitled to ensure that the social benefits which they make available are granted for the purposes for which they are intended. On the other hand, they must accept that EU citizens, who have been lawfully resident within their territory for a relevant period of time, may equally be eligible for such assistance where they fulfil the objective conditions set for their own nationals. In this respect, they must ensure that the criteria and conditions for granting such assistance do not discriminate directly or indirectly between their own nationals and other EU citizens, that they are clear, suited to attaining the purpose of the assistance, are made known in advance and that the application is subject to judicial review<sup>35</sup>. To this I would add that it should also be possible to apply them with sufficient flexibility to take account of the particular individual circumstances of applicants, where refusal of such assistance is likely to affect what is known in German constitutional law as the 'Kernbereich' or the substantive core of a fundamental right granted by the Treaty, such as the rights contained in art 18(1) EC. It is interesting to note that this principle has been laid down in art II-112 of the Charter of Fundamental Rights of the Union which is incorporated in the Draft Treaty establishing a Constitution for Europe<sup>36</sup>. This provides that any limitation on the exercise of the rights and freedoms recognised by the Charter must respect the essence of these rights and freedoms. Article II-105 of the Charter guarantees the freedom of EU citizens to move and reside within the territory of the member states in terms which are essentially identical to art 18(1) EC.

33. There has, in other words, been a marked development in EU citizenship (arts 17 and 18(1) EC) in conjunction with the prohibition of discrimination on grounds of nationality (art 12 EC) in providing a basis for entitlement to certain social benefits in the member states in which EU citizens are lawfully resident. As I observed in para 29, above, where the benefits concerned were required to be explicitly within the scope *ratione materiae* of the EC Treaty, the court in *Collins*' case apparently accepted that this is the case if the benefit concerned is provided for purposes which coincide with the objectives of primary or secondary Community law. Persons who have moved to another member state and have, at least initially, complied with the residence conditions laid down in the residence directives, but have since found themselves in a situation in which they need to apply for financial assistance are, subject to the limitations and conditions laid down by the Community legislature, entitled to

35 See *Collins*' case, cited in footnote 18, above (para 72 of the judgment).

36 CIG 87/04 of 6 August 2004.

- a such assistance on an equal footing with nationals of the host member state. These limitations and conditions must be applied in such a way that the final result is not disproportionate to the aims for which they are imposed. Neither may that result amount to a discrimination of the EU citizen which cannot be objectively justified, where that EU citizen finds himself in the same material circumstances as a national of the host member state and is sufficiently socially
- b integrated in that member state. In this regard, depending on the nature of the benefits concerned, the member states may lay down such objective conditions as are necessary to ensure that the benefit is provided to persons who have a sufficient link with its territory.

V—THE PRELIMINARY QUESTIONS

- c A—*The first question: citizenship and maintenance assistance*

34. The first question referred by the High Court is aimed at ascertaining whether financial support provided by the member states to students to assist them with maintenance costs continues to fall outside the scope of the application of the EC Treaty for the purposes of art 12 EC, in view of

d the addition of art 18 EC to the EC Treaty and in view of the developments in the field of education, since the court gave its judgments in *Lair's* case and *Brown's* case.

35. Bidar observes, first, that he should be regarded as an EU citizen student who resided lawfully in the United Kingdom for more than three years before his courses commenced. Consequently, he is not in the position of an

e EU national falling within the ambit of Directive 93/96. As Community competence has been extended to the field of education, the material scope of the Treaty is not restricted to matters related to access to education, but also covers matters related to the encouragement of student mobility, including the provision of assistance with maintenance costs. He states that *Grzelczyk's* case confirms that the court's judgment in *Brown's* case has been overtaken by these

f developments in Community law. Even if he is considered as falling within the scope of Directive 93/96, Bidar observes that the conditions imposed by that directive are not absolute and must be applied in accordance with the general principles of Community law, in particular the principle of proportionality. In this respect he points out that his education is already very much bound up

g with the United Kingdom education system. Finally, he submits that it is artificial to make a distinction between assistance with tuition fees on the one hand and maintenance grants and subsidised loans on the other, as denial of access to either constitutes an obstacle for students to the enjoyment of free movement.

36. As to Bidar's personal status the United Kingdom government points out

h that, before the national court, he relied on Directive 93/96 and as such he cannot be regarded as being 'settled' within the United Kingdom. The German government adds that by applying for a loan even before commencing his studies, Bidar deprived himself of the possibility of acquiring the right of residence under Directive 93/96 and of invoking art 18 EC in conjunction with art 12 EC.

i 37. All member state governments having submitted written observations and the Commission consider that financial assistance with maintenance costs provided to students continues to fall outside the scope of application of the EC Treaty. Various arguments were advanced in support of this assertion, eg the introduction of art 149 EC (formerly art 126 of the EC Treaty) which recognises the responsibility of the member states for the content of teaching



and the organisation of education systems. According to them this includes systems of student support. They point out that the right of residence provided for in art 18(1) EC is subject to limitations and conditions laid down in the Treaty and the measures adopted to give it effect. Article 3 of Directive 93/96 excludes a right of migrant students to maintenance grants which, in their view, was confirmed by the court in *Grzelczyk's* case. Reference was also made to European Parliament and Council Directive (EC) 2004/38<sup>37</sup> which must be transposed by the member states by 30 April 2006. Article 24(2) of this directive explicitly provides that prior to acquisition of permanent residence, a right which is obtained after a continued period of five years of legal residence in the host member state, that state is not obliged to grant maintenance aid for studies consisting in student grants or student loans to persons other than workers, self-employed persons, persons who retain such status and members of their families. a

38. More generally, the Austrian government points out that the European Agreement on Continued Payment of Scholarships to Students Studying Abroad, adopted in the framework of the Council of Europe in 1969, is based on the principle that the home state is responsible for the payment of scholarships and that if the host state also were to become responsible in this regard, there would be danger of duplicate payments. Similarly, the Netherlands government observes that as there is no co-ordination in this field at Community level, intermingling the home state and host state principles could have disruptive effects. The Danish and Finnish governments also refer to the possible effects of a negative answer to the first question on their rules for granting maintenance assistance to students. b

39. Firstly, I would observe that the answer to the first question of the High Court depends on the factual situation of the case. Although it focuses on whether or not assistance with maintenance costs for students now comes within the ambit of the EC Treaty, it is essential to establish under which set of rules that question must be appreciated. On the one hand, the United Kingdom in particular contends that, as Bidar is a national of another member state who is in the United Kingdom in order to follow university education, he falls exclusively within the scope of Directive 93/96. Bidar, on the other hand, refers to the fact that he had already been resident in the United Kingdom for three years prior to taking up his studies and that he had also followed his secondary education in the United Kingdom. In that respect he submits that he is in the same factual situation as Ms D'Hoop and must be regarded as an EU citizen who had made use of his right to move to another member state under art 18(1) EC. This implies that the question as to his right to a student maintenance loan should be considered under that Treaty provision in conjunction with art 12 EC. In my view there are strong indications on the basis of the facts set out in para 5, above, that Bidar does indeed come within the second category and that he fulfils the conditions laid down in Directive 90/364. However, as it is up to the referring court to establish the facts and thereby determine which set of rules is applicable to the case, I will discuss both options. c

40. Article 18(1) EC subjects the rights of EU citizens to move and reside within the territory of the member states to the limitations and conditions laid d

<sup>37</sup> On the right of citizens of the Union and their family members to move and reside freely within the territory of the member states amending Regulation (EEC) 1612/68 and repealing Directives (EEC) 64/221, 68/360, 72/194, 73/148, 75/34, 75/35, 90/364, 90/365 and 93/96) (OJ 2004 L158 p 77, as corrected in OJ 2004 L229 p 35).

a down in the EC Treaty and the measures adopted to give it effect. As far as students are concerned, their situation is governed by Directive 93/96. This directive applies to students who have gone to another member state to take up a course of studies. In other words, following a course of studies in the host member state is the reason for them using the rights conferred upon them by art 18(1) EC. Students in this situation must meet the conditions already  
b mentioned in para 18, above, particularly in respect of their financial independence. They must not become an unreasonable burden on the public finances of the host member state nor, according to art 3 of Directive 93/96, are they entitled to maintenance grants.

c 41. In *Grzelczyk's* case the court confirmed these principles as such, but attenuated their severity in the light of the circumstances of the case at hand. Although barring entitlement to a maintenance grant, it found that the directive was silent as to the possibility of acquiring a social security benefit, such as a minimum subsistence allowance. In addition, though the directive was aimed at avoiding students becoming an unreasonable burden on public finance, the court considered that this principle was not to be applied in an  
d absolute sense, but must be understood as meaning that in certain cases, such as that of *Grzelczyk's* case who had run into financial difficulty in his final year of studies, member states must accept a degree of financial solidarity by supporting each other's nationals.

e 42. If Bidar is to be regarded as a student coming solely within the ambit of Directive 93/96, it is abundantly clear that art 3 of the directive presents a considerable barrier for him being eligible for a maintenance grant in the United Kingdom. However, what is at issue is not eligibility for a maintenance grant, but eligibility for a (subsidised) loan to cover maintenance costs. Student loans are not covered explicitly by art 3 of Directive 93/96 and indeed, in view of the fact that they now have been explicitly excluded by the parallel provision in Directive 2004/38, art 24(2), it could be inferred that eligibility for such loans  
f is not excluded by art 3 of Directive 93/96.

g 43. That being said, the question as to whether students coming from other member states should be eligible for student loans for maintenance costs must be answered by reference to the general principle of art 1 of Directive 93/96 that in order to obtain the right to residence in the host member state, students must declare that they possess sufficient resources to avoid becoming a burden on the social assistance system during their period of residence. As the court stated in *Grzelczyk's* case, the directive only requires a declaration by the student to that effect at the beginning of his period of residence within the member state. There are two reasons for querying whether this condition also applies to student loans for maintenance costs. The first is that such loans  
h generally are not part of the social assistance systems of the member states and indeed, in *Grzelczyk's* case, the court made just this distinction. The second is that, although such loans are usually provided at non-commercial conditions and repayment in certain cases is waived, the burden on the public finances resulting from these aspects is smaller than in the case of benefits that do not have to be repaid.

i 44. Nevertheless, it is clear from the basic condition that students must of themselves possess sufficient resources on arriving in the host member state, that they are precluded from applying for a (subsidised) loan in respect of maintenance costs. The cumulative effect of loans provided under conditions, such as those of the Student Support Regulations, constitutes a considerable burden on public finance, as is also apparent from the information provided by

the national court on this point<sup>38</sup>. This justifies them being treated in the same manner as maintenance grants for the purposes of art 3 of Directive 93/96. a

45. I could, however, envisage an exception to this rule and, indeed, the Netherlands government also suggested that in certain exceptional circumstances there may be reasons for applying art 3 leniently. Referring to my earlier observation in paras 31 and 32, above that the conditions imposed by Directive 93/96 must be applied in accordance with the general principles of Community law, particularly the principle of proportionality, it must be ensured that the core of the fundamental rights accorded by art 18(1) EC is respected. For instance, a student who first complied with the basic conditions of the directive may encounter financial difficulties at a later stage of his studies. In such a situation, it would seem to me that the logic of the *Grzelczyk* judgment should apply. Where, according to that judgment, under arts 18(1) and 12 EC, an EU citizen, as a student, is entitled to a minimum subsistence allowance in his final year of studies on an equal footing with nationals of the member state if his financial position has changed since he took up his studies, there would be no reason to exclude entitlement of EU citizens in a similar situation under those provisions to the less burdensome instrument of a student loan. In such exceptional situations the principle of financial solidarity between the nationals of the member states entails that once a student has commenced a course of studies in another member state and has progressed to a certain stage of these studies, that state should enable him to complete these studies by providing the financial assistance which is available to its nationals. b  
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46. The second situation to be considered is based on the presumption that Bidar should not be regarded as a student falling within the scope of Directive 93/96, but as an EU citizen who has exercised his right to move to and reside on the territory of another member state. This involves examining whether following the introduction of the provisions on EU citizenship and education, the scope of the EC Treaty now extends to financial support provided by the member states for students' maintenance costs. e  
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47. In its judgments of 21 June 1988 the court held that in view of the stage of development of Community law at that time, assistance for maintenance and training given to students, who did not enjoy worker or worker-derived status, in principle, falls outside the scope of the E(E)C Treaty for the purposes of art 12 EC. This was explained by the fact that such assistance is to be regarded, on the one hand, as a matter of educational policy which is not as such included in the spheres entrusted to the Community institutions and, on the other, a matter of social policy which falls within the competence of the member states in so far as it is not covered by specific provisions of the E(E)C Treaty. g

48. After those judgments a number of provisions were added by the Treaty of Maastricht to the EC Treaty on education. Articles 3(1), sub q, and 149 EC now provide a basis for Community action in this area. The scope of these provisions is limited. Any action taken by the Community in this field is restricted to promoting co-operation between the member states in various respects, including the mobility of students and teachers. Harmonisation is excluded explicitly. Though opening the possibility to take certain incentive measures in the field of education, the Treaty provisions in this area are based on the principle that the member states retain responsibility for the content of teaching and the organisation of education systems. h  
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<sup>38</sup> See para 70, below.



a 49. I am not convinced that assistance granted for maintenance costs must still be regarded as falling outside the scope of Community law for the sole reason that such assistance must be regarded as an aspect of the 'organisation of education systems'. What is important in this context is that, although conferring limited powers on the Community institutions, these provisions do  
b make it possible for the Community itself to adopt measures for facilitating the mobility of students, including the provision of financial assistance with maintenance costs. Not only is educational policy as such therefore now within 'the spheres entrusted to the Community institutions', this also applies to financial measures adopted to facilitate student mobility. In *Grzelczyk's* case the court, too, attached importance to these developments since its judgment in *Brown's* case<sup>39</sup>.

c 50. The inclusion of these provisions on education is therefore indicative of the fact that the subject of assistance with maintenance costs now falls within the substantive scope of the EC Treaty. Furthermore, it is important that, in comparison with the situation in 1988 under the EEC Treaty, the EC Treaty grants fundamental rights to move and reside within the territory of the  
d member states not only to economically active nationals of the member states, but also to nationals of the member states who are not economically active. Certainly, the exercise of these rights has been made subject to limitations and conditions and to measures adopted to facilitate the exercise of this right. As has repeatedly been emphasised by intervening parties, these include conditions relating to the financial independence of these economically  
e inactive EU citizens. It does not follow from this, however, that social benefits of various kinds, including financial support for maintenance costs, fall by their nature outside the scope of the Treaty. In this respect I need only refer to the case law on EU citizenship and social benefits, reproduced above. The directives adopted to facilitate the exercise of the rights granted by art 18(1) EC  
f may lay down rules concerning eligibility for benefits provided by the member states or even excluding such eligibility, this does not place these benefits outside the scope of the Treaty.

g 51. Maintenance assistance has long been regarded as a social advantage within the meaning of art 7(2) of Regulation 1612/68<sup>40</sup>. In *Lair's* case the court observed that such assistance is particularly appropriate from a worker's point of view for improving his professional qualifications and promoting his social advancement<sup>41</sup>. In a more general vein, the court considered in *Echternach's* case that equal treatment as regards benefits granted to members of workers' families contributes to their integration in the society of the host country, in accordance with the aims of the freedom of movement of workers<sup>42</sup>. Where it is acknowledged that such a benefit comes within the scope *ratione materiae* of  
h the EC Treaty for workers and given the rationale of this finding, it would seem to me artificial to exclude the same benefit from the scope of the Treaty for other categories of persons who are now also covered by the Treaty. The question whether these latter categories of persons are entitled to such benefits should be distinguished from the question whether the benefit itself is within the scope of the Treaty.

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39 See *Grzelczyk's* case, cited in footnote 16, above (para 35 of the judgment).

40 See *Lair's* case and *Brown's* case, both cited in footnote 2, above (paras 24 and 25 of the judgments respectively).

41 See *Lair's* case (para 23 of the judgment).

42 See *Echternach's* case, cited in footnote 11, above (para 20 of the judgment).

52. Furthermore, it is important in this regard to point to the development of the case law described above in respect of the rights adhering to EU citizenship under art 18(1) EC since the court's judgment in *Martínez Sala's* case. Not only are EU citizens entitled to equal treatment with nationals of the host member state in which they are lawfully resident with respect to matters coming within the scope *ratione materiae* of the Treaty, citizenship itself may provide a basis for bringing certain matters within that scope where the objectives pursued by the national measure correspond with those pursued by the Treaty or secondary legislation as is apparent from the court's judgment in *Collins' case*. The court has already recognised that benefits of the kind at issue in this case contribute to the integration of the recipients in the society of the host member state in accordance with the aims of free movement of workers. As the provisions on citizenship likewise aim to facilitate the free movement of economically inactive persons, this provides a further reason for considering that they come within the scope *ratione materiae* of the EC Treaty.

53. I therefore conclude that the first question referred by the High Court should be answered in the negative, ie that since the introduction of arts 17 EC et seq on EU citizenship and in view of the developments in relation to the competence of the European Union in the field of education, assistance with maintenance costs for students attending university courses either in the form of subsidised loans or grants, no longer falls outside the scope of the application of the EC Treaty for the purposes of art 12 EC and the prohibition of discrimination on grounds of nationality.

*B—The second question: grounds for justifying differential treatment*

54. By its second question the High Court asks the court which criteria must be applied by the national court in determining whether the conditions governing eligibility for maintenance assistance are based on objectively justifiable conditions not dependent on nationality. This question is based on the premiss that the conditions laid down in the Student Support Regulations in respect of eligibility of EU citizens, who do not enjoy worker status or a status which is derived from a worker, for maintenance assistance, constitute discrimination within the meaning of art 12 EC.

55. In order to be eligible for maintenance assistance economically inactive EU citizens are required to be 'settled' in the United Kingdom within the meaning of national immigration law. Periods spent receiving full-time education are not taken into consideration for calculating the period of being settled. Settled status must also be demonstrated by the possession of a residence permit. This same condition of 'being settled' does not apply to British nationals. They only need to have been ordinarily resident within the United Kingdom for the three years prior to commencing their studies. I would only remark in this regard that where the eligibility conditions are more cumbersome for EU citizens who are lawfully resident in the United Kingdom than for British nationals, it is quite clear that this amounts to an indirect discrimination on grounds of nationality within the meaning of art 12 EC. Consequently, it must be considered whether such a difference in treatment can be justified under Community law.

56. *Bidar* and the United Kingdom, Austrian and German governments assert that a difference in treatment of this type may be justified by objective considerations which are unrelated to the nationality of the persons concerned and are proportionate to the legitimate aim of the national provisions. The United Kingdom, German, Austrian and Netherlands governments and the

a Commission assert further that the member states are entitled to ensure that there is a real link between the student and the member state or its employment market or that there is a sufficient degree of integration in society. The Finnish government refers in this regard to a permanent structural and real link with the society of the member state of study. The United Kingdom submits that it is legitimate for a member state to ensure that the  
b parents of students have made or the students themselves are likely to make, a sufficient contribution through work and hence taxation to justify the provision of subsidised loans. Referring to Advocate General Ruiz-Jarabo Colomer's opinion in *Collins'* case, the Austrian, German and Netherlands governments add that the member states have a legitimate interest in preventing abuse of their student support schemes. As to the proportionality requirement, various  
c governments and the Commission contend that a minimum period of residence is both necessary and appropriate. In order to determine what is an adequate period, they refer to the period of five years required for permanent residence laid down in art 16 of Directive 2004/38.

57. I have already had the opportunity in my opinion of 27 February 2003 in  
d *Ninni-Orasche v Bundesminister für Wissenschaft, Verkehr und Kunst*<sup>43</sup> to express my views on the circumstances in which EU citizens enjoy equal treatment under arts 18(1) and 12 EC in respect of obtaining financial support with study costs. The facts of that case were comparable to those of the present case, but differed as to the basis of the right of residence and the personal circumstances of the persons concerned. However, the legal assessment of the grounds of  
e justification for differential treatment is essentially the same.

58. As the court has held on various occasions<sup>44</sup> and as all parties having submitted written and oral observations state, inequality of treatment can be justified only if it is based on objective considerations independent of the nationality of the persons concerned and it is proportionate to the legitimate aim of the national provisions. In this respect the court has recognised that it is  
f legitimate for a national legislature to wish to ensure that there is a real link between the applicant for an allowance in the nature of a social advantage within the meaning of art 7(2) of Regulation 1612/68 and the geographic employment market in question<sup>45</sup>.

59. In both these cases the social benefits, the tideover allowance in *D'Hoop's* case and the jobseeker's allowance in *Collins'* case, were aimed at providing  
g financial assistance to the beneficiaries either in the transition from education to employment or them otherwise genuinely seeking employment. In order to ensure that there was sufficient connection with the domestic employment market, the court considered in *Collins'* case that a residence requirement is in principle appropriate, but that it must not go beyond what is necessary in order  
h to attain that objective. The criteria used in applying this requirement must be clear, made known in advance and provision must be made for a means of redress of a judicial nature. Where a period of residence is required in order to be eligible, 'the period must not exceed what is necessary in order for the national authorities to be able to satisfy themselves that the person concerned is genuinely seeking work in the employment market of the host member  
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<sup>43</sup> Case C-413/01 [2004] All ER (EC) 765.

<sup>44</sup> See e.g. *D'Hoop's* case and *Collins'* case, both cited in footnote 18, above (respectively paras 36 and 66 of these judgments).

<sup>45</sup> See *D'Hoop's* case and *Collins'* case, both cited in footnote 18, above (respectively paras 38 and 67 of the judgments).



state'<sup>46</sup>. In *D'Hoop's* case the court found that the requirement that a school diploma be obtained in Belgium in order to be eligible for the tideover allowance was 'too general and exclusive in nature', as— a

[I]t unduly favours an element which is not necessarily representative of the real and effective degree of connection between the applicant for the tideover allowance and the geographic employment market, to the exclusion of all other representative elements'<sup>47</sup>. b

60. In the case of maintenance assistance for students, be it in the form of a subsidised loan or a grant, the real link to be established is not primarily with the employment market of the host member state, although that may be an aspect which may be taken into consideration. Rather, this link is to be found in the degree of affinity which the applicant for this assistance has with the educational system and the degree of his integration into society<sup>48</sup>. It would seem to me that where an EU citizen has followed his secondary education in a member state other than that of which he is a national, which is more adapted to preparing him for entry to an establishment of higher or tertiary education in that member state than elsewhere, the link with the education system of the host member state is evident. In assessing the degree of integration, the individual circumstances of the applicant must necessarily be taken into account. As far as this is concerned, it should be emphasised that the situation of an EU citizen who has come to another member state as a minor, as the dependant of another EU citizen, must be distinguished from EU citizens who have moved to another member state as adults making their own choices. The chances that an EU citizen in the situation of *Bidar* has integrated into society as a young person, having lived there under the legal guardianship of his grandmother, who was already settled in the United Kingdom, and having followed secondary education in the host member state, surely must be deemed to be greater than EU citizens arriving at later stages of life. c

61. Obviously a member state must for reasons of legal certainty and transparency lay down formal criteria for determining eligibility for maintenance assistance and to ensure that such assistance is provided to persons proving to have a genuine connection with the national educational system and national society. In this respect, and as the court recognised in *Collins'* case, a residence requirement must, in principle, be accepted as being an appropriate way to establish that connection under the conditions set out in that judgment and cited in para 59, above. It may be inferred from these conditions that the court recognises that a residence requirement may be imposed as a starting point of the assessment of the situation of an individual applicant. The fact that it states that the period must not exceed what is necessary for the purpose of enabling the national authorities to satisfy themselves that a person is genuinely seeking work in the domestic employment market, indicates, however, that other factors must be able to be taken into account in that assessment. This is further borne out by its consideration in *D'Hoop's* case that the single condition applied by the national authorities in that case was too general and exclusive and that no account could be taken of other representative factors. Ultimately, it would appear to me that if the result of the application of a residence requirement is to exclude a d  
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<sup>46</sup> See *Collins'* case (para 72 of the judgment).

<sup>47</sup> See *D'Hoop's* case (para 39 of the judgment).

<sup>48</sup> Cf for children of workers, *Echternach's* case, cited in footnote 11, above (para 35 of the judgment).

a person, who can demonstrate a genuine link with the national education system or society, from the enjoyment of maintenance assistance, this result would be contrary to the principle of proportionality.

62. Additional factors which could be taken into account in a case such as the present one are the need for ensuring continuity in the education of the applicant<sup>49</sup>, the likelihood that he indeed will enter the national employment market and the possibility that he may not be eligible for maintenance assistance from other sources, such as the member state of which he is a national as he no longer fulfils the eligibility criteria in that member state.

63. It may also be recalled in this connection that the court, in the context of Regulation 1612/68, has stated that the freedom of workers must be guaranteed in compliance with the principles of liberty and dignity and the best possible conditions for the integration of the Community worker's family in the society of the host country<sup>50</sup>. There is no reason why this general principle should not apply in the context of the free movement of EU citizens as well.

64. All governments intervening in this case and the Commission point out that, according to art 24(2) of Directive 2004/38, the member states are not obliged to grant maintenance aid for studies to economically inactive EU citizens prior to acquisition of permanent residence. This status is only achieved after five years of continuous residence in the host member state. Leaving aside that this directive entered into force on 30 April 2004, i.e. after the facts in the present case arose, and that it must be transposed by 30 April 2006, it would seem to me that in applying this condition, the fundamental rights conferred directly by the EC Treaty on EU citizens must be fully respected. This implies that the considerations set out above in respect of applying a residence requirement in individual cases are valid in respect of the application of a settlement requirement such as that contained in the Student Support Regulations and that account must be taken of all relevant factors in determining whether or not a genuine link exists with the educational system and the society of the host member state. I do not consider that this amounts to an undermining of the requirement adopted by the Community legislature. Rather it is necessary to ensure that this requirement is applied in conformity with the fundamental provisions of the EC Treaty.

65. The United Kingdom government contends that it is legitimate for a member state to ensure that students' parents have contributed sufficiently, or that the students themselves are likely to make a sufficient contribution to the public finances through taxation in order to justify maintenance assistance being granted. This argument suggests that there is a direct or indirect link between the obligation of residents of a member state to pay taxes and the entitlement to benefits of the kind at issue in the present case. If it is taken to its logical conclusion, this argument implies that if parents have not contributed to taxation or only made a modest contribution, their children would not be eligible for maintenance assistance, whereas students whose parents have contributed significantly would be entitled to such assistance. It does not seem probable that the United Kingdom seriously would accept the social discrimination inherent to this position. Furthermore, as it is loans which

<sup>49</sup> See *Echternach's case* (para 22 of the judgment).

<sup>50</sup> See *Di Leo's case*, cited in footnote 13, above (para 13 of the judgment), *Baumbast's case*, cited in footnote 21, above (paras 50 and 59 of the judgment) and *Kaba v Secretary of State for the Home Dept* Case C-356/98 [2000] All ER (EC) 537, [2000] ECR I-2623 (para 20).

are at issue here, it is illogical to require that a person has first contributed to public finances in order to be eligible for a loan which he thereafter must repay even though there is an element of subsidy in the terms for granting this loan. This ground for justification therefore is inherently contradictory.

66. Finally, it was submitted by various intervening governments that the member states have a legitimate interest in preventing abuse of their student support schemes and in preventing 'benefit tourism'. I do consider that this is indeed a legitimate concern of the member states, but the manner in which this should be ensured should not be such as to undermine the fundamental rights of EU citizens residing lawfully within their territory. A simple residence requirement is too non-selective for achieving this aim. In my view it can be achieved adequately in the context of establishing whether or not an applicant has a genuine link with the national education system or society as set out above.

67. These considerations lead me to the following conclusion: where the result of the application of a settlement requirement, such as that laid down in the Student Support Regulations, to an EU citizen, who is sufficiently integrated into society in the host member state, whose education is closely linked to the education system in the member state and who is in a comparable situation to a national of the host member state, is to deny that EU citizen access to assistance with maintenance costs, this amounts to an unjustified discrimination within the meaning of art 12 EC in conjunction with art 18(1) EC. In those circumstances, the result of the application of such a settlement requirement is not in proportion with the aim it seeks to achieve, ie that maintenance assistance is granted to those who have a genuine link with the national educational system.

68. In the light of the foregoing observations the following answer must be given to the second question. Conditions laid down in national law governing eligibility for assistance with maintenance costs for students must be objectively justified and unrelated to the nationality of EU citizens. In order to determine whether this is the case a national court must ascertain that these conditions are appropriate for establishing a real link between an EU citizen applying for such assistance and the national education system and society. In addition, these conditions must not go beyond what is necessary for achieving that aim.

*C—The third question: temporal effects*

69. The third question concerns the temporal effects of a judgment by the court finding that assistance with maintenance costs, either in the form of a subsidised loan or a grant, now comes within the scope of the EC Treaty for the purposes of the application of the prohibition of discrimination on grounds of nationality in art 12 EC.

70. Bidar submits that there is no reason to limit the temporal effects of a judgment in this sense. To the extent that they have addressed this point, the intervening governments of the member states have argued that such a limitation should be imposed. The United Kingdom government points out that temporal limitations on the effects of a judgment are only imposed exceptionally and, in particular, where two conditions are satisfied. Firstly, the member state must have been led to adopt practices which did not comply with Community law by reason of objective, significant uncertainty regarding the scope of application of Community provisions, to which the conduct of the Community institutions or other member states have contributed. It



- a submits that a negative answer to the first question fulfils this condition. Secondly, there must be a risk of serious economic repercussions owing, in particular, to the large number of legal relationships entered into on good faith on the basis of rules considered to be validly in force. In this respect the government refers to the calculation made in the order for reference which shows that the cost involved could amount to £66m for the academic year 2000/2001. At the hearing it was added to this that following the enlargement of the Union on 1 May 2004, this figure could rise to £75m per annum.
- b

71. The case law on this matter is well settled and was summarised by the court in *Grzelczyk*'s case. There it stated that it has—

- c 'repeatedly held that an interpretation it gives to a provision of Community law clarifies and defines its meaning and scope only as it should have been understood and applied from the time of its entry into force ...

- d 51. It is only exceptionally that the court may, in application of the general principle of legal certainty inherent in the Community legal order, be moved to restrict the possibility for any person concerned to rely upon a provision which it has interpreted with a view to calling into question legal relationships established in good faith ...

52. It is also settled in case law that the financial consequences which might ensue for a member state from a preliminary ruling do not in themselves justify limiting the temporal effect of the ruling ...

- e 53. The court has taken that step only in quite specific circumstances, where there was a risk of serious economic repercussions owing in particular to the large number of legal relationships entered into in good faith on the basis of rules considered to be validly in force and where it appeared that both individuals and national authorities had been led into adopting practices which did not comply with Community law by reason of objective, significant uncertainty regarding the implications of Community provisions, to which the conduct of other member states or the Commission may even have contributed ...<sup>51</sup>
- f

- g 72. Starting with this latter aspect, I agree with the submissions of the United Kingdom government, that a negative answer to the first question amounts to a new and unforeseen development in Community law. I would accept in this respect that the Student Support Regulations took account of the state of Community law prior to such a finding by the court. The answer which I gave to the second question, however, significantly restricts the scope of the answer given to the first question. The figures presented to justify the financial repercussions of a negative answer to the first question appear to be based on the presumption that all EU citizens, who do not qualify under Regulation 1612/68, would henceforth be eligible for maintenance assistance. It is not exactly clear what the financial impact would be if only those EU citizens who are lawfully resident within the territory of the United Kingdom and have a genuine link with the national educational system and society were to become eligible for such financial assistance. However it cannot be excluded that this interpretation could have wider implications which could go back to the entry into force of the provisions on EU citizenship on 1 November 1993, not only in the United Kingdom, but in all member states. In the event that the court finds that the first question must be given a negative answer, I therefore
- i

<sup>51</sup> See *Grzelczyk*'s case, cited in footnote 16, above.

consider that it is justified to limit the temporal effect of such a judgment to legal relationships established as from the date of that judgment, except where legal proceedings have been initiated prior to that date for the purpose of challenging decisions refusing entitlement to assistance with maintenance costs for students.

#### VI—CONCLUSION

73. I am, therefore, of the opinion that the Court of Justice should give the following answers to the questions referred by the High Court of Justice of England and Wales, Queen's Bench Division (Administrative Court):

(1) Since the introduction of arts 17 EC et seq on EU citizenship and in view of the developments in relation to the competence of the European Union in the field of education, assistance with maintenance costs for students attending university courses either in the form of subsidised loans or grants, no longer falls outside the scope of the application of the EC Treaty for the purposes of art 12 EC and the prohibition of discrimination on grounds of nationality.

(2) Conditions laid down in national law governing eligibility for assistance with maintenance costs for students must be objectively justified and unrelated to the nationality of EU citizens. In order to determine whether this is the case a national court must ascertain that these conditions are appropriate for establishing a real link between an EU citizen applying for such assistance and the national education system and society. In addition, these conditions must not go beyond what is necessary for achieving that aim.

(3) Article 12 EC may only be relied upon to claim entitlement to assistance with maintenance costs from the date of the judgment of the court except in cases where legal proceedings were already initiated for the same purpose prior to that date.

15 March 2005. **THE COURT OF JUSTICE (Grand Chamber)** delivered the following judgment.

1. This reference for a preliminary ruling concerns the interpretation of the first paragraph of arts 12 and 18 EC (formerly arts 6 and 8a of the EC Treaty).

2. The reference was made in the course of proceedings between Mr Bidar and the London Borough of Ealing and the Secretary of State for Education and Skills concerning the refusal of his application for a subsidised student loan to cover his maintenance costs.

#### LEGAL BACKGROUND

##### *Community legislation*

3. The first paragraph of art 12 EC provides:

'Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.'

4. Article 18(1) EC reads as follows:

'Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect.'

a 5. Article 149 EC (formerly art 126 of the EC Treaty) provides:

‘1. The Community shall contribute to the development of quality education by encouraging cooperation between Member States and, if necessary, by supporting and supplementing their action, while fully respecting the responsibility of the Member States for the content of teaching and the organisation of education systems and their cultural and linguistic diversity.

b

2. Community action shall be aimed at:

—developing the European dimension in education, particularly through the teaching and dissemination of the languages of the Member States;

c

—encouraging mobility of students and teachers, inter alia by encouraging the academic recognition of diplomas and periods of study;

—promoting cooperation between educational establishments;

—developing exchanges of information and experience on issues common to the education systems of the Member States;

—encouraging the development of youth exchanges and of exchanges of socio-educational instructors;

d

—encouraging the development of distance education ...

4. In order to contribute to the achievement of the objectives referred to in this Article, the Council:

—acting in accordance with the procedure referred to in Article 251, after consulting the Economic and Social Committee and the Committee of the Regions, shall adopt incentive measures, excluding any harmonisation of the laws and regulations of the Member States;

e

—acting by a qualified majority on a proposal from the Commission, shall adopt recommendations.’

f

6. Council Directive (EEC) 90/364 (on the right of residence) (OJ 1990 L180 p 26) provides in art 1(1) that the member states are to grant the right of residence to nationals of member states who do not enjoy this right under other provisions of Community law and to members of their families, provided that they themselves and the members of their families are covered by sickness insurance in respect of all risks in the host member state and have sufficient resources to avoid becoming a burden on that state’s social assistance system during their period of residence.

g

7. Under art 3 of that directive, the right of residence is to remain for as long as the beneficiaries of that right fulfil the conditions laid down in art 1 of the directive.

8. According to the seventh recital in the preamble to Council Directive (EEC) 93/36 (on the right of residence for students) (OJ 1993 L317 p 59):

h

‘... in the present state of Community law, as established by the case-law of the Court of Justice, assistance granted to students, does not fall within the scope of the [EEC] Treaty within the meaning of Article 7 thereof [later art 6 of the EC Treaty, now, after amendment, art 12 EC].’

i

9. Article 1 of that directive provides:

‘In order to lay down conditions to facilitate the exercise of the right of residence and with a view to guaranteeing access to vocational training in a non-discriminatory manner for a national of a Member State who has been accepted to attend a vocational training course in another Member State, the Member States shall recognise the right of residence for any



student who is a national of a Member State and who does not enjoy that right under other provisions of Community law, and for the student's spouse and their dependent children, where the student assures the relevant national authority, by means of a declaration or by such alternative means as the student may choose that are at least equivalent, that he has sufficient resources to avoid becoming a burden on the social assistance system of the host Member State during their period of residence, provided that the student is enrolled in a recognised educational establishment for the principal purpose of following a vocational training course there and that he is covered by sickness insurance in respect of all risks in the host Member State.' a

10. Article 3 of that directive provides: b

'This Directive shall not establish any entitlement to the payment of maintenance grants by the host Member State on the part of students benefiting from the right of residence.'

11. Directives 90/364 and 93/96 were repealed with effect from 30 April 2006 by Directive (EC) 2004/38 of the European Parliament and of the Council (on the right of citizens of the Union and their family members to move and reside freely within the territory of the member states) (OJ 2004 L229 p 35), which, in accordance with art 40, must be transposed by the member states by 30 April 2006. c

#### *National legislation* d

12. In England and Wales, financial assistance for students to cover maintenance costs is, under the Education (Student Support) Regulations 2001, SI 2001/951 (the Student Support Regulations), provided essentially by means of loans. e

13. Under the Student Support Regulations, students who are recipients of a loan receive 75% of the maximum amount of the loan, while the remaining 25% is granted on the basis of the financial position of the student and of his parents or partner. The loan is provided at an interest rate which is linked to the rate of inflation and is therefore below the normal rate for a commercial loan. The loan is repayable after the student completes his studies, provided that he is earning in excess of £10,000. If that is the case, he pays an annual amount equivalent to 9% of the income earned above £10,000, until the loan is repaid in full. f

14. Under reg 4 of the Student Support Regulations, a person is eligible for a student loan for a designated course if he falls within one of the situations mentioned in Sch 1 to those regulations. g

15. Under para 1 of that schedule, a person is eligible to receive a student loan if he is settled in the United Kingdom within the meaning of the Immigration Act 1971 and meets the residence conditions referred to in para 8 of the schedule, namely: h

(a) he is ordinarily resident in England and Wales on the first day of the first academic year of the course; i

(b) he has been ordinarily resident throughout the three-year period preceding that day in the United Kingdom and Islands; and

(c) his residence in the United Kingdom and Islands has not during any part of that three-year period been wholly or mainly for the purpose of receiving full-time education.

a 16. As regards migrant workers and members of their families covered by Council Regulation (EEC) 1612/68 (on freedom of movement for workers within the Community) (OJ English Sp Edn 1968 (II) p 475), paras 4 to 6 of Sch 1 to the Student Support Regulations do not require them to be settled in the United Kingdom and make their eligibility for a student loan subject to the same residence conditions, while considering that they satisfy the condition of  
b ordinary residence in para 8(b) of that schedule from the time when they reside in the European Economic Area.

17. Under the Immigration Act 1971 a person is settled in the United Kingdom if he is ordinarily resident there without being subject to any restriction on the period for which he may remain in the territory.

c 18. However, it is apparent from the case file that under United Kingdom law a national of another member state cannot, in his capacity as a student, obtain the status of being settled in the United Kingdom.

19. As regards tuition fees, the Student Support Regulations provide for financial support on the same conditions for nationals of the United Kingdom and those of other member states.

d THE MAIN PROCEEDINGS AND THE QUESTIONS REFERRED FOR A PRELIMINARY RULING

20. In August 1998 Mr Bidar, a French national, entered the territory of the United Kingdom, accompanying his mother who was to undergo medical treatment there. It is common ground that in the United Kingdom he lived  
e with his grandmother, as her dependant, and pursued and completed his secondary education without ever having recourse to social assistance.

21. In September 2001 he started a course in economics at University College London.

22. While Mr Bidar received assistance with respect to tuition fees, his application for financial assistance to cover his maintenance costs, in the form of  
f a student loan, was refused on the ground that he was not settled in the United Kingdom.

23. In the proceedings brought by him against that refusal, Mr Bidar submits that, by making the grant of a student loan to a national of a member state conditional on his being settled in the United Kingdom, the Student Support Regulations introduced discrimination prohibited under art 12 EC. He submits,  
g in the alternative, that, even if it were accepted that the provision of a grant falls outside the scope of the Treaty, that is not the case with an application for assistance in the form of a subsidised loan.

24. The Secretary of State for Education and Skills, who is the responsible authority for making the Student Support Regulations, contends, on the other  
h hand, that the provision of assistance for maintenance costs, whether in the form of a grant or a loan, does not fall within the scope of art 12 EC, as the court acknowledged in *Lair v Universität Hannover* Case 39/86 [1988] ECR 3161 and *Brown v Secretary of State for Scotland* Case 197/86 1989 SLT 402, [1988] ECR 3205. Even if such assistance were to fall within the scope of the Treaty, the conditions for granting that assistance would guarantee the existence of a  
i direct link between the recipient of the assistance and the state which finances it.

25. The national court observes that student loans represent a cost to the state, because of the reduced rates of interest and possible problems with repayment, a cost which the Secretary of State for Education and Skills estimates at the equivalent of 50% of the amount of the loans. The average

loan made to a student for the academic year 2000–01 is said to be £3,155. If the 41,713 nationals of the European Union who studied in England and Wales during that year without being settled there had received student loans, the probable cost to the state would thus have been £66m. a

26. According to the national court, Mr Bidar is not covered by Regulation 1612/68 and cannot claim any right to a student loan on the basis of Directive 93/96. b

27. In those circumstances, the High Court of Justice of England and Wales, Queen's Bench Division (Administrative Court), decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

'(1) Whether, given the decisions of the Court of Justice of the European Communities in ... *Lair* ... and ... *Brown* ... and developments in the law of the European Union, including the adoption of Article 18 EC and developments in relation to the competence of the European Union in the field of education, assistance with maintenance costs for students attending university courses, such assistance being given by way of either (a) subsidised loans or (b) grants, continues to fall outside the scope of the application of the EC Treaty for the purposes of Article 12 EC and the prohibition on discrimination on grounds of nationality? c

(2) If either part of question (1) is answered in the negative, and if assistance with maintenance costs for students in the form of grants or loans [does] now fall within the scope of Article 12 EC, what criteria should the national court apply in determining whether the conditions governing eligibility for such assistance are based on objectively justifiable considerations not dependent on nationality? d

(3) If either part of question (1) is answered in the negative, whether Article 12 EC may be relied upon to claim entitlement to assistance with maintenance costs from a date prior to the date of the judgment of the Court of Justice in the present case and, if [not], whether an exception should be made for those who initiated legal proceedings before that date?' e

#### THE QUESTIONS REFERRED FOR A PRELIMINARY RULING

##### Question (1)

28. By its first question, the national court asks essentially whether, in the present state of Community law, assistance to students in higher education intended to cover their maintenance costs, in the form of a subsidised loan or a grant, falls outside the scope of the Treaty, in particular the first paragraph of art 12 EC. f

29. According to the order for reference, the claimant in the main proceedings is not covered by Regulation 1612/68. g

30. In that context, the national court wishes to know whether assistance granted to students to cover their maintenance costs is within the scope of application of the Treaty within the meaning of the first paragraph of art 12 EC, which states that, without prejudice to any special provisions contained in the Treaty, any discrimination on grounds of nationality is prohibited within that scope of application. h

31. To assess the scope of application of the Treaty within the meaning of art 12 EC, that article must be read in conjunction with the provisions of the Treaty on citizenship of the Union. Citizenship of the Union is destined to be the fundamental status of nationals of the member states, enabling those who i



- a find themselves in the same situation to receive the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for (see *Grzelczyk v Centre Public d'Aide Sociale d'Ottignies-Louvain-la-Neuve* Case C-184/99 [2003] All ER (EC) 385, [2001] ECR I-6193 (paras 30, 31) and *Garcia Avello v Belgium* Case C-148/02 [2004] All ER (EC) 740, [2003] ECR I-11613 (paras 22, 23)).
- b 32. According to settled case law, a citizen of the European Union lawfully resident in the territory of the host member state can rely on art 12 EC in all situations which fall within the scope *ratione materiae* of Community law (see *Martínez Sala v Freistaat Bayern* Case C-85/96 [1998] ECR I-2691 (para 63) and *Grzelczyk's case* (para 32)).
- c 33. Those situations include those involving the exercise of the fundamental freedoms guaranteed by the Treaty and those involving the exercise of the right to move and reside within the territory of the member states, as conferred by art 18 EC (see *Criminal proceedings against Bickel* Case C-274/96 [1998] ECR I-7637 (paras 15, 16), *Grzelczyk's case* (para 33) and *Garcia Avello's case* (para 24)).
- d 34. Moreover, there is nothing in the text of the Treaty to suggest that students who are citizens of the Union, when they move to another member state to study there, lose the rights which the Treaty confers on citizens of the Union (see *Grzelczyk's case* (para 35)).
35. As is apparent from *D'Hoop v Office National de l'Emploi* Case C-224/98 [2003] All ER (EC) 527, [2002] ECR I-6191 (paras 29–34), a national of a member state who goes to another member state and pursues secondary education there exercises the freedom to move guaranteed by art 18 EC.
- e 36. Furthermore, a national of a member state who, like the claimant in the main proceedings, lives in another member state where he pursues and completes his secondary education, without it being objected that he does not have sufficient resources or sickness insurance, enjoys a right of residence on the basis of art 18 EC and Directive 90/364.
- f 37. With regard to social assistance benefits, the court held in *Trojani v Centre Public d'Aide Sociale de Bruxelles (CPAS)* Case C-456/02 [2004] All ER (EC) 1065 (para 43), that a citizen of the Union who is not economically active may rely on the first paragraph of art 12 EC where he has been lawfully resident in the host member state for a certain time or possesses a residence permit.
- g 38. It is true that the court held in *Lair's case* and *Brown's case* (paras 15, 18 respectively) that 'at the present stage of development of Community law assistance given to students for maintenance and for training falls in principle outside the scope of the EEC Treaty for the purposes of Article 7 thereof [later art 6 of the EC Treaty, now, after amendment, art 12 EC]'. In those judgments the court considered that such assistance was, on the one hand, a matter of education policy, which was not as such included in the spheres entrusted to the Community institutions, and, on the other, a matter of social policy, which fell within the competence of the member states in so far as it was not covered by specific provisions of the EEC Treaty.
- h 39. However, since judgment was given in *Lair's case* and *Brown's case*, the Treaty on European Union has introduced citizenship of the Union into the EC Treaty and added to Title VIII (now Title XI) of Part Three a Chapter 3 devoted *inter alia* to education and vocational training (see *Grzelczyk's case* (para 35)).
- i 40. Thus art 149(1) EC gives the Community the task of contributing to the development of quality education by encouraging co-operation between

member states and, if necessary, by supporting and supplementing their action, while fully respecting the responsibility of those states for the content of teaching and the organisation of education systems and their cultural and linguistic diversity.

41. Under paras 2 and 4 of that article, the Council may adopt incentive measures, excluding any harmonisation of the laws and regulations of the member states, and recommendations aimed in particular at encouraging the mobility of students and teachers (see *D'Hoop's case* (para 32)).

42. In view of those developments since the judgments in *Lair's case* and *Brown's case*, it must be considered that the situation of a citizen of the Union who is lawfully resident in another member state falls within the scope of application of the Treaty within the meaning of the first paragraph of art 12 EC for the purposes of obtaining assistance for students, whether in the form of a subsidised loan or a grant, intended to cover his maintenance costs.

43. That development of Community law is confirmed by art 24 of Directive 2004/38, which states in para 1 that all Union citizens residing in the territory of another member state on the basis of that directive are to enjoy equal treatment 'within the scope of the Treaty'. In that the Community legislature, in para 2 of that article, defined the content of para 1 in more detail, by providing that a member state may in the case of persons other than workers, self-employed persons, persons who retain such status and members of their families restrict the grant of maintenance aid in the form of grants or loans in respect of students who have not acquired a right of permanent residence, it took the view that the grant of such aid is a matter which, in accordance with art 24(1), now falls within the scope of the Treaty.

44. That interpretation is not invalidated by the argument put forward by the governments which have submitted observations and by the Commission concerning the limitations and conditions referred to in art 18 EC. Those governments and the Commission observe that, while citizenship of the Union enables nationals of the member states to rely on the first paragraph of art 12 EC when they exercise the right to move and reside within the territory of those states, their situation falls within the scope of application of the Treaty within the meaning of art 12 EC only, in accordance with art 18(1) EC, subject to the limitations and conditions laid down in the Treaty and by the measures adopted to give it effect, which include those laid down by Directive 93/96. Since art 3 of that directive excludes the right to payment of maintenance grants on the part of students benefiting from the right of residence, those grants are still outside the scope of the Treaty.

45. In this respect, it is indeed the case that students who go to another member state to start or pursue higher education there and enjoy a right of residence there for that purpose under Directive 93/96 cannot base any right to payment of maintenance assistance on that directive.

46. However, art 3 of Directive 93/96 does not preclude a national of a member state who, by virtue of art 18 EC and Directive 90/364, is lawfully resident in the territory of another member state where he intends to start or pursue higher education from relying during that residence on the fundamental principle of equal treatment enshrined in the first paragraph of art 12 EC.

47. In a context such as that of the main proceedings where the right of residence of the applicant for assistance is not contested, the assertion, made by some of the governments which have submitted observations, that Community law allows a member state to take the view that a national of

a another member state who has recourse to social assistance no longer fulfils the conditions of his right of residence and if appropriate to take measures, within the limits imposed by Community law, for the removal of that national (see *Grzelczyk's case* (para 42) and *Trojani's case* (para 45)) is moreover immaterial.

b 48. In the light of all the foregoing, the answer to question (1) must be that assistance, whether in the form of subsidised loans or of grants, provided to students lawfully resident in the host member state to cover their maintenance costs falls within the scope of application of the Treaty for the purposes of the prohibition of discrimination laid down in the first paragraph of art 12 EC.

c *Question (2)*

49. By its second question, the national court seeks to know the criteria which a national court must apply to determine whether the conditions of granting assistance to cover the maintenance costs of students are based on objective considerations independent of nationality.

d 50. For this purpose it should first be examined whether the legislation at issue in the main proceedings distinguishes on the ground of nationality between students who apply for such assistance.

e 51. It must be recalled here that the principle of equal treatment prohibits not only overt discrimination based on nationality but also all covert forms of discrimination which, by applying other distinguishing criteria, lead in fact to the same result (see, inter alia, *Sotgiu v Deutsche Bundespost* Case 152/73 [1974] ECR 153 (para 11), *Meints v Minister van Landbouw, Natuurbeheer en Visserij* Case C-57/96 [1997] ECR I-6689 (para 44) and *European Commission v Italy* Case C-212/99 [2001] ECR I-4923 (para 24)).

f 52. As regards persons not covered by Regulation 1612/68, para 1 of Sch 1 to the Student Support Regulations requires, for the grant to students of assistance to cover their maintenance costs, that the person concerned is settled in the United Kingdom for the purposes of national law and satisfies certain residence conditions, namely that of residing in England and Wales on the first day of the first academic year and that of having resided in the United Kingdom and Islands for the three years preceding that day.

g 53. Such requirements risk placing at a disadvantage primarily nationals of other member states. Both the condition requiring an applicant for that assistance to be settled in the United Kingdom and that requiring him to have resided there prior to his studies are likely to be more easily satisfied by United Kingdom nationals.

h 54. Such a difference in treatment can be justified only if it is based on objective considerations independent of the nationality of the persons concerned and is proportionate to the legitimate aim of the national provisions (see *Bickel's case* (para 27), *D'Hoop's case* (para 36) and *Garcia Avello's case* (para 31)).

i 55. According to the United Kingdom government, it is legitimate for a member state to ensure that the contribution made by parents or students through taxation is or will be sufficient to justify the provision of subsidised loans. It is also legitimate to require a genuine link between the student claiming assistance to cover his maintenance costs and the employment market of the host member state.

56. On this point, it must be observed that, although the member states must, in the organisation and application of their social assistance systems, show a certain degree of financial solidarity with nationals of other member



states (see *Grzelczyk's* case (para 44)), it is permissible for a member state to ensure that the grant of assistance to cover the maintenance costs of students from other member states does not become an unreasonable burden which could have consequences for the overall level of assistance which may be granted by that state. a

57. In the case of assistance covering the maintenance costs of students, it is thus legitimate for a member state to grant such assistance only to students who have demonstrated a certain degree of integration into the society of that state. b

58. In this context, a member state cannot, however, require the students concerned to establish a link with its employment market. Since the knowledge acquired by a student in the course of his higher education does not in general assign him to a particular geographical employment market, the situation of a student who applies for assistance to cover his maintenance costs is not comparable to that of an applicant for a tideover allowance granted to young persons seeking their first job or for a jobseeker's allowance (see, in this regard, *D'Hoop's* case (para 38) and *Collins v Secretary of State for Work and Pensions* Case C-138/02 [2004] All ER (EC) 1005 (para 67), respectively). c

59. On the other hand, the existence of a certain degree of integration may be regarded as established by a finding that the student in question has resided in the host member state for a certain length of time. d

60. With respect to national legislation such as the Student Support Regulations, the guarantee of sufficient integration into the society of the host member state follows from the conditions requiring previous residence in the territory of that state, in this case the three years' residence required by the United Kingdom rules at issue in the main proceedings. e

61. The additional condition that students are entitled to assistance to cover their maintenance costs only if they are also settled in the host member state could admittedly, like the requirement of three years' residence referred to in the preceding paragraph, correspond to the legitimate aim of ensuring that an applicant for assistance has demonstrated a certain degree of integration into the society of that state. However, it is common ground that the rules at issue in the main proceedings preclude any possibility of a national of another member state obtaining settled status as a student. They thus make it impossible for such a national, whatever his actual degree of integration into the society of the host member state, to satisfy that condition and hence to enjoy the right to assistance to cover his maintenance costs. Such treatment cannot be regarded as justified by the legitimate objective which those rules seek to secure. f

62. Such treatment prevents a student who is a national of a member state and who is lawfully resident and has received a substantial part of his secondary education in the host member state, and has consequently established a genuine link with the society of the latter state, from being able to pursue his studies under the same conditions as a student who is a national of that state and is in the same situation. g

63. The answer to question (2) must accordingly be that the first paragraph of art 12 EC must be interpreted as precluding national legislation which grants students the right to assistance covering their maintenance costs only if they are settled in the host member state, while precluding a national of another member state from obtaining the status of settled person as a student even if that national is lawfully resident and has received a substantial part of h

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- a his secondary education in the host member state and has consequently established a genuine link with the society of that state.

Question (3)

- b 64. By its third question, the national court asks the court whether, if the court were to rule that assistance to cover the maintenance costs of students falls within the scope of application of the Treaty within the meaning of the first paragraph of art 12 EC, the effects of such a judgment should be limited in time.
- c 65. The United Kingdom, German and Austrian governments request the court, should it so rule, to limit in time the effects of its judgment, except as regards judicial proceedings brought before the date of that judgment. In support of their request, they rely in particular on the financial implications raised by the national court.
- d 66. It should be recalled that the interpretation the court gives to a rule of Community law is limited to clarifying and defining the meaning and scope of that rule as it ought to have been understood and applied from the time of its coming into force. It follows that the rule as thus interpreted may, and must, be applied by the courts even to legal relationships arising and established before the judgment ruling on the request for interpretation, provided that in other respects the conditions enabling an action relating to the application of that rule to be brought before the courts having jurisdiction are satisfied (see *Amministrazione delle Finanze dello Stato v Denkavit Italiana Srl* Case 61/79 [1980] ECR 1205 (para 16), and *Blaizot v University of Liège* Case 24/86 [1988] ECR 379 (para 27)).
- e 67. It is only exceptionally that the court may, in application of the general principle of legal certainty inherent in the Community legal order, be moved to restrict the possibility for any person concerned of relying on a provision it has interpreted with a view to calling in question legal relationships established in good faith (see *Blaizot's case* (para 28), *Administration des Douanes et Droits Indirects v Legros* Case C-163/90 [1992] ECR I-4625 (para 30) and *Sürül v Bundesanstalt für Arbeit* Case C-262/96 [1999] ECR I-2685 (para 108)).
- f 68. Moreover, it is settled case law that the financial consequences which might ensue for a member state from a preliminary ruling do not in themselves justify limiting the temporal effect of the ruling (see, inter alia, *Grzelczyk's case* (para 52)).
- g 69. The court has taken that step only in quite specific circumstances, where there was a risk of serious economic repercussions owing in particular to the large number of legal relationships entered into in good faith on the basis of rules considered to be validly in force and where it appeared that both individuals and national authorities had been led into adopting practices which did not comply with Community legislation by reason of objective, significant uncertainty regarding the implications of Community provisions, to which the conduct of other member states or the Commission may even have contributed (see *Grzelczyk's case* (para 53)).
- h 70. In the present case, it suffices to state that the information provided by the United Kingdom, German and Austrian governments is not capable of supporting their argument that this judgment might, if its effects were not limited in time, entail significant financial consequences for the member states. The figures referred to by those governments in fact relate also to cases which are not similar to that at issue in the main proceedings.
- i

71. Consequently, the answer to question (3) must be that there is no need to limit the temporal effects of the present judgment. a

#### COSTS

72. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the court, other than the costs of those parties, are not recoverable. b

On those grounds, the Court of Justice (Grand Chamber) rules as follows:

(1) Assistance, whether in the form of subsidised loans or of grants, provided to students lawfully resident in the host member state to cover their maintenance costs falls within the scope of application of the EC Treaty for the purposes of the prohibition of discrimination laid down in the first paragraph of art 12 EC (formerly art 6 of the EC Treaty). c

(2) The first paragraph of art 12 EC must be interpreted as precluding national legislation which grants students the right to assistance covering their maintenance costs only if they are settled in the host member state, while precluding a national of another member state from obtaining the status of settled person as a student even if that national is lawfully resident and has received a substantial part of his secondary education in the host member state and has consequently established a genuine link with the society of that state. d

(3) There is no need to limit the temporal effects of the present judgment.



**a** **Peak Holding AB v Axolin-Elinor AB**  
(Case C-16/03)

**b** COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES (GRAND CHAMBER)  
JUDGES SKOURIS (PRESIDENT), JANN, TIMMERMANS, ROSAS AND SILVA DE LAPUERTA  
(PRESIDENTS OF CHAMBERS), GULMANN (RAPPORTEUR), PUISSOCHET, SCHINTGEN  
AND CUNHA RODRIGUES  
ADVOCATE GENERAL STIX-HACKL  
24 MARCH, 27 MAY, 30 NOVEMBER 2004

**c** *European Community – Trade marks – Exhaustion of right conferred by trade mark –  
Putting on the market of goods by proprietor of trade mark – Interpretation of  
directive – First Council Directive (EEC) 89/104, arts 5, 7(1).*

**d** The applicant, a company in a Danish group of companies, was the proprietor of the trade mark 'PEAK PERFORMANCE'. The right to use that trade mark was granted to PPP, an associated company, which produced and sold clothing and accessories under that trade mark in Sweden and other countries. At the material time, the respondent company, a company governed by Swedish law, carried out in shops in Sweden direct sales of clothing and other items, largely

**e** trade-marked goods which were parallel imports or re-imports or were obtained outside the normal distribution channels of the proprietor of the trade mark concerned. In 2000, the respondent marketed a consignment of approximately 25,000 garments under the 'PEAK PERFORMANCE' trade mark, after placing advertisements in the press offering the sale of those articles at half-price. Those articles had been manufactured outside the European

**f** Economic Area (EEA) on behalf of PPP and had been imported into the EEA in order to be sold there. According to the respondent, the garments offered for sale from 1996 to 1998 had been offered in shops belonging to independent resellers, while according to the applicant, they had been offered in PPP's shops. In late 1999, all the garments in the consignment formed part of those

**g** offered for sale to final consumers in a store in Denmark supplied by a sister company of PPP. The consignment thus consisted of goods which had remained unsold after the sales. PPP sold that consignment to an undertaking established in France. According to the applicant, the contract concluded on that occasion provided that the consignment was not to be resold in European countries (other than Russia and Slovenia), with the exception of 5% of the

**h** total quantity, which could be sold in France. The respondent contested the existence of such a restriction, and submitted that, in any event, it had no knowledge of it when it purchased the consignment. It was common ground that the consignment had not left the EEA from the time when it left PPP's warehouses in Denmark until it was delivered to the respondent in Sweden. The applicant, claiming that the conditions of marketing chosen by the

**i** respondent, in particular its advertisements, infringed its trade mark rights, brought an action in the district court. It asked the court to order that the respondent pay damages, that it be prohibited from marketing and selling the clothing and other articles from the consignment in question, and that those goods be destroyed. The respondent contended that those claims should be dismissed, as the goods at issue had been put on the market in the EEA by

the applicant, so that it was not entitled to prohibit the use of the trade mark on the sale of the goods. The district court dismissed the application, taking the view that the goods had in fact been marketed by reason of being made available to consumers in the Danish store and that the rights conferred by the trade mark could not be restored after that had occurred. The applicant appealed against that decision. Since it considered that the outcome of the dispute depended on the interpretation of the expression 'put on the market' in art 7(1)<sup>a</sup> of First Council Directive (EEC) 89/104 (to approximate the laws of the member states relating to trade marks), the court stayed the proceedings and referred to the Court of Justice of the European Communities for a preliminary ruling under art 234 EC (formerly art 177 of the EC Treaty) the questions, inter alia: (i) whether goods were to be regarded as having been put on the market by virtue of the fact that the proprietor of the trade mark: (a) had imported them into the common market and paid import duty on them, with the intention that they be sold there; or (b) had offered them for sale in the trade mark proprietor's own shops or those of a related company within the common market but a sale of the goods had not taken place; and (ii) whether goods were to be regarded as having been put on the market by virtue of the fact that they had been sold by the trade mark proprietor to another company in the internal market, if, upon the sale, the trade mark proprietor imposed a restriction on the buyer under which he was not entitled to resell the goods in the common market.

**Held** – (1) Articles 5b and 7 of the directive effected a complete harmonisation of the rules relating to the rights conferred by a trade mark and accordingly defined the rights of proprietors of trade marks in the Community. The expression 'put on the market' in the EEA used in art 7(1) of the directive constituted a decisive factor in the extinction of the exclusive right of the proprietor of a trade mark laid down in art 5 of that directive. The directive was intended to ensure that the proprietor had the exclusive right to use the trade mark for the purpose of putting the goods bearing it on the market for the first time. By specifying that the placing of goods on the market outside the EEA did not exhaust the proprietor's right to oppose the importation of those goods without his consent, the Community legislature thus allowed the proprietor of the trade mark to control the initial marketing in the EEA of goods bearing the mark. Article 7(1) of the directive was intended to make possible the further marketing of an individual item of a product bearing a trade mark without the proprietor of the trade mark being able to oppose that. For a trade mark to be able to fulfil its essential role in the system of undistorted competition which the EC Treaty sought to establish, it had to offer a guarantee that all the goods or services bearing it had been manufactured or supplied under the control of a single undertaking which was responsible for their quality. In the instant case, it had not been disputed that, where it sold goods bearing its mark to a third party in the EEA, the proprietor put those goods on the market within the meaning of art 7(1) of the directive. A sale which allowed the proprietor to realise the economic value of his trade mark exhausted the exclusive rights conferred by the directive, more particularly the right to prohibit the acquiring third party from reselling the goods. On the other hand, where the proprietor imported its goods with a view to selling them in the EEA or offered them for sale in the EEA, it did not put

<sup>a</sup> Article 7(1) of the directive is set out at judgment para 4, below

- a them on the market within the meaning of art 7(1) of the directive. Such acts did not transfer to third parties the right to dispose of the goods bearing the trade mark. They did not allow the proprietor to realise the economic value of the trade mark. Even after such acts, the proprietor retained its interest in maintaining complete control over the goods bearing its trade mark, in order
- b in particular to ensure their quality. Moreover, art 5(3)(b) of the directive, relating to the content of the proprietor's exclusive rights, distinguished, *inter alia*, between offering goods, putting them on the market, stocking them for those purposes and importing them. The wording of that provision therefore also confirmed that importing the goods or offering them for sale in the EEA could not be equated to putting them on the market there. The answer to the
- c first question had therefore to be that art 7(1) of the directive had to be interpreted as meaning that goods bearing a trade mark could not be regarded as having been put on the market in the EEA where the proprietor of the trade mark had imported them into the EEA with a view to selling them there or where he had offered them for sale to consumers in the EEA, in his own shops or those of an associated company, without actually selling them (see judgment
- d paras 30–44, below).

- (2) Article 7(1) of the directive made Community exhaustion subject either to a putting on the market in the EEA by the proprietor of the trade mark itself or to a putting on the market in the EEA by a third party but with the proprietor's consent. It followed from the answer to the first question that, in circumstances such as those in the instant case, putting on the market in the
- e EEA by the proprietor presupposed a sale of the goods by him in the EEA. In the event of such a sale, art 7(1) of the directive did not make exhaustion of the rights conferred by the trade mark subject in addition to the proprietor's consent to a further marketing of the goods in the EEA. Exhaustion occurred solely by virtue of the putting on the market in the EEA by the proprietor. Any stipulation, in the act of sale effecting the first putting on the market in the
- f EEA, of territorial restrictions on the right to resell the goods concerned only the relations between the parties to that act. It could not preclude the exhaustion provided for by the directive. The answer to the second question had therefore to be that, in circumstances such as those in the instant case, the stipulation, in a contract for sale concluded between the proprietor of a trade
- g mark and an operator established in the EEA, of a prohibition on reselling in the EEA did not mean that there was no putting on the market in the EEA within the meaning of art 7(1) of the directive and thus did not preclude the exhaustion of the proprietor's exclusive rights in the event of resale in the EEA in breach of the prohibition (see judgment paras 50–56, below).

## h Notes

For the statutory exhaustion of rights where goods are marketed within the European Economic Area, see 48 *Halsbury's Laws* (4th edn 2000 reissue) para 98.

## Cases cited

- i *Administration des Douanes et Droits Indirects v Rioglass SA* Case C-115/02 [2004] ETMR 38, ECJ.
- Arsenal Football Club plc v Reed* Case C-206/01 [2003] All ER (EC) 1, [2003] Ch 454, [2003] 3 WLR 450, [2002] ECR I-10273, ECJ.
- Bayerische Motorenwerke AG (BMW) v Deenik* Case C-63/97 [1999] All ER (EC) 235, [1999] ECR I-905, ECJ.



- Björnekulla Fruktindustrier AB v Procordia Food AB* Case C-371/02 [2005] IP & T 112, ECJ. a
- Bristol-Myers Squibb v Paranova A/S* Joined cases C-427/93, C-429/93 and C-436/93 (1996) 34 BMLR 59, [2003] Ch 75, [2002] 3 WLR 1746, [1996] ECR I-3457, ECJ.
- Centrafarm BV v Winthrop BV* Case 16/74 [1974] ECR 1183, ECJ.
- IHT Internationale Heiztechnik GmbH v Ideal-Standard GmbH* Case C-9/93 [1994] ECR I-2789, ECJ. b
- Philips Electronics NV v Remington Consumer Products Ltd* Case C-299/99 [2002] All ER (EC) 634, [2003] Ch 159, [2003] 2 WLR 294, [2002] ECR I-5475, ECJ.
- Sebago Inc v GB-Unic SA* Case C-173/98 [1999] All ER (EC) 575, [2000] Ch 558, [2000] 2 WLR 1341, [1999] ECR I-4103, ECJ.
- Silhouette International Schmied GmbH & Co KG v Hartlauer Handelsgesellschaft mbH* Case C-355/96 [1998] All ER (EC) 769, [1999] Ch 77, [1998] 3 WLR 1218, [1998] ECR I-4799, ECJ. c
- Van Doren + Q. GmbH v Lifestyle sports + sportswear Handelsgesellschaft mbH* Case C-244/00 [2004] All ER (EC) 912, [2003] ECR I-3051, ECJ.
- Zino Davidoff SA v A & G Imports Ltd* [1999] 3 All ER 711, [2000] Ch 127, [1999] 3 WLR 849. d
- Zino Davidoff SA v A & G Imports Ltd, Levi Strauss & Co v Tesco Stores Ltd, Levi Strauss & Co v Costco Wholesale UK Ltd* Joined cases C-414–416/99 [2002] All ER (EC) 55, [2002] Ch 109, [2002] 2 WLR 321, [2001] ECR I-8691, ECJ.

## Reference e

The Hovrätt över Skåne och Blekinge (Sweden) referred to the Court of Justice of the European Communities for a preliminary ruling under art 234 EC (formerly art 177 of the EC Treaty) questions on the interpretation of First Council Directive (EEC) 89/104 (to approximate the laws of the member states relating to trade marks) as amended by the Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L1 p 3) (the directive), and in particular art 7(1) thereof. The reference was made in the course of proceedings between Peak Holding AB (Peak Holding) and Axolin-Elinor AB (Axolin-Elinor), formerly Handelskompaniet Factory Outlet i Löddeköpinge AB (Factory Outlet) at the material time, concerning the manner in which Factory Outlet marketed a consignment of clothing bearing the Peak Performance trade mark, of which Peak Holding is the proprietor. Observations were submitted on behalf of: Peak Holding, by G Gozzo, Advokat; Axolin-Elinor, by K Azelius, Advokat, and M Palm, jur kand; the Swedish government, by K Wistrand and A Kruse, acting as agents; the Commission of the European Communities, by N B Rasmussen and K Simonsson, acting as agents. The language of the case was Swedish. The facts are set out in the opinion of the Advocate General. f

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27 May 2004. **The Advocate General (C Stix-Hackl)** delivered the following opinion<sup>1</sup>.

## I—INTRODUCTION

1. In the present case, the Court of Justice of the European Communities is once again called upon to interpret art 7(1) of First Council Directive (EEC) 89/104<sup>2</sup> (hereinafter Directive 89/104) in relation to the principle of the EEA-wide exhaustion of the rights conferred by a trade mark. i

<sup>1</sup> Original language: German.

<sup>2</sup> To approximate the laws of the member states relating to trade marks (OJ 1989 L40 p 1).

a 2. In the main proceedings, marked goods were manufactured outside the EEA and imported into the EEA by the trade mark proprietor, or in any event by companies associated with the proprietor. Subsequent sales of those goods were made partly by the associated companies and partly by third parties, and it is not disputed that the sales were made within the EEA. The trade mark proprietor having brought proceedings for infringement of the mark with a  
b view to exercising control over those sales within the EEA, the national court raised the question whether, and if so from what time, the rights of the proprietor are or were to be treated as exhausted.

c 3. Against that background, the national court is essentially asking whether the mere importation of the marked goods into the EEA is to be regarded as the putting onto the market which gives rise to exhaustion, or whether this should instead be treated as occurring as a result of later acts of the trade mark proprietor.

## II—LEGAL FRAMEWORK

4. Article 5 of Directive 89/104 provides in extract:

d *'Rights conferred by a trade mark'*  
1. The registered trade mark shall confer on the proprietor exclusive rights therein. The proprietor shall be entitled to prevent all third parties not having his consent from using in the course of trade:  
e (a) any sign which is identical with the trade mark in relation to goods or services which are identical with those for which the trade mark is registered ...  
3. The following, *inter alia*, may be prohibited under paragraphs 1 and 2 ...  
f (b) offering the goods, or putting them on the market or stocking them for these purposes under that sign, or offering or supplying services thereunder;  
(c) importing or exporting the goods under the sign ...'

5. Article 7 of the directive is headed 'Exhaustion of the rights conferred by a trade mark'. Article 7(1) states:

g 'The trade mark shall not entitle the proprietor to prohibit its use in relation to goods which have been put on the market in the Community under that trade mark by the proprietor or with his consent.'

h 6. Under art 65(2) in conjunction with para 4 of Annex XVII to the Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L1 p 3), art 7(1) of the directive was amended for the purposes of the Agreement by substituting the words 'in a Contracting State' for the expression 'in the Community'.

## III—THE FACTS, THE MAIN PROCEEDINGS AND THE QUESTIONS REFERRED

i 7. Peak Holding AB (hereinafter Peak Holding) is the owner of a number of trade marks registered in Sweden or in the Community. The right to use the trade marks was transferred to a related company Peak Performance Production AB (hereinafter Peak Production), which produces and sells garments and accessories under those trade marks in Sweden and abroad.

8. In September 2000, Handelskompaniet Factory Outlet i Löddeköpinge AB, the predecessor of Axolin-Elinor AB (hereinafter Axolin-Elinor), offered a consignment of approximately 25,000 garments with Peak Holding's trade

mark for sale to consumers in its stores, and advertised the offer in newspapers. The garments in the consignment were produced outside Europe on Peak Production's behalf<sup>3</sup>. They were imported into Europe for the purposes of sale and in 1996–1998 were included in Peak Production's standard range.

9. It is common ground between the parties to the main proceedings that 70% of those garments were displayed for sale to consumers in the stores during that period. While Axolin-Elinor claimed that those garments were displayed for sale in independent stores, Peak Holding submitted that the sales had been made in Peak Production's own stores.

10. In November and December 1999, all the garments in the consignment in question were available for sale to consumers in Copenhagen in Base Camp, the store supplied by Peak Production's sister company, Carli Gry Denmark A/S. Peak Production then sold the remainder of the garments to the French company COPAD International. Peak Production claims that it was a condition of the sale that the consignment should not be resold in countries in Europe other than Slovenia and Russia, except that 5% of the total quantity could be sold in France.

11. Axolin-Elinor expressly denies that any such restriction was agreed upon, and contends instead that it acquired the consignment from the Swedish company Truefit Sweden AB.

12. The parties do not dispute that the consignment in question did not leave the EEA from the time when it left Peak Production's warehouse in Denmark until it was delivered to Axolin-Elinor.

13. Asserting that the marketing that Axolin-Elinor had carried out infringed Peak Holding's trade mark right, Peak Holding brought an action in October 2000 before the Lunds tingsrätt (Lund District Court). The tingsrätt dismissed the action, holding that the goods had been put on the market by virtue of the fact that they had been offered for sale to consumers in the Base Camp store and that the trade mark right could not be restored after that event. Peak Holding appealed against the judgment of the tingsrätt to the Hovrätt över Skåne och Blekinge (Court of Appeal for Skåne och Blekinge).

14. As that court was of the opinion that an interpretation of art 7(1) of Directive 89/104 was necessary for a resolution of the dispute, it decided to stay the proceedings and to refer the following questions for a preliminary ruling:

(1) Are goods to be regarded as having been put on the market by virtue of the fact that the proprietor of the trade mark:

(a) has imported them into the common market and paid import duty on them, with the intention that they be sold there?

(b) has offered them for sale in the trade mark proprietor's own shops or those of a related company within the common market but a sale of the goods has not taken place?

(2) If goods have been put on the market under one of the above alternatives and exhaustion of the trade mark rights thereby occurs without there having been a sale of the goods, can a trade mark proprietor interrupt exhaustion by returning the goods to a warehouse?

(3) Are goods to be regarded as having been put on the market by virtue of the fact that they have been sold by the trade mark proprietor to

<sup>3</sup> It is not possible to establish with certainty from the order for reference whether the word 'Europe' refers only to EEA contracting states. It is assumed for the purposes of this opinion that the consignment in question was manufactured outside the EEA.



a another company in the internal market, if, upon the sale, the trade mark proprietor imposed a restriction on the buyer under which he was not entitled to resell the goods in the common market?

(4) Is the answer to question (3) affected if the trade mark proprietor, upon selling the consignment to which the goods belonged, gave the buyer permission to resell a small part of the goods in the common market but did not specify the individual goods to which that permission applied?

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#### IV—LEGAL ANALYSIS

15. The first question asks in particular at what precise time goods bearing a trade mark are to be regarded as having been 'put on the market'. The second question appears to be supplementary to the first in that it applies if goods are to be regarded as having been put on the market as a result of the acts referred to by the national court in the first question. As the first two questions are closely connected, I should like to consider them together.

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16. The third and fourth questions referred concern the relationship between the criterion of putting goods on the market and that of the consent provided for in art 7(1), with the fourth question merely addressing a particular form of that, possibly decisive, consent. Both questions should therefore be considered together.

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#### A—The first and second questions

17. The first and second questions essentially require that a definition of the concept of putting on the market be provided that will enable it to be determined at what time goods bearing a trade mark are to be treated as if they had been put on the market in the EEA by the trade mark proprietor himself. That point is of great practical importance. On its solution will depend in particular the analysis under trade mark law of intra-group transactions<sup>4</sup> and of ancillary transactions<sup>5</sup>.

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18. It should be noted at the outset that the rights conferred by a trade mark are stated in art 5 of Directive 89/104 to be exclusive. Article 5(3) lists the rights of the trade mark proprietor in detail. Under art 5(3)(b), those rights include the right to prohibit offering goods or putting them on the market under that sign or stocking them for those purposes. According to settled Community case law, the fundamental rights of the proprietor include the right to control the place and time of the putting of goods on the market in the EEA of goods bearing the mark<sup>6</sup>.

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h 4 Is, for example, the exclusive right of the trade mark proprietor to be treated as exhausted where he has disposed of goods bearing the mark to a related company?

5 Is, for example, the exclusive right of the trade mark proprietor to be treated as exhausted where he has delivered goods bearing the mark to a forwarding agent?

6 And indeed, because of the principle of EEA-wide exhaustion, even if the goods were first put on the market by the trade mark proprietor outside the EEA—see Fezer *Markenrecht* (3rd edn, 2001) section 24 *Markengesetz*, point 93. For a critical analysis, see Laddie J ([1999] 3 All ER 711, [2000] Ch 127), reference for a preliminary ruling in *Zino Davidoff SA v A & G Imports Ltd, Levi Strauss & Co v Tesco Stores Ltd, Levi Strauss & Co v Costco Wholesale UK Ltd* Joined cases C-414–416/99 [2002] All ER (EC) 55, [2001] ECR I-8691 (extracts of which are published in IIC Vol 30 No 5/1999, p 567) (para 36): 'In my view this illustrates how [*Silhouette International Schmied GmbH & Co KG v Hartlauer Handelsgesellschaft mbH* Case C-355/96 [1998] All ER (EC) 769, [1998] ECR I-4799] has bestowed on a trade mark owner a parasitic right to interfere with the distribution of goods which bears little or no relationship to the proper function of the trade mark right. It is difficult to believe that a properly informed legislature intended such a result, even if it is the proper construction of art 7(1) of the directive.'

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19. The principle of Community-wide exhaustion embodied in art 7(1) of Directive 89/104 represents a balancing of interests between the free movement of goods on the one hand and the exercise of the rights conferred by a trade mark on the other. Without that principle, the proprietor would have the right to prevent goods bearing the mark being put onto the market in a particular member state where he himself or a third party with his consent had put the same goods on the market in another member state. That would materially affect the functioning of the internal market. In the interests of a properly functioning internal market, the principle of Community-wide exhaustion, now contained in art 7(1) of Directive 89/104, thus enables the principle of the territorial scope of the protection afforded by national trade marks to be overcome<sup>7</sup>. Because a balancing of interests is achieved, the trade mark proprietor is given the right to decide when the goods are put on the market in the EEA for the first time<sup>8</sup>, but is denied any trade mark control over the subsequent distribution of the goods.

20. A particular feature of the (partial) harmonisation of national trade mark laws under Directive 89/104 is that the principle of the Community-wide exhaustion of rights, which was originally developed in the context of the internal market, has also acquired importance for trade with non-member states<sup>9</sup>. The Court of Justice has made it clear in that regard that the putting of goods on the market outside the EEA does not exhaust the trade mark proprietor's right to oppose the importation of those goods without his consent and has concluded from that that 'the Community legislature has allowed the proprietor of the trade mark to control the initial marketing in the EEA of goods bearing the mark'<sup>10</sup> without, however, examining the spirit and purpose of the principle of exhaustion beyond the—irrelevant in the context—considerations of the proper functioning of the internal market<sup>11</sup>.

21. It should lastly be noted at the outset that a strengthening of the rights of the trade mark proprietor, for example by deferring the time of the act which is deemed to amount to exhaustion, would in principle create new opportunities for restricting the free movement of goods within the EEA.

22. The answer to the first two questions relating to the criterion of putting on the market under art 7(1) of Directive 89/104 requires that that provision be interpreted in accordance with the customary methods of interpretation. Those methods require that the suggested meanings proposed by the national court in the first question should be considered.

<sup>7</sup> With regard to the role of the exhaustion principle in the balancing of interests, see also my opinion in the *Zino Davidoff* case (para 80 et seq).

<sup>8</sup> That point was expressly made in the judgment in the *Zino Davidoff* case, cited in footnote 7, above (para 33) and the case law cited there.

<sup>9</sup> See also my opinion in the *Zino Davidoff* case, cited in footnote 7, above (paras 78, 84) and the observations made in footnote 6, above.

<sup>10</sup> See the judgment in the *Zino Davidoff* case, cited in footnote 7, above (para 33). See also in that regard the judgment in *Sebago Inc v GB-Unic SA* Case C-173/98 [1999] All ER (EC) 575, [1999] ECR I-4103 (para 21).

<sup>11</sup> See also Thomas Hays in *Parallel Importation under European Union Law* (2004) paras 7.55, 10.02 et seq and 10.11 et seq.

*a* Literal interpretation of art 7(1) of Directive 89/104

23. Notwithstanding any differences that there may be in the different language versions of art 7(1) of Directive 89/104<sup>12</sup>, the Swedish government rightly points out that, if one takes everyday language as a basis, the words used in the provision would mean that an act of the trade mark proprietor that is directed towards the market is necessary in any event if the criterion of putting on the market is to be regarded as satisfied. That is also confirmed by a historical consideration. In the leading case of *Centrafarm BV v Winthrop BV*<sup>13</sup>, the court stated:

*c* 'Such an obstacle [to the free movement of goods] is not justified when the product has been *put onto the market* in a legal manner in the Member State from which it has been imported, by the trade mark proprietor himself or with his consent, so that there can be no question of abuse or infringement of the trade mark.' (My emphasis.)

*d* 24. It follows from the importance of the direction of the trade mark proprietor's act, that is to say towards the market, coupled with the exhaustion of rights conferred by the mark under art 7(1) of Directive 89/104, that the wording of that provision, of itself, means that internal transactions, such as the transfer of goods bearing the mark to a retail subsidiary, or preparatory acts, such as the importation by the proprietor of goods from non-member countries which have been manufactured there on his behalf, cannot be considered to constitute the putting on the market of the goods bearing the mark.

*e* 25. As regards goods bearing the mark manufactured outside the EEA, it may also be observed that the trade mark proprietor need not necessarily, on their importation into the EEA, have yet decided how they are to be sold for the first time in the EEA. If the mere importation of and customs clearance on the initiative of the trade mark proprietor of goods bearing a trade mark were to be sufficient to exhaust the rights conferred by the mark, the proprietor would, in the final analysis, have no control over the first sale of the goods bearing the mark in the EEA.

*f* 26. If one therefore treats the mere importation into the EEA as being irrelevant to the question when goods are put on the market, the point remains open whether the offering of goods in the EEA amounts to their being put on the market, or whether it is instead necessary that they be sold, or at least that power to dispose of them is transferred under an arrangement that is more than a provisional one, for them to be treated as having been put on the market.

*g* 27. It hardly seems possible to resolve this question on the basis of a literal interpretation of art 7(1) of Directive 89/104, as both the offering and sale of the marked goods are acts which are 'directed towards the market'. The best that could be stated—as, for example, the Swedish government has observed—in the context of a literal interpretation is that to treat the relevant point as being the sale of the goods is not convincing, inasmuch as the goods are in fact taken off the market precisely because they are sold. Axolin-Elinor

*i* 12 While the German version uses the term 'Inverkehrbringen' (putting into trade or circulation), the Dutch ('in de handel zijn gebracht'), the French ('mis dans le commerce'), the Italian ('immessi in commercio') and the Spanish and the similarly-worded Portuguese versions ('comercializado' and 'comercializados') refer to sales made in course of trade, whereas the Danish ('markedsført'), English ('put on the market') and Swedish ('marknaden') versions refer specifically to the market.

13 Case 16/74 [1974] ECR 1183 (para 10).



adopts a similar approach when it contends that the offering of goods in a shop clearly indicates that they are on the market. a

*Systematic interpretation of art 7(1) of Directive 89/104*

28. From a systematic point of view, it is necessary to give primary consideration to the relationship between arts 5(3) and 7(1) of Directive 89/104. Article 5(3)(b) provides that the trade mark proprietor may, inter alia, prohibit 'offering the goods, or putting them on the market or stocking them for these purposes under that sign ...' Those words suggest that a distinction is to be drawn between the mere offering of goods for sale and their being put on the market. b

29. It is however open to question whether putting on the market under that provision is the same as the identical expression in art 7(1). The fact that the same words are used and that both provisions distinguish between acts directed towards the market and those which are purely internal in character support that approach<sup>14</sup>. The fact that the provisions serve different purposes argues against such a uniform interpretation; while art 5 contains detailed provisions governing the extent of the protection provided by the exclusive rights in the mark, art 7(1) contains a restriction on those exclusive rights<sup>15</sup>. c

30. A systematic interpretation of art 7(1) of Directive 89/104 accordingly fails to provide a clear answer. d

*Teleological interpretation of art 7(1) of Directive 89/104*

31. The starting point for a teleological interpretation of art 7(1) of Directive 89/104 is the balancing function of the principle of exhaustion of rights mentioned above<sup>16</sup>. Any interpretation must accordingly be discounted that would restrict the right of the trade mark proprietor to control the first putting on the market in the EEA of the goods bearing the mark. It should be noted at the same time that the limitations on the proprietor's rights under art 7(1) of Directive 89/104 not only serve the proper functioning of the internal market, but also assist legal certainty inasmuch as they prevent the proprietor having control over all subsequent sales, thereby enabling trade mark law to protect purchasers in good faith. e

32. It is also necessary in the context of a teleological interpretation to ensure that the proprietor may exercise his exclusive rights to the extent mentioned<sup>17</sup> and may benefit economically from them, without legal certainty being threatened thereby. f

33. It was stated above that those requirements would not be satisfied if the goods bearing the trade mark were to be treated as having been put on the market merely because of their being imported into the EEA<sup>18</sup>. g

34. Although both the Commission of the European Communities and the Swedish government accept that the opportunity to derive economic benefit from the mark is the determining factor, they draw different conclusions from the point. While the Commission is of the view that the economic benefit h

<sup>14</sup> See, in that regard, in relation to the German law transposing the directive, Ingerl and Rohnke *Markengesetz* (2nd edn, 2003) section 24, para 18.

<sup>15</sup> See in relation to the German law transposing the directive, Fezer *Markenrecht*, cited in footnote 6, para 7d and Ströbele and Hacker *Markengesetz* (7th edn, 2003) section 24, para 33 and the case law cited therein. i

<sup>16</sup> See para 19, above.

<sup>17</sup> See para 19, above.

<sup>18</sup> See para 24 et seq, above.

a referred to can only arise when the goods bearing the mark are sold, the Swedish government takes the view that it is sufficient that the trade mark proprietor be in a position to offer his goods to the public, as in such a case—irrespective of whether the goods are actually sold—he could in any event control the circumstances in which the first sale of the goods occurred.

b 35. The opinion of the Swedish government can certainly be supported from an economic perspective, which would equate putting on the market with marketing in the sense of introducing the goods to the market, and thus also interpret the completion of the sale of the goods as leaving the market. If the market is defined as a place where services are freely traded for consideration, in which the price is established by supply and demand, then it must be pointed out that the interpretation favoured by the Swedish government is by no means obligatory. Prices are established in the market through the interplay of supply and demand and are only finally set when goods are sold. There is thus something to be said in favour of the interpretation favoured by the Commission. Only that interpretation does justice to the concept of the market as a place in which services are freely traded for consideration<sup>19</sup>.

c 36. According to Axolin-Elinor, it can nevertheless not be disputed that goods offered in a shop have been put on the market. It is also the case that if the relevant point is treated as being the offer to final consumers, the principal function of the trade mark, that is to say the guarantee of origin, will be maintained.

d 37. There are many reasons why that approach is not convincing. Even if it must be accepted that an act directed towards the market is involved, the approach fails to give adequate consideration to the interests of the trade mark proprietor, as the protection of his investment in the mark cannot be realised in economic terms purely by offering goods bearing the mark for sale<sup>20</sup>.

e 38. Practical considerations are also against treating the offering of the goods as being the relevant point. Peak Holding argues in that regard that it is difficult to treat the offer for sale as being the relevant point, since, where goods are stored in warehouses, it is unclear which of them are subject to exhaustion. Reference should also be made in that context to the judgment in the *Sebago* case<sup>21</sup>, which states:

f '... the rights conferred by the trade mark are exhausted only in respect of the individual items of the product which have been put on the market with the proprietor's consent in the territory there defined. The proprietor may continue to prohibit the use of the mark in pursuance of the right conferred on him by the Directive in regard to individual items of that product which have been put on the market in that territory without his consent.'

g It follows from that judgment that in order to decide whether exhaustion has occurred, it must be established in any event which particular goods have been

19 See also, in another context, the opinion of Advocate General Léger in *Björnekulla Fruktindustrier AB v Procordia Food AB* Case C-371/02 [2005] IP & T 112 (para 40): 'The word marketplace implies the interface of supply and demand or an exchange, a transaction ...'

i 20 It should be noted in that context that while, in its judgment in *Arsenal Football Club plc v Reed* Case C-206/01 [2003] All ER (EC) 1, [2002] ECR I-10273 the court confirmed the traditional function of the mark as an indicator of the origin of the goods, at the same time, following the line of reasoning of Advocate General Ruiz-Jarabo Colomer (see the opinion in the *Arsenal* case (para 46)), it emphasised its growing importance as a vehicle for investment and publicity. Seen from that point of view, the approach of Axolin-Elinor appears unduly restrictive.

21 Cited in footnote 10, above (para 19).

put on the market—whether by the proprietor himself or with his consent. If it were sufficient for goods to be offered for them to be put on the market, it would be unclear how to apply the necessary tests with adequate legal certainty to goods stored in warehouses which may possibly not be intended for sale.

39. It should also be pointed out that to treat the time of the offer as being the relevant point would make it impossible to prevent parallel imports from non-member countries where the goods were in the EEA first of all and failed to find a buyer there. In *Silhouette International Schmied GmbH & Co KG v Hartlauer Handelgesellschaft mbH*<sup>22</sup>, where those facts arose, the court, as is well known, considered the permissibility of a national rule providing for the international exhaustion of trade mark rights, which in turn logically supposes that the rights conferred by a trade mark were not to be treated as already exhausted when goods are offered in a member state.

40. If one therefore treats—from an economic point of view—the disposal of the goods bearing the mark as being the time which is relevant to their being put on the market<sup>23</sup>, it must finally be determined from a legal point of view whether a change of ownership is required. The order for reference suggests this, as the first question refers to there being no ‘sale’ of the goods. The Commission has also argued—particularly at the hearing—in favour of ‘sale’ as being the relevant factor.

41. It should be pointed out in that regard that a change of ownership also leaves open the question whether the trade mark proprietor can obtain an economic benefit from the mark. In other words, the change of ownership of the marked goods must be irrelevant if the necessary economic approach is to be followed<sup>24</sup>.

42. If a change of ownership is irrelevant, it becomes necessary to treat the transfer of the actual right of disposal of the goods as being the relevant point. Goods are accordingly put on the market when a third party, whose decisions in relation to the sale of the goods cannot be ascribed to the trade mark proprietor, for example because that third party is objectively independent<sup>25</sup>, has acquired the actual right of disposal of the goods.

43. I therefore propose that the answer to the first question should be that goods bearing a trade mark are not put on the market merely by reason of their importation into the EEA and customs clearance, nor by reason of their being offered for sale in shops belonging to the trade mark proprietor or undertakings associated with him. Goods are instead put on the market in the EEA within the meaning of art 7(1) of Directive 89/104, with the effect that

<sup>22</sup> Case C-355/96 [1998] All ER (EC) 769, [1998] ECR I-4799.

<sup>23</sup> Which could also be inferred from, for example, the judgment in *Administration des Douanes et Droits Indirects v Rioglass SA* Case C-115/02 [2004] ETMR 38 (para 28), which states that a transit operation (which consists in transporting goods lawfully manufactured in a member state to a non-member country by passing through one or more member states) ‘by definition does not constitute a placing on the market [in the sense of putting a product on the market—see also para 25 of that judgment]’.

<sup>24</sup> When goods bearing a trade mark are sold under reservation of title, the transfer of the right of disposal precedes a change in legal ownership. To that extent, the reservation of title has no effect on the exhaustion provided for under trade mark law. Where goods are transferred by way of security, it is doubtful in any event whether an act directed towards the market is involved, as the assignor remains in possession of the goods in question. See to that effect Mulch *Der Tatbestand der markenrechtlichen Erschöpfung* (2001) p 20.

<sup>25</sup> This does not as a rule apply to transactions between related companies or to transactions within a distribution system.



a the rights are exhausted, when an independent third party has acquired the right of disposal of the goods bearing the mark.

44. In the light of that proposed answer, it is no longer necessary to consider the second question.

b *B—The third and fourth questions*

45. The last two questions essentially ask whether and to what extent a contractual expression of will by the trade mark proprietor with regard to the sale of the goods bearing the mark is relevant to the criterion of consent under art 7(1) of Directive 89/104.

c 46. Underlying that question is the notion that if a breach of that contractual expression of will can be proved there would be no consent within the meaning of art 7(1) of the directive, so that the question whether the marked goods had been put on the market in the EEA would no longer be relevant.

d 47. It is clear from the order for reference that the trade mark proprietor Peak Holding wished the great majority of the remaining items to be sold in non-member countries. Peak Holding inserted a provision to that effect in the contract with the French company COPAD. The third and fourth questions are clearly inspired by Peak Holding's argument that the breach of that provision imposing a territorial restriction on sales would amount to a failure of consent within the meaning of art 7(1) of Directive 89/104, thus precluding the exhaustion of the rights in the mark.

e 48. That approach misunderstands the legal nature of exhaustion as a restriction on the rights conferred by the mark which arises by operation of law, as the Swedish government rightly submits. Both semantically and from the point of view of its spirit and purpose, the concept of exhaustion requires that a distinction be made between putting on the market by the trade mark proprietor himself and putting on the market by a third party—but with the proprietor's consent<sup>26</sup>. The concept of consent in art 7(1) of Directive 89/104 represents a criterion of attributability which allows it to be established whether the putting on the market of goods in the EEA by a third party is to be attributed to the trade mark proprietor<sup>27</sup>.

f 49. Where the goods bearing the mark are put on the market in the EEA by the trade mark proprietor himself, exhaustion of rights arises by operation of law, irrespective of the contract between the proprietor and the purchaser. g Breach of any territorial restrictions on sale which the proprietor may have imposed on a purchaser of the goods in relation to their sale in the EEA may give rise to claims under the contract, but is irrelevant in principle under trade mark law.

h 50. A reference also to the judgment in the *Zino Davidoff* case<sup>28</sup> alters nothing in that analysis. There, the court held, inter alia, that 'a rule of national law which proceeded upon the mere silence of the trade mark proprietor would not recognise implied consent but rather deemed consent. This would not meet the need for consent positively expressed required by Community law'<sup>29</sup>. It can indeed be concluded from that that the consent of the trade mark

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<sup>26</sup> See also my opinion cited in footnote 7, above (para 42).

<sup>27</sup> As long ago as its judgment in *IHT Internationale Heiztechnik GmbH v Ideal-Standard GmbH* Case C-9/93 [1994] ECR I-2789 (para 43), the court made it clear that 'the consent implicit in any assignment is not the consent required for application of the doctrine of exhaustion of rights'.

<sup>28</sup> Cited in footnote 7, above.

<sup>29</sup> See the *Zino Davidoff* case (para 58).

proprietor within the meaning of art 7(1) of Directive 89/104, that is to say the consent to the putting of the goods on the market in the EEA by a third party, cannot be inferred merely from the absence of territorial restrictions on sale in the contract between the trade mark proprietor and his purchaser. a

51. Whether, conversely, the insertion of a territorial restriction on sales in that contract excludes the consent of the trade mark proprietor within the meaning of art 7(1) of Directive 89/104 as a matter of principle, however, is only relevant in so far as exhaustion is to be deduced from that consent. That question arises where goods are reimported from non-member countries<sup>30</sup>. Such issues do not arise in the main proceedings, where the question is only at what time the marked goods were put on the market in the EEA by the trade mark proprietor himself. b

52. It is not necessary to consider whether the territorial restriction on sales in the contract between Peak Holding and COPAD is compatible with competition law, as that point is of no relevance in answering the third question. c

53. As regards the fourth question, suffice it to observe that if the presence of a territorial restriction on sales is of no relevance to the question whether or not exhaustion arises in a case such as that in the main proceedings<sup>31</sup>, the same must apply a fortiori where that provision is used in a particular form. d

54. The answer to the third and fourth questions should therefore be that where goods bearing the mark are sold to another undertaking within the EEA, it is irrelevant to the consideration of when exhaustion arises under art 7(1) of Directive 89/104 whether and to what extent the trade mark proprietor has imposed territorial restrictions on sale on the purchaser. e

#### V—COSTS

55. The costs incurred by the Swedish government and by the Commission, which have submitted observations to the court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court. f

#### VI—CONCLUSION

56. I therefore propose that the Court of Justice should answer the questions referred as follows: g

(1) Article 7(1) of First Council Directive (EEC) 89/104 (to approximate the laws of the member states relating to trade marks) is to be interpreted as meaning that goods bearing a trade mark are not put on the market merely by reason of their importation into the EEA and customs clearance, nor by reason of their being offered for sale in shops belonging to the trade mark proprietor or undertakings associated with him. Goods are instead put on the market in the EEA when an independent third party has acquired the right of disposal of the goods bearing a mark, for example as the result of a sale. h

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<sup>30</sup> If the marked goods have not yet been put on the market in the EEA by the proprietor, but have none the less been imported by a third party into the EEA, for example by way of grey reimports, the question that arises in relation to a possible exhaustion of rights conferred by the mark is not whether the goods were put on the market in the EEA by the trade mark proprietor himself, but whether they were put on the market in the EEA by the third party with his consent. i

<sup>31</sup> See para 51, above.

- a (2) Where goods bearing a mark are sold to another undertaking within the EEA, it is irrelevant to the consideration of when exhaustion arises under art 7(1) of the directive whether and to what extent the trade mark proprietor has imposed territorial restrictions on sale on the purchaser.
- b 30 November 2004. **The COURT OF JUSTICE (Grand Chamber)** delivered the following judgment.
1. This reference for a preliminary ruling concerns the interpretation of art 7(1) of First Council Directive (EEC) 89/104 (to approximate the laws of the member states relating to trade marks) (OJ 1989 L40 p 1), as amended by the Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L1 p 3) (the directive).
- c 2. The reference was made in the course of proceedings between Peak Holding AB (Peak Holding) and Axolin-Elinor AB (Axolin-Elinor), formerly Handelskompaniet Factory Outlet i Löddeköpinge AB (Factory Outlet) at the material time, concerning the manner in which Factory Outlet marketed a consignment of clothing bearing the Peak Performance trade mark, of which
- d Peak Holding is the proprietor.

#### LEGAL BACKGROUND

3. Article 5 of the directive, entitled 'Rights conferred by a trade mark', reads as follows:

- e '1. The registered trade mark shall confer on the proprietor exclusive rights therein. The proprietor shall be entitled to prevent all third parties not having his consent from using in the course of trade:
- (a) any sign which is identical with the trade mark in relation to goods or services which are identical with those for which the trade mark is registered ...
- f 3. The following, *inter alia*, may be prohibited under [para 1] ...
- (b) offering the goods, or putting them on the market or stocking them for these purposes under that sign, or offering or supplying services thereunder;
- (c) importing ... the goods under the sign ...'

- g 4. Article 7 of the directive, in its original version, entitled 'Exhaustion of the rights conferred by a trade mark', provided:

'1. The trade mark shall not entitle the proprietor to prohibit its use in relation to goods which have been put on the market in the Community under that trade mark by the proprietor or with his consent ...'

- h 5. In accordance with art 65(2) of the Agreement on the European Economic Area (the EEA) in conjunction with point 4 of Annex XVII to that Agreement, the original version of art 7(1) of Directive 89/104 was amended for the purposes of that Agreement, the expression 'in the Community' being replaced by 'in a Contracting Party'.

i

#### THE MAIN PROCEEDINGS AND THE QUESTIONS REFERRED FOR A PRELIMINARY RULING

6. Peak Holding, a company in the Danish group IC-Companys, is the proprietor *inter alia* of the trade mark Peak Performance. The right to use that trade mark was granted to Peak Performance Production AB (Peak



Performance Production), a company associated with that group. That company produces and sells clothing and accessories under that trade mark in Sweden and other countries. a

7. At the material time Factory Outlet, a company governed by Swedish law, carried out in shops in Sweden direct sales of clothing and other items, largely trade-marked goods which were parallel imports or re-imports or were obtained outside the normal distribution channels of the proprietor of the trade mark concerned. b

8. In late 2000, Factory Outlet marketed, in particular, a consignment of approximately 25,000 garments under the Peak Performance trade mark, after placing advertisements in the press offering the sale of those articles at half-price. c

9. The articles came from the Peak Performance collections for the years 1996–1998. They had been manufactured outside the EEA on behalf of that company and had been imported into the EEA in order to be sold there.

10. According to Factory Outlet, the garments offered for sale from 1996 to 1998 had been offered in shops belonging to independent resellers, while, according to Peak Holding, they had been offered in Peak Performance Production's shops. d

11. In November and December 1999, all the garments in the consignment formed part of those offered for sale to final consumers in Copenhagen (Denmark) in the Base Camp store supplied by Carli Gry Danmark A/S, a sister company of Peak Performance Production. The consignment thus consisted of goods which had remained unsold after the sales. e

12. Peak Performance Production sold that consignment to COPAD International (COPAD), an undertaking established in France. According to Peak Holding, the contract concluded on that occasion provided that the consignment was not to be resold in European countries other than Russia and Slovenia, with the exception of 5% of the total quantity, which could be sold in France. Factory Outlet contested the existence of such a restriction, and submitted that, in any event, it had no knowledge of it when it purchased the consignment. f

13. Factory Outlet asserted that it had acquired the consignment from Truefit Sweden AB, a company governed by Swedish law.

14. It is common ground that the consignment did not leave the EEA from the time when it left Peak Performance Production's warehouses in Denmark until it was delivered to Factory Outlet in Sweden. g

15. Peak Holding, claiming that the conditions of marketing chosen by Factory Outlet, in particular its advertisements, infringed Peak Holding's trade mark rights, brought an action in the Lunds tingsrätt (Lund District Court) (Sweden) on 9 October 2000. It asked that court to order that Factory Outlet pay damages, that it be prohibited from marketing and selling the clothing and other articles from the consignment in question, and that those goods be destroyed. h

16. Factory Outlet contended that Peak Holding's claims should be dismissed. It submitted that the goods at issue had been put on the market in the EEA by Peak Holding, so that it was not entitled to prohibit the use of the trade mark on the sale of the goods. i

17. Factory Outlet submitted, first, that the goods had been put on the market by virtue of their import into the internal market by Peak Performance Production and of payment of the customs duties on them, with the intention of selling the goods in the Community. It submitted, second, that the goods

- a had been put on the market by virtue of having been offered for sale by independent resellers. It submitted, third, that they had been put on the market by virtue of having been marketed by Peak Performance Production in its own shops and in the Base Camp store and that, in those circumstances, they had been offered to consumers. It argued, fourth, that, in any event, the goods had been put on the market by virtue of having been sold to COPAD, regardless of whether they had been sold with or without a restriction on reselling in the internal market.

b 18. Peak Holding disputed that the goods had been put on the market by or with the consent of the proprietor of the trade mark. It argued that, even if the trade mark rights had been exhausted by reason of the goods having been offered for sale in the Base Camp store, that exhaustion had been interrupted and the trade mark rights restored after the goods had been returned to the warehouses.

c 19. The Lunds tingsrätt dismissed the application, taking the view that the goods had in fact been marketed by reason of being made available to consumers in the Base Camp store and that the rights conferred by the trade mark could not have been restored after that had occurred.

d 20. Peak Holding appealed to the referring court against the judgment of the Lunds tingsrätt.

e 21. Since it considered that the outcome of the dispute between Peak Holding and Axolin-Elinor depended on the interpretation of the expression 'put on the market' in art 7(1) of the directive, the Hovrätten över Skåne och Blekinge decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Are goods to be regarded as having been put on the market by virtue of the fact that the proprietor of the trade mark:

f (a) has imported them into the common market and paid import duty on them, with the intention that they be sold there?

(b) has offered them for sale in the trade mark proprietor's own shops or those of a related company within the common market but a sale of the goods has not taken place?

g (2) If goods have been put on the market under one of the above alternatives and exhaustion of the trade mark rights thereby occurs without there having been a sale of the goods, can a trade mark proprietor interrupt exhaustion by returning the goods to a warehouse?

h (3) Are goods to be regarded as having been put on the market by virtue of the fact that they have been sold by the trade mark proprietor to another company in the internal market, if, upon the sale, the trade mark proprietor imposed a restriction on the buyer under which he was not entitled to resell the goods in the common market?

i (4) Is the answer to question (3) affected if the trade mark proprietor, upon selling the consignment to which the goods belonged, gave the buyer permission to resell a small part of the goods in the common market but did not specify the individual goods to which that permission applied?

#### THE QUESTIONS REFERRED FOR A PRELIMINARY RULING

##### Question 1

22. In the light of the circumstances of the main proceedings, the national court essentially asks, by its first question, whether art 7(1) of the directive must be interpreted as meaning that goods bearing a trade mark are regarded

as having been put on the market in the EEA where the proprietor of the trade mark has imported them into the EEA with a view to selling them there or where he has offered them for sale to consumers in the EEA, in his own shops or those of an associated company, but without actually selling them. a

*Observations submitted to the court*

23. Peak Holding and the Commission of the European Communities submit that exhaustion of the rights conferred by the trade mark occurs only when the goods are sold in the EEA by or with the consent of the proprietor of the trade mark. The rights are not exhausted in the hypotheses referred to in the first question. b

24. Axolin-Elinor submits that exhaustion of the rights of the trade mark proprietor occurs by virtue of the mere fact of importation, customs clearance and warehousing of the goods in the EEA with a view to sale. In the alternative, it argues that the rights conferred by the trade mark are exhausted when the proprietor of the mark offers the goods for sale to consumers, even if the offer is not taken up. c

25. The Swedish government submits that the different language versions of the directive must be understood as requiring the proprietor of the trade mark to have taken a step directed towards the market for it to be possible for goods to be regarded as having been put on the market. d

26. Goods should not thus be regarded as put on the market in the EEA merely because they have been imported, cleared through customs, and then warehoused in the EEA by the proprietor, since none of those steps is directed towards the market. e

27. Exhaustion occurs at the latest when the proprietor of the trade mark or a person who has acquired the right to use the mark offers the goods for sale to consumers in the EEA.

28. Exhaustion does not occur, by contrast, when the proprietor of the trade mark offers his goods in the EEA to resellers, since an offer to sell frequently relates only to a certain quantity of the goods in question. In such a case it is not possible to identify the goods in relation to which exhaustion has occurred. Moreover, an offer which is not followed by a transfer cannot be regarded as a sufficiently definitive disposal on the part of the proprietor. f

29. Exhaustion occurs on an actual transfer to a reseller, provided that the transfer appears as a step directed towards the market. A transfer between companies within the same group should be regarded as an internal measure within the group which does not bring about exhaustion of the rights. g

*Findings of the court*

30. Articles 5 to 7 of the directive effect a complete harmonisation of the rules relating to the rights conferred by a trade mark and accordingly define the rights of proprietors of trade marks in the Community (see *Silhouette International Schmied GmbH & Co KG v Hartlauer Handelgesellschaft mbH* Case C-355/96 [1998] All ER (EC) 769, [1998] ECR I-4799 (paras 25, 29) and *Zino Davidoff SA v A & G Imports Ltd*, *Levi Strauss & Co v Tesco Stores Ltd*, *Levi Strauss & Co v Costco Wholesale UK Ltd* Joined cases C-414-416/99 [2002] All ER (EC) 55, [2001] ECR I-8691 (para 39)). h

31. The expression 'put on the market' in the EEA used in art 7(1) of the directive constitutes a decisive factor in the extinction of the exclusive right of the proprietor of the trade mark laid down in art 5 of that directive (see *Van* i



a *Doren + Q. GmbH v Lifestyle sports + sportswear Handelsgesellschaft mbH* Case C-244/00 [2004] All ER (EC) 912, [2003] ECR I-3051 (para 34)).

32. It must therefore be given a uniform interpretation in the Community legal order (see, by analogy, the *Zino Davidoff* case (paras 41–43)).

b 33. The wording alone of art 7(1) of the directive does not make it possible to determine whether goods imported into the EEA or offered for sale in the EEA by the proprietor of the trade mark are to be regarded as having been ‘put on the market’ in the EEA within the meaning of that provision. The interpretation of the provision in question must therefore be sought with regard to the scheme and objectives of the directive.

c 34. Article 5 of the directive confers on the trade mark proprietor exclusive rights which entitle him inter alia to prevent any third party from importing goods bearing the mark, offering the goods, or putting them on the market or stocking them for these purposes. Article 7(1) contains an exception to that rule, in that it provides that the trade mark proprietor’s rights are exhausted where the goods have been put on the market in the EEA by him or with his consent (see the *Zino Davidoff* case (para 40) and the *Van Doren* case (para 33)).

d 35. The court has held that the directive is intended in particular to ensure that the proprietor has the exclusive right to use the trade mark for the purpose of putting the goods bearing it on the market for the first time (see, inter alia, *Bristol-Myers Squibb v Paranova A/S* Joined cases C-427/93, C-429/93 and C-436/93 (1996) 34 BMLR 59, [1996] ECR I-3457 (paras 31, 40, 44)).

e 36. It has also held that, by specifying that the placing of goods on the market outside the EEA does not exhaust the proprietor’s right to oppose the importation of those goods without his consent, the Community legislature thus allowed the proprietor of the trade mark to control the initial marketing in the EEA of goods bearing the mark (see *Sebago Inc v GB-Unic SA* Case C-173/98 [1999] All ER (EC) 575, [1999] ECR I-4103 (para 21), the *Zino Davidoff* case (para 33) and the *Van Doren* case (para 26)).

f 37. It has further stated that art 7(1) of the directive is intended to make possible the further marketing of an individual item of a product bearing a trade mark without the proprietor of the trade mark being able to oppose that (see *Bayerische Motorenwerke AG (BMW) v Deenik* Case C-63/97 [1999] All ER (EC) 235, [1999] ECR I-905 (para 57) and the *Sebago* case (para 20)).

g 38. It has held, finally, that for a trade mark to be able to fulfil its essential role in the system of undistorted competition which the EC Treaty seeks to establish, it must offer a guarantee that all the goods or services bearing it have been manufactured or supplied under the control of a single undertaking which is responsible for their quality (see, inter alia, *Philips Electronics NV v Remington Consumer Products Ltd* Case C-299/99 [2002] All ER (EC) 634, [2002] ECR I-5475 (para 30)).

h 39. In the present case, it is not disputed that, where he sells goods bearing his trade mark to a third party in the EEA, the proprietor puts those goods on the market within the meaning of art 7(1) of the directive.

i 40. A sale which allows the proprietor to realise the economic value of his trade mark exhausts the exclusive rights conferred by the directive, more particularly the right to prohibit the acquiring third party from reselling the goods.

41. On the other hand, where the proprietor imports his goods with a view to selling them in the EEA or offers them for sale in the EEA, he does not put them on the market within the meaning of art 7(1) of the directive.

42. Such acts do not transfer to third parties the right to dispose of the goods bearing the trade mark. They do not allow the proprietor to realise the economic value of the trade mark. Even after such acts, the proprietor retains his interest in maintaining complete control over the goods bearing his trade mark, in order in particular to ensure their quality. a

43. Moreover, it should be noted that art 5(3)(b) and (c) of the directive, relating to the content of the proprietor's exclusive rights, distinguishes *inter alia* between offering the goods, putting them on the market, stocking them for those purposes and importing them. The wording of that provision therefore also confirms that importing the goods or offering them for sale in the EEA cannot be equated to putting them on the market there. b

44. The answer to the first question must therefore be that art 7(1) of the directive must be interpreted as meaning that goods bearing a trade mark cannot be regarded as having been put on the market in the EEA where the proprietor of the trade mark has imported them into the EEA with a view to selling them there or where he has offered them for sale to consumers in the EEA, in his own shops or those of an associated company, without actually selling them. c  
d

#### Question 2

45. The second question is asked only if the answer to the first question is in the affirmative.

46. There is thus no need to answer it. e

#### Question 3

47. By its third question, the national court essentially asks whether, in circumstances such as those of the main proceedings, the stipulation, in a contract of sale concluded between the proprietor of the trade mark and an operator established in the EEA, of a prohibition on reselling in the EEA means that there is no putting on the market in the EEA within the meaning of art 7(1) of the directive and thus precludes the exhaustion of the proprietor's exclusive rights in the event of resale in the EEA in breach of the prohibition. f

#### *Observations submitted to the court*

48. Peak Holding observes that the exhaustion provided for in art 7(1) of the directive presupposes a putting on the market by the proprietor himself or with his consent. Exhaustion thus requires the consent of the proprietor in either case. It does not therefore occur on a sale of the goods by the proprietor of the trade mark, if he stipulates that he retains his trade mark rights. In the event that that stipulation is not complied with, the goods have not been put on the market with the consent of the proprietor, so that exhaustion does not supervene. g  
h

49. Axolin-Elinor, the Swedish government and the Commission submit that a stipulation such as that referred to in the third question does not prevent exhaustion, which takes place by operation of law. Such a stipulation cannot be relied on against third parties. Failure to comply with a prohibition on resale corresponds to a breach of contract, not an infringement of intellectual property rights. The legal effect of exhaustion as regards third parties is thus not left at the disposal of the contracting parties, whatever effects the agreement is supposed to have as regards the obligations. Any other interpretation would be contrary to the purpose of art 7(1) of the directive. i

*a Findings of the court*

50. Article 7(1) of the directive makes Community exhaustion subject either to a putting on the market in the EEA by the proprietor of the trade mark himself or to a putting on the market in the EEA by a third party but with the proprietor's consent.

*b* 51. It follows from the answer to the first question that, in circumstances such as those of the main proceedings, putting on the market in the EEA by the proprietor presupposes a sale of the goods by him in the EEA.

52. In the event of such a sale, art 7(1) of the directive does not make exhaustion of the rights conferred by the trade mark subject in addition to the proprietor's consent to further marketing of the goods in the EEA.

*c* 53. Exhaustion occurs solely by virtue of the putting on the market in the EEA by the proprietor.

54. Any stipulation, in the act of sale effecting the first putting on the market in the EEA, of territorial restrictions on the right to resell the goods concerns only the relations between the parties to that act.

55. It cannot preclude the exhaustion provided for by the directive.

*d* 56. The answer to the third question must therefore be that, in circumstances such as those of the main proceedings, the stipulation, in a contract of sale concluded between the proprietor of the trade mark and an operator established in the EEA, of a prohibition on reselling in the EEA does not mean that there is no putting on the market in the EEA within the meaning of art 7(1) of the directive and thus does not preclude the exhaustion of the proprietor's exclusive rights in the event of resale in the EEA in breach of the prohibition.

*e*

*Question 4*

*f* 57. The fourth question assumes that the answer to the third question is that the stipulation referred to in that question means that the goods have not been put on the market in the EEA in the event of resale in the EEA in breach of the territorial restriction agreed on.

58. There is therefore no need to answer it.

**COSTS**

*g* 59. The costs incurred by the Swedish government and by the Commission, which have submitted observations to the court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

*h* On those grounds, the Court of Justice (Grand Chamber) rules as follows:

*i* (1) Article 7(1) of First Council Directive (EEC) 89/104 (to approximate the laws of the member states relating to trade marks), as amended by the Agreement on the European Economic Area of 2 May 1992, must be interpreted as meaning that goods bearing a trade mark cannot be regarded as having been put on the market in the European Economic Area (EEA) where the proprietor of the trade mark has imported them into the EEA with a view to selling them there or where he has offered them for sale to consumers in the EEA, in his own shops or those of an associated company, without actually selling them.

(2) In circumstances such as those of the main proceedings, the stipulation, in a contract of sale concluded between the proprietor of the trade mark and



an operator established in the EEA, of a prohibition on reselling in the EEA *a*  
does not mean that there is no putting on the market in the EEA within the  
meaning of art 7(1) of Directive 89/104, as amended by the Agreement on  
the European Economic Area, and thus does not preclude the exhaustion  
of the proprietor's exclusive rights in the event of resale in the EEA in breach of  
the prohibition. *b*

# Lindfors v Finland

(Case C-365/02)

COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES (FIRST CHAMBER)

JUDGES JANN (PRESIDENT OF THE CHAMBER), ROSAS, VON BAHR, SILVA DE LAPUERTA AND LENAERTS (RAPPORTEUR)

ADVOCATE GENERAL STIX-HACKL

15 JANUARY, 4 MARCH, 15 JULY 2004

*European Community – Freedom of movement – Persons – Restriction on freedom – Transfer of residence from one member state to another – Tax levied before registration or bringing into use of vehicle – Citizen of European Union bringing vehicle into use in one member state before transferring residence to another member state and importing vehicle to that member state – Whether tax levied on vehicle in second member state amounting to consumption tax and thus not to be levied – Whether tax capable of influencing decisions of citizens of Union to exercise right to freedom of movement – Council Directive (EEC) 83/183, art 1(1), (2) – Article 18 EC (formerly EC Treaty, art 8a).*

In Finland, a person who imported a vehicle into national territory or who manufactured a vehicle therein was liable to pay a car tax (the *autovero*) before registering or permanently bringing that vehicle into use. The claimant in the main proceedings had moved permanently to Finland, importing with her a private vehicle, which she had brought into use in the Netherlands, and upon which the *autovero* was levied in Finland. She brought an action challenging the levying of that tax on the basis that it constituted a consumption tax prohibited by art 1(1)<sup>a</sup> of Council Directive (EEC) 83/183 (on tax exemptions applicable to permanent imports from a member state of the personal property of individuals)—which required member states to exempt personal property imported permanently from other member states by private individuals from turnover tax, excise duty and other consumption taxes which normally applied to such property. Dismissing her action, the national court held that, since the *autovero* was a tax connected with the registration or use in traffic of a vehicle in Finland, it was to be regarded as a specific tax connected with the use of property within the country for the purposes of art 1(2) of the directive—which exempted specific and/or periodical duties from the scope of the directive. On the claimant's appeal, the national appellate court decided to stay the proceedings and refer to the Court of Justice of the European Communities under art 234 EC (formerly art 177 of the EC Treaty) a question for a preliminary ruling concerning whether a car tax such as the *autovero* fell within the ambit of art 1(1) or (2) of the directive. Although the national court had formally limited its question in that regard, the Court of Justice also examined the effect of the right to freedom of movement, enshrined in particular by art 18 EC<sup>b</sup> (formerly art 8a of the EC Treaty), in order to provide

<sup>a</sup> Article 1 of the directive is set out at judgment para 3, below

<sup>b</sup> Article 18 EC provides, so far as material: 'Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect.'

the national court with a full interpretation of Community law to assist in the adjudication on the case pending before it. a

**Held** – Where the residence of the owner of a vehicle was transferred from one member state to another, art 1 of the directive did not preclude the charging of a tax such as the *autovero* before the registration or bringing into use of the vehicle in the member state to which residence was transferred. b

However, having regard to the requirements deriving from art 18 EC, it was for the national court to ascertain whether the application of national law was capable of ensuring that the owner of the vehicle was not placed in a less favourable situation than that of citizens who resided permanently in the member state and, if necessary, whether such a difference in treatment was justified by objective considerations independent of the residence of the persons concerned and proportionate to the legitimate aim pursued by national law. The chargeable event for *autovero* was the use of a vehicle on Finnish territory, which was not necessarily connected with the act of importation. Therefore, such a tax did not fall within the scope of the tax exemption laid down by art 1(1) of the directive. Further, since *autovero* was payable as a result of the use of the vehicle in Finland, it was a specific tax connected with the use of the vehicle within the national territory, and, therefore, art 1(2) of the directive applied. However, *autovero* might have a negative influence on decisions of citizens of the European Union to exercise their right to freedom of movement as enshrined, in particular, by art 18 EC. In that regard, the EC Treaty offered no guarantee to a citizen of the Union that transferring his activities to a member state other than that in which he previously resided would be neutral as regards taxation. Furthermore, given the disparities in the tax legislation of the member states, such a transfer might be to the citizen's advantage in terms of indirect taxation or not, according to circumstance. Therefore, in principle, any disadvantage, by comparison with the situation in which that citizen carried on activities prior to that transfer, was not contrary to art 18 EC, provided that the legislation concerned did not place that citizen at a disadvantage as compared with those already subject to such a tax (see judgment paras 26–28, 31, 34, 36 below). c

*D'Hoop v Office National de l'Emploi* Case C-224/98 [2003] All ER (EC) 527 and *Weigel v Finanzlandesdirektion für Vorarlberg* Case C-387/01 [2004] 3 CMLR 931 considered. d

## Notes

For the prohibition on discriminatory taxation, see 12(2) *Halsbury's Laws* (4th edn reissue) para 7. e

## Cases cited

*Consortio per la Tutela del Formaggio Gorgonzola v Käserei Champignon Hofmeister GmbH & Co KG* Case C-87/97 [1999] ECR I-1301, ECJ. f

*Cura Anlagen GmbH v Auto Service Leasing GmbH (ASL)* Case C-451/99 [2002] ECR I-3193, ECJ.

*D'Hoop v Office National de l'Emploi* Case C-224/98 [2003] All ER (EC) 527, [2002] ECR I-6191, ECJ. g

*De Danske Bilimportører v Skatteministeriet, Told- og Skattestyrelsen* Case C-383/01 [2005] All ER (EC) 553, [2003] ECR I-6065, ECJ. h

*EC Commission v Belgium* Case 391/85 [1988] ECR 579, ECJ.

*European Commission v Greece* Case C-375/95 [1997] ECR I-5981, ECJ. i



- a *Kerrutt v Finanzamt Mönchengladbach-Mitte* Case 73/85 [1986] ECR 2219, ECJ.  
*Klattner v Greece* Case C-389/95 [1998] STC 90, [1997] ECR I-2719, ECJ.  
*Ministère Public and Ministre des Finances du Royaume de Belgique v Ledoux* Case 127/86 [1991] STC 553, [1988] ECR 3741, ECJ.  
*Ministère Public and Ministry of Finance v Profant* Case 249/84 [1985] ECR 3237, ECJ.
- b *Rigsadvokaten v Ryborg* Case C-297/89 [1991] ECR I-1943, ECJ.  
*SARPP—Société d'application et de recherches en Pharmacologie et Phytothérapie SARL v Chambre syndicale des raffineurs et conditioneurs de sucre de France* Case C-241/89 [1990] ECR I-4695, ECJ.  
*Tulliasiamies (Proceedings brought by)* Case C-101/00 [2002] ECR I-7487, ECJ.
- c *Verband Sozialer Wettbewerb eV v Clinique Laboratories SNC* Case C-315/92 [1994] ECR I-317, ECJ.  
*Weigel v Finanzlandesdirektion für Vorarlberg* Case C-387/01 [2004] 3 CMLR 931, ECJ.  
*Wisselink en Co BV v Staatssecretaris van Financiën* Joined cases 93/88 and 94/88 [1989] ECR 2671, ECJ.

d

## Reference

By order of 10 October 2002, the Korkein hallinto-oikeus (Supreme Administrative Court) referred to the Court of Justice of the European Communities for a preliminary ruling under art 234 EC (formerly art 177 of the EC Treaty) a question on the interpretation of art 1 of Council Directive (EEC) 83/183 (on tax exemptions applicable to permanent imports from a member state of the personal property of individuals). That question was raised in proceedings between Marie Lindfors and the Finnish authorities concerning the car tax under Finnish legislation to which she was assessed following the transfer of her residence to Finland. Written observations were submitted on behalf of: Ms Lindfors, by P Snell, oikeustieteen kandidaatti; the Finnish government, by T Pynnä, acting as agent; the Danish government, by J Bering Liisberg, acting as agent; the Greek government, by P Panagiotounakos, D Kalogiros and P Mylonopoulos, acting as agents; the Commission of the European Communities, by R Lyal and I Koskinen, acting as agents. Oral observations were submitted on behalf of: Ms Lindfors, represented by P Snell; the Finnish government, represented by T Pynnä; the Danish government, represented by J Molde, acting as agent; the Greek government, represented by M Apessos, acting as agent; and the Commission, represented by R Lyal and I Koskinen. The language of the case was Finnish. The facts are set out in the opinion of the Advocate General.

- h 4 March 2004. **The Advocate General (C Stix-Hackl)** delivered the following opinion<sup>1</sup>.

## I—INTRODUCTION

- i 1. In this reference for a preliminary ruling the Korkein hallinto-oikeus (Supreme Administrative Court) (Finland) seeks an interpretation of art 1 of Council Directive (EEC) 83/183 (on tax exemptions applicable to permanent imports from a member state of the personal property of individuals) (hereinafter the directive)<sup>2</sup>. In particular it concerns the question whether the

<sup>1</sup> Original language: German.

<sup>2</sup> OJ 1983 L105 p 64.

car tax payable under the Autoverolaki (Law on Car Tax) (1482/1994) before a vehicle is registered or brought into use is a duty or a tax from which a vehicle imported into Finland in connection with a transfer of residence should be exempted under the above provision. a

## II—LEGAL FRAMEWORK b

### A—National law

2. Under para 1(1) of the Autoverolaki (1482/1994) of 29 December 1994 in the version in force in 1999 (hereinafter AVL), car tax (hereinafter *autovero*) is payable before a vehicle is registered or brought into use in Finland.

3. Bringing into use means use of the vehicle in traffic on Finnish territory, even if the vehicle is not registered (para 2 of the AVL). c

4. Under the main provision concerning liability to tax, para 4(1) of the AVL, the *autovero* is payable by the importer of a vehicle or the manufacturer of a vehicle manufactured in Finland.

5. Additionally, under para 5 of the AVL, taxpayers are also liable to pay a value added tax on the *autovero* of an amount laid down in the Arvonlisäverolaki (Value added tax law) (1501/93) (hereinafter *Arvonlisäverolaki*). d

6. The amount of the *autovero* is, under para 6(1) of the AVL, the amount of the taxable value of the vehicle less FIM 4,600 (now €770), but in all cases at least 50% of the taxable value of the vehicle.

7. Under para 7(1) of the AVL, the tax levied in respect of an imported used vehicle is that on a new vehicle, but reduced on a percentage basis according to the number of months for which the vehicle has been in use. Under para 11(1) and (2) of the Law, the basis of the taxable value of the imported vehicle is its acquisition value to the taxpayer, which is set according to the customs value of the vehicle. e

8. Under para 25(1) of the AVL, the tax levied on a vehicle imported by an individual in connection with a transfer of his residence to Finland and privately owned may be reduced in accordance with the conditions laid down therein by a maximum of FIM 80,000 (now €13,450). f

### B—Community law

9. According to the recitals of the directive, its objective is to eliminate tax obstacles to the free movement of persons within the Community. The scope of the directive is defined in art 1 as follows: g

‘1. Every Member State shall, subject to the conditions and in the cases hereinafter set out, exempt personal property imported permanently from another Member State by private individuals from turnover tax, excise duty and other consumption taxes which normally apply to such property. h

2. Specific and/or periodical duties and taxes connected with the use of such property within the country, such as for instance motor vehicle registration fees, road taxes and television licences, are not covered by this Directive.’ i

## III—FACTS, MAIN PROCEEDINGS AND QUESTION REFERRED FOR A PRELIMINARY RULING

10. Ms Lindfors, who had resided abroad for several years, imported as a private individual a car belonging to her of the Audi A6 Avant make on 4 August 1999 in the course of her transfer of residence from another member

a state of the European Communities to Finland. She had bought the car, which had left the factory on 20 March 1995, in Germany and brought it into use on 5 April 1995 in the Netherlands.

11. The Hangan tullikamari (Hanko Customs Board) by tax decision of 4 August 1999 granted Ms Lindfors a tax reduction of FIM 80,000 in accordance with para 25(1) of the AVL and assessed the autovero payable by her at FIM 16,556 plus FIM 3,642 value added tax, making a total of FIM 20,198.

b 12. Ms Lindfors applied to the Helsingin hallinto-oikeus (Helsinki Administrative Court) for the tax decision to be set aside and the taxes paid by her to be refunded. She submitted that the autovero constitutes a consumption tax within the meaning of art 1(1) of the directive which may not be levied on her car imported in connection with a transfer of residence.

c 13. The Helsinki Administrative Court dismissed the application. It took the view that the autovero is a tax connected with the registration or use of the vehicle in traffic on Finnish territory and that therefore it is to be regarded as a specific tax connected with the use of property within the country within the meaning of art 1(2) of the directive, which is not covered by the directive.

d 14. Thereupon Ms Lindfors sought leave to appeal to the Korkein hallinto-oikeus and asked in her appeal for the decision of the Helsinki Administrative Court and the tax decision of the Customs Board to be set aside.

e 15. In order to resolve the question whether in the light of the directive a car tax such as the autovero may be levied on a vehicle imported in connection with the transfer of residence, the Supreme Administrative Court decided by order of 10 October 2002 to make a reference to the court for a preliminary ruling on the following question:

f 'Is Article 1 of Directive 83/183 ... to be interpreted as meaning that car tax (autovero) charged under the Law on Car Tax (Autoverolaki) on a vehicle imported into Finland from another Member State in connection with a transfer of residence is a consumption tax within the meaning of Article 1(1) of the directive, or is it a specific duty or tax connected with the use of such property within the country within the meaning of Article 1(2)?'

g IV—THE QUESTION REFERRED FOR A PRELIMINARY RULING

A—Introductory remarks

16. With the exception of value added tax—for which incidentally several derogations apply in connection with the purchase of new vehicles<sup>3</sup>—the taxation of motor vehicles in the Community has not been harmonised to any extent<sup>4</sup>.

h 17. Correspondingly the taxes and duties payable on private cars in the member states vary considerably not only in their amount but also in their structure<sup>5</sup>. Certain taxes in one member state have no counterpart whatsoever

i <sup>3</sup> Even in the case of an acquisition by a private individual new vehicles are, by way of derogation from the general rule, taxed according to the country of destination: see art 28a of Sixth Council Directive (EEC) 77/388 (on the harmonisation of the laws of the member states relating to turnover taxes—common system of value added tax: uniform basis of assessment) (OJ 1977 L145 p 1) (hereinafter Sixth Value Added Tax Directive).

<sup>4</sup> See *Cura Anlagen GmbH v Auto Service Leasing GmbH (ASL)* Case C-451/99 [2002] ECR I-3193 (para 40).

<sup>5</sup> A useful overview of that issue can be found in the communication from the Commission of the European Communities to the Council and the European Parliament (on the taxation of passengers cars in the European Union—options for action at national and Community levels) (COM(2002) 431



in other member states. One must therefore bear in mind, in particular in a case such as the present one in which the referring court seeks to ascertain whether a particular national tax falls within a tax definition set out in a Community instrument, that there is a lack of common concepts which would permit an exact classification of different taxes. a

18. For the purposes of exposition—and because the parties concerned with this case have evidently also assumed such a classification—I should like however to make a rough distinction between three different types of tax and duty which are levied by member states in respect of private cars. b

19. Firstly, there are one-off taxes, I will call them ‘registration taxes’, which are payable on the purchase of a car or as a condition for bringing it into use on the territory of a member state. c

20. Secondly, almost all member states also levy taxes—calculated according to differing criteria—payable periodically or, as the case may be, annually, known, for example, in Germany and Austria as ‘Kraftfahrzeugsteuern’ (car taxes).

21. Finally, duties may be levied in connection with the registration of a vehicle in a member state to cover the administration costs (registration fees). d

22. It emerges from the case file and the observations of the Finnish government that in each of those cases Finland also levies such taxes on cars.

23. The *autovero*, as is already clear from the AVL, is a one-off tax payable on cars and other categories of vehicle before their registration or bringing them into use, calculated on the basis of their taxable value; additionally under the Finnish *Arvonlisäverolaki* so-called value added tax is also levied on the amount of the *autovero*. e

24. Additionally, there are also taxes payable periodically, that is, car taxes in the narrower sense, the *ajoneuvovero* (vehicle tax, or ‘*vignette*’) and *moottorijoneuvovero* (diesel tax).

25. Finally, duties are also payable in Finland on the registration of a vehicle to cover the administrative costs associated with the registration (registration fee). f

26. The present case only concerns the *autovero* which the court already had to consider in *Proceedings brought by Tulliasiamies* and in which I also delivered my opinion<sup>6</sup>.

27. That case raised the question whether a tax such as the *autovero* in the form and the amount as was in force at the time in respect of a used vehicle imported from another member state constitutes an unlawful discriminatory domestic tax, to which the court replied in the affirmative. The present case however concerns the question whether in specific circumstances, that is, when a private car is permanently imported within the scope of a transfer of residence, a tax such as the Finnish *autovero*—irrespective of its amount or the method of its calculation—may be levied at all. g  
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28. The referring court essentially wishes to know whether the tax exemption provided for by art 1 of the directive precludes such taxation.

29. I should finally like to point out that the Commission has already raised that question in connection with the Standard Fuel Consumption Tax i

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final), and a Study on Vehicle Taxation in the Member States of the European Union of January 2002 produced for the Commission by TIS/PT (Consultores em Transportes Inovação e Sistemas, SA) available online at: [http://europa.eu.int/comm/taxation\\_customs/taxation/car\\_taxes/vehicle\\_tax\\_study\\_15-02-2002.pdf](http://europa.eu.int/comm/taxation_customs/taxation/car_taxes/vehicle_tax_study_15-02-2002.pdf).

<sup>6</sup> Case C-101/00 [2002] ECR I-7487.

a (Normverbrauchsabgabe or NOVA) levied in Austria in the context of the reference for a preliminary ruling in *Weigel v Finanzlandesdirektion für Vorarlberg*, also currently pending before the court, which however primarily concerns the compatibility of the NOVA with arts 23, 25 and 39 EC (formerly arts 9, 12 and 48 of the EC Treaty) and with the Sixth Value Added Tax Directive, and that Advocate General Tizzano has in his opinion in that case also delivered his view on the matter<sup>7</sup>.

B—Main arguments of the parties

c 30. According to Ms Lindfors and the Commission, the directive in setting out a principle of tax exemption precludes the levying of tax in a situation such as that arising in the main proceedings. In their opinion the autovero constitutes a consumption tax levied on or by reason of permanent importation, to which art 1(1) applies.

d 31. Ms Lindfors argues inter alia that in reality, or rather judging by the formalities of the tax declaration, the autovero is levied by reason of the fact of importing the vehicle to Finland. That it constitutes a consumption tax within the meaning of art 1(1) of the directive follows also indirectly from the scope of Council Directive (EEC) 83/182 (on tax exemptions within the Community for certain means of transport temporarily imported into one member state from another)<sup>8</sup> and from the proposal for a Council Directive governing the tax treatment of private motor vehicles moved permanently to another member state in connection with a transfer of residence or used temporarily in a member state other than that in which they are registered (hereinafter Commission proposal)<sup>9</sup>.

f 32. The Commission contends that art 1(1) of the directive precludes the levying of taxes whose chargeable event is the importation. This prohibition cannot be circumvented by utilising instead of the importation an alternative chargeable event, such as registration. The Commission also points out that the directive must be interpreted in the light of the provisions on free movement of persons and to avoid double taxation.

g 33. The Finnish, Danish and Greek governments, which have submitted observations in the present case, on the other hand take the view that a tax such as the autovero is not covered by the tax exemption provided for in art 1(1) of the directive, referring in this respect also to the opinion of Advocate General Tizzano in the case of *Weigel*<sup>10</sup>. They emphasise, essentially in agreement with one another, that the autovero does not constitute a tax which is levied on importation but rather one which is linked to utilisation. If the vehicle is not brought into use in Finland—such as in the case of a car which is to be exhibited in a museum, as the Finnish government explains by way of example—the autovero is not payable. Accordingly it is to be seen as a tax on the use of the vehicle or as ‘motor vehicle registration fees’ within the meaning of art 1(2) of the directive and therefore is not included within the tax exemption.

i 34. In so far as the governments make reference to the Commission proposal or to Directive 83/182, they draw the opposite conclusion from those texts to

7 See the opinion of Advocate General Tizzano delivered on 3 July 2003 Case C-387/01 [2004] 3 CMLR 931 (paras 40–56).

8 OJ 1983 L105 p 59.

9 COM(98) 30 final (OJ 1998 C108 p 75), as amended by COM(1999) 165 final (OJ 1999 C145 p 6).

10 Opinion cited in footnote 7, above.

Ms Lindfors or the Commission as to the interpretation of the scope of the directive. The governments also point out that registration taxes such as the *autovero* have not yet been harmonised within the Community and that therefore the possibility of double taxation must also be accepted as a consequence of that situation. The Danish government explains that the derogation concerning vehicle registration taxes in art 1(2) of the directive was inserted into the directive's text by the Council on the initiative of Denmark for the very purpose of expressly excluding registration taxes such as the *autovero* from the scope of the directive. a

35. The Commission agreeing with Ms Lindfors, however, interprets the derogation contained in art 1(2) as only referring to the administrative costs or fees which are incurred on registration and bases that interpretation above all on the French and English language versions of the directive which refer to the 'droits' and 'fees' for the registration of vehicles. b

36. The governments submitting observations reject that interpretation for linguistic and logical reasons. In particular, Community law does not in any case preclude the levying of fees to cover administrative costs. c

#### C—Appraisal d

37. Under art 1(1) of the directive, the scope of the directive extends to consumption taxes—'turnover tax, excise duty and other consumption taxes'—which 'normally' apply to 'personal property imported permanently from another Member State by private individuals'. Those consumption taxes are contrasted in art 1(2) with '[s]pecific and/or periodical duties and taxes connected with the use of such property' which are not in any event to be covered by the directive. '[M]otor vehicle registration fees, road taxes and television licences' are expressly cited as examples of such taxes. e

38. Evidently, then, to delimit the directive's scope, it distinguishes between those (consumption) taxes and duties which are connected with the importation of property and those which apply to its use within the country. f

39. On an initial view that distinction also appears to be obvious, since it would not be very clear why a Community citizen who permanently transfers his place of residence to another member state and as a consequence lives and uses property there should be exempted from taxes which relate to such use of the property in that member state. g

40. By contrast, taxes and duties which are linked to the importation of property do very probably constitute an immediate tax obstacle to the free movement of persons.

41. As regards the question concerning which taxes or duties relating to importation might be envisaged under art 1(1) of the directive, customs duties or charges of an equivalent effect within the meaning of arts 23 and 25 EC, for example, are not to be considered (although according to the court's case law it is of course a very characteristic of those charges that they are levied by reason of importation or the crossing of the frontier of a member state)<sup>11</sup>. Since such financial burdens are in any case precluded by primary law and also cannot under art 99 EC (formerly art 103 of the EC Treaty) be subject to harmonisation measures, it is clear that the directive does not concern them. h

<sup>11</sup> See inter alia *De Danske Bilimportører v Skatteministeriet, Told- og Skattestyrelsen* Case C-383/01 [2005] All ER (EC) 553, [2003] ECR I-6065 (para 34). i



a 42. Rather, art 1(1) of the directive is directed towards internal taxation—to use the terminology of art 90 EC (formerly art 95 of the EC Treaty)—or indirect taxes or, more accurately, consumption taxes which use importation as the chargeable event.

b 43. Whilst at present examples of such taxes may not immediately spring to mind, it must however not be forgotten that the directive goes back to a time before the introduction of the internal market on 1 January 1993 and the progress thereby achieved in removing tax obstacles to intra-Community trade. At that time member states could in particular still levy turnover taxes on imports or other (special) consumption taxes which for taxation purposes were linked to the fact of importation of goods<sup>12</sup>.

c 44. As regards value added taxes, the principle of imposing tax on imports within intra-Community trade was abolished by Council Directive (EEC) 91/680<sup>13</sup> as a condition of eliminating fiscal frontiers and was replaced by the concept of imposing tax on acquisitions according to the member state of destination. Since then turnover taxes on imports are only permitted in the context of trade with third countries.

d 45. Under art 33 of the Sixth Value Added Tax Directive member states are indeed left free to maintain or introduce at their discretion consumption taxes or other indirect taxes, provided that they cannot be characterised as turnover taxes within the meaning of the Sixth Directive or compromise the functioning of the common value added tax system<sup>14</sup>. However, in respect of consumption taxes—for example, also for special consumption taxes on motor vehicles—it must be noted that under art 3(3) of the 'System Directive'<sup>15</sup> those taxes may 'not give rise to border-crossing formalities' in intra-Community trade. Thus whilst the possibility for member states to introduce or maintain special consumption taxes whose chargeable event is linked to importation or the crossing of a border is de facto considerably restricted, it is however not completely excluded<sup>16</sup>.

f 46. I do not wish to elaborate further on these observations, but they may serve as an introduction to my examination of the compatibility of a tax with the characteristics of the *autovero* with the tax exemption provided for by the directive.

g 47. Under the AVL, the chargeable event of the *autovero* is linked to the registration of the vehicle or bringing it into use in Finland.

48. Even the Commission and Ms Lindfors assume, however, that the tax exemption provided for under art 1(1) of the directive relates to taxes whose chargeable event is connected to importation. They argue nevertheless that,

h 12 For an example see, for instance, the Belgian value added tax on imports also levied on motor vehicles which was the subject matter of *Ministère Public and Ministry of Finance v Profant* Case 249/84 [1985] ECR 3237.

13 Supplementing the common system of value added tax and amending Council Directive (EEC) 77/388 with a view to the abolition of fiscal frontiers (OJ 1991 L376 p 1).

i 14 See inter alia *Wisselink en Co BV v Staatssecretaris van Financiën* Joined cases 93/88 and 94/88 [1989] ECR 2671 (para 17) and *Kerrutt v Finanzamt Mönchengladbach-Mitte* Case 73/85 [1986] ECR 2219 (para 22).

15 Council Directive (EEC) 92/12 (on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products) (OJ 1992 L76 p 1).

16 See also Jatzke 'Das neue Verbrauchsteuerrecht im EG-Binnenmarkt' *Steuerrecht* No 1 (1993) 41, p 42. For an example of a special consumption tax levied on vehicles, inter alia on their importation, see *European Commission v Greece* Case C-375/95 [1997] ECR I-5981.

despite the AVL providing for the linking of the autovero to registration or bringing into use, in reality it must be seen as a tax which is levied on importation. a

49. At the hearing the Finnish government demonstrated, in my opinion convincingly, that in practice neither the tax declaration relating to the autovero nor the payment thereof needs to take place on crossing the border or on importation and that the customs formalities described by Ms Lindfors relate to importation from a third country. It cannot therefore be concluded from the practical border-crossing arrangements that a tax such as the autovero in reality constitutes a tax which is levied on or because of importation. b

50. I consider to be more significant the Commission's submission that a tax such as the autovero which in formal terms is linked to registration or bringing into use is also to be regarded as a consumption tax or turnover tax levied on importation within the meaning of art 1(1) of the directive and that that provision may not be circumvented by providing for an alternative chargeable event to that of importation. c

51. In that respect it must be firstly noted that—as the Finnish government illustrated with its example of a vehicle to be exhibited in a museum—a tax such as the autovero does not operate as a 'true' consumption tax levied on importation, because despite the transfer to Finland liability does not arise or does not arise until the car is brought into circulation or registered there. d

52. It could of course be argued that in reality the link with registration or the bringing into use constitutes a substitute link which is in practical terms comparable with the fact of importation, since in respect of the vast majority of vehicles brought into a member state it can be assumed that the vehicle is also to be used. e

53. The court, in a different connection to that of the present case, had in its judgment in *EC Commission v Belgium* similarly to deal with the Commission's submission that the registration tax for new cars applicable at that time in Belgium in reality constituted a value added tax. The Belgian government contended inter alia that the two taxes should be distinguished from one another because they were linked to different events (delivery/registration)<sup>17</sup>. f

54. The court observed in that regard that 'that argument could be accepted only if the two taxes were genuinely independent of each other'. In that case it came to the conclusion that the registration tax was not independent, but that was against the background in that case that thanks to an offsetting mechanism a direct link existed between the registration tax and the value added tax, eliminating the difference between the chargeable events upon which the two taxes became chargeable<sup>18</sup>. g

55. In the present case the autovero however does not have a comparable link to a value added tax which might be payable on importation. In those circumstances the difference in terms of their respective chargeable events between a tax such as the autovero and a consumption tax levied by reason of importation appears sufficiently material for it not to be possible to equate the former with the latter for the purposes of art 1(1) of the directive. h

56. I am therefore assuming that a tax such as the autovero does not constitute a turnover tax, excise duty or other consumption tax levied on importation within the meaning of art 1(1) of the directive. The preceding observations have however also made it clear that those tax concepts cannot be i

<sup>17</sup> Case 391/85 [1988] ECR 579 (paras 14, 22).

<sup>18</sup> See footnote above (para 25).

a strictly delineated and that the mere fact that a tax is levied as a result of or as a condition of registration does not in itself preclude also regarding it as a type of import-consumption tax.

57. In that connection art 1(2) of the directive must now be examined. It emerges from the drafts of the directive put forward at that time that that provision was not originally contained in the Commission's proposal and was  
b incorporated into the directive precisely to satisfy the wishes of several member states seeking precision as to the directive's scope<sup>19</sup>. That provision also expressly mentions 'motor vehicle registration fees' which in the view of the governments submitting observations refers to taxes such as the *autovero*.

58. For several reasons I am not convinced by the Commission's submission  
c that that only intends to refer to fees which may be payable on registration to cover administrative costs.

59. Firstly, above all the Danish government correctly pointed out, in particular at the hearing, that that argument cannot be supported convincingly by a purely literal interpretation of art 1(2) of the directive. Given the widely differing approaches and traditions of the member states in the field of  
d taxation, caution is from the outset called for in this matter. Whilst, for example, in the French text one can find grounds for the Commission's view in the distinction between 'taxes' and 'droits', little support for such a view can however be found, for example, in the German text with the expressions 'Steuern' and 'Abgaben', since both expressions can be used together synonymously.

e 60. Secondly, 'motor vehicle registration fees' are cited in art 1(2) of the directive as an example of duties connected with the use of imported property. In the case of a duty covering administrative costs or as payment for administrative services that, by definition, would however not be so.

61. Moreover, it must be observed that the fact that a tax such as the *autovero* is not payable periodically and that it is payable (in the amount too) irrespective  
f of the extent to which or for how long the vehicle is actually used following registration does not preclude classifying that tax as a duty connected with the use of property within the meaning of the directive. That surely follows from art 1(2) of the directive, under which not only periodical duties can be duties within the meaning of that provision ('[s]pecific and/or periodical duties').

62. From the case file and the observations of the Finnish government it  
g appears that a lawful bringing into use or operation of a vehicle in Finland is as a rule only permitted following the completion of registration<sup>20</sup>. Payment of the *autovero* therefore constitutes in any event a condition for the (lawful) use of a car in Finland.

63. Such a tax may correctly be regarded as a duty connected with the use of  
h property, which according to art 1(2) of the directive is expressly excluded from its scope.

64. Furthermore, contrary to the argument of Ms Lindfors, it cannot automatically be concluded from the inclusion of registration taxes in the tax exemption under Directive 83/182 which concerns the mere temporary

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19 Internal document No 6205/79 of the Council Working Group on Finance of 23 April 1979, p 3, included, with the Council's permission, by the Danish government in its written observations.

20 Viewed in that way, the bringing of the vehicle into use on Finnish territory could constitute an alternative chargeable event ensuring in any event that the tax (already) becomes payable under the *Autoverolaki* even if the vehicle is, for example, used in traffic, contrary to the rules, without registration.



importation of vehicles that such taxes ought also to be included in the tax exemption under Directive 83/183 which concerns the permanent importation of the vehicle. a

65. The parties additionally referred to the Commission proposal for a successor provision to those directives, in which the prohibition on imposing taxes now expressly extends to registration taxes and the *autovero*<sup>21</sup>. Judging from its recitals, the objective of the proposal is to remove existing problems concerning the taxation of vehicles following a transfer of residence, so that the proposal evidently assumes rather that the tax exemption under the present directive does not (yet) concern registration taxes<sup>22</sup>. But of course that does not really offer a reliable indication for interpreting the meaning of the present directive. b

66. Finally, the Commission's argument that the directive should be interpreted in the light of the objectives pursued by tax harmonisation and the fundamental freedoms must be considered. c

67. It is doubtless the case that just as for Directive 83/182 also for that directive—

‘the provisions of the Directive must be interpreted in the light of the fundamental aims of the endeavour to harmonise value added tax (VAT), in particular the promotion of freedom of movement for persons and goods and the prevention of double taxation ...’<sup>23</sup> d

68. In my view, however, no conclusions can be drawn therefrom on the basis of the directive concerning motor vehicle taxes connected with registration such as the *autovero*, which are, as set out above, excluded from the scope of the directive. e

69. Furthermore, the prohibition on double taxation raised by the Commission—which, as is apparent from the case law cited<sup>24</sup>, constitutes an objective of harmonisation in the field of value added tax—does not apply automatically to all types of tax. f

70. Rather, in the field of vehicle taxation, as the court concluded in the case of *Cura Anlagen*, member states are free to exercise their powers of taxation in that area and registration appears to be ‘the natural corollary of the exercise of those powers of taxation’:

‘It is lawful for [the member states] to allocate those powers of taxation amongst themselves ... and to conclude agreements amongst themselves to ensure that a vehicle is subject to indirect taxation in only one of the signatory States.’<sup>25</sup> g

71. It therefore follows that as Community law stands with regard to motor vehicle registration taxes—such as the *autovero*—consequences of the lack of harmonisation in this area such as double taxation have to be accepted; at best that could be prevented by voluntary measures of the member states. h

<sup>21</sup> See art 1 together with Annex I of the Commission proposal.

<sup>22</sup> In a similar vein see also Advocate General Tizzano in his opinion in *Weigel's case*, cited in footnote 7, above (paras 51, 52).

<sup>23</sup> See *Klattnner v Greece* Case C-389/95 [1998] STC 90, [1997] ECR I-2719 (para 25); see inter alia also *Profant's case*, cited in footnote 12, above (para 25), *Ministère Public and Ministre des Finances du Royaume de Belgique v Ledoux* Case 127/86 [1991] STC 553, [1988] ECR 3741 (para 11) and *Rigsadvokaten v Ryborg* Case C-297/89 [1991] ECR I-1943 (para 13).

<sup>24</sup> See footnote above.

<sup>25</sup> See the *Cura Anlagen* case, cited in footnote 4, above (paras 40, 41). i

a 72. In the light of the foregoing the answer to the question is that art 1 of the directive does not preclude the levying of a tax such as the *autovero* which is levied on vehicles brought from one member state into another member state in connection with the transfer of a residence.

b V—CONCLUSION

73. I therefore propose that the Court of Justice answer the question as follows:

c Article 1 of Council Directive (EEC) 83/183 (on tax exemptions applicable to permanent imports from a member state of the personal property of individuals) is to be interpreted as meaning that it does not preclude the levying of a tax such as car tax imposed under the *Autoverolaki* which is levied on vehicles imported from one member state into another member state in connection with a transfer of residence.

d 15 July 2004. **The COURT OF JUSTICE (First Chamber)** delivered the following judgment.

e 1. By order of 10 October 2002, received at the Court of Justice of the European Communities on 14 October 2002, the Korkein hallinto-oikeus (Supreme Administrative Court) referred to the Court of Justice for a preliminary ruling under art 234 EC (formerly art 177 of the EC Treaty) a question on the interpretation of art 1 of Council Directive (EEC) 83/183 (on tax exemptions applicable to permanent imports from a member state of the personal property of individuals) (OJ 1983 L105 p 64).

2. That question was raised in proceedings between Ms Lindfors and the Finnish authorities concerning the car tax under Finnish legislation to which she was assessed following the transfer of her residence to Finland.

f LEGAL BACKGROUND

*Relevant provisions of Directive 83/183*

3. Article 1 of Directive 83/183 provides:

g '1. Every Member State shall, subject to the conditions and in the cases hereinafter set out, exempt personal property imported permanently from another Member State by private individuals from turnover tax, excise duty and other consumption taxes which normally apply to such property.

h 2. Specific and/or periodical duties and taxes connected with the use of such property within the country, such as for instance motor vehicle registration fees, road taxes and television licences, are not covered by this Directive.'

*Finnish legislation*

i 4. The relevant provisions of national law are in the *Autoverolaki* (1482/1994) (Law on Car Tax) of 29 December 1994, in the version applicable in 1999 (the Law on Car Tax).

5. Paragraph 1(1) of the Law on Car Tax prescribes that that tax (or 'autovero') is 'payable to the State before registration or bringing into use of [a private vehicle] in Finland'.

6. According to para 2 of that law, 'bringing into use in Finland means use of the vehicle in traffic in Finnish territory even if the vehicle is not registered in Finland'. That provision continues:

'However, the use exclusively for his own needs for up to six months ... of a vehicle registered in a State other than Finland temporarily imported for his own use by a natural person permanently resident in a State other than Finland is not regarded as taxable use of a vehicle.'

7. Under para 4(1) of that law, '[t]he person liable to pay car tax is the importer of the vehicle or the manufacturer of a vehicle manufactured in Finland'. Similarly, para 5 of the law states that '[t]he person liable to pay car tax must also pay value added tax on the car tax'.

8. At the material time for the main proceedings, para 6(1) of the Law on Car Tax stated:

'The tax due is the taxable value of the car, reduced by FIM 4,600. The amount of the tax is, however, always at least 50% of the taxable value of the vehicle.'

9. Under para 7(1) of that law, the tax levied on an imported used car is the tax on an equivalent new vehicle, but reduced according to a proportional scale which takes into account the period (calculated in months) during which the vehicle has been in use.

10. Under para 25(1) of that law, '[t]he tax on one privately owned taxable vehicle imported in connection with a person's transfer of residence to the country is reduced by up to FIM 80,000', if the conditions set out in that provision are satisfied.

#### THE MAIN PROCEEDINGS AND THE QUESTION REFERRED FOR A PRELIMINARY RULING

11. After residing in other member states, Ms Lindfors moved permanently to Finland, and in connection with that transfer of residence imported into Finland on 4 August 1999 a private vehicle which was her personal property, which she had brought into use in the Netherlands in 1995 after buying it in Germany.

12. In a tax assessment of 4 August 1999, the Hangon tullikamari (Hanko Customs Board) (Finland) granted Ms Lindfors a tax reduction of FIM 80,000 and fixed the car tax payable by her at FIM 16,556, plus value added tax of FIM 3,642, making a total of FIM 20,198 (approximately €3,400).

13. Ms Lindfors brought proceedings against that decision in the Helsingin hallinto-oikeus (Helsinki Administrative Court) (Finland). She considered that *autovero* constituted a consumption tax prohibited under art 1(1) of Directive 83/183.

14. Her action was dismissed. The Helsingin hallinto-oikeus held that, as a tax connected with the registration or use in traffic of a vehicle in Finland, *autovero* was to be regarded as a specific tax connected with the use of property within the country within the meaning of art 1(2) of Directive 83/183, such a tax being outside the scope of that directive.

15. Ms Lindfors sought leave from the Korkein hallinto-oikeus to appeal against the decision of the Helsingin hallinto-oikeus.

16. The Korkein hallinto-oikeus decided to stay the proceedings and refer the following question to the Court of Justice for a preliminary ruling:

'Is Article 1 of Directive 83/183 ... to be interpreted as meaning that car tax (*autovero*) charged under the Law on Car Tax (*Autoverolaki*) on a vehicle imported into Finland from another Member State in connection with a transfer of residence is a consumption tax within the meaning of



- a Article 1(1) of the directive, or is it a specific duty or tax connected with the use of such property within the country within the meaning of Article 1(2)?

#### THE QUESTION REFERRED FOR A PRELIMINARY RULING

##### *Preliminary remarks*

- b 17. The court has already held, in its judgment of 19 September 2002 in *Proceedings brought by Tulliasiamies* Case C-101/00 [2002] ECR I-7487 (paras 61, 80), that *autovero* constitutes discriminatory internal taxation prohibited by art 90 EC (formerly art 95 of the EC Treaty) in so far as the amount of that tax on an imported used car exceeds the amount of the residual tax incorporated in the value of a similar used car already registered in Finnish territory.

- c 18. The national court's question concerns solely the lawfulness of levying a tax such as *autovero*—regardless of its method of calculation or amount—on the occasion of a transfer of residence from one member state to another.

##### *Observations submitted to the court*

- d 19. Ms Lindfors submits that *autovero* is a consumption tax which is levied because of the importation of a vehicle into Finnish territory. Such a tax should fall within the exemption laid down in art 1(1) of Directive 83/183.

- e 20. That *autovero* is a consumption tax within the meaning of that provision follows, according to Ms Lindfors, not only from the characteristics of that tax but also indirectly from the scope of Council Directive (EEC) 83/182 (on tax exemptions within the Community for certain means of transport temporarily imported into one member state from another) (OJ 1983 L105 p 59) and from Proposal 98/C 108/12 for a Council Directive governing the tax treatment of private motor vehicles moved permanently to another member state in connection with a transfer of residence or used temporarily in a member state other than that in which they are registered (OJ 1998 C108 p 75, and—amended proposal—OJ 1999 C145 p 6).

- f 21. The Finnish, Danish and Greek governments observe that *autovero* cannot be equated to a tax which normally applies to personal property imported permanently from another member state by private individuals within the meaning of art 1(1) of Directive 83/183. The determining circumstance for liability to the tax is the use of the vehicle on the highway in Finland, even if that tax is usually charged on the occasion of registration.
- g In any event, *autovero*, as a specific tax connected with use or registration, is expressly excluded from the scope of that directive by virtue of art 1(2) of the directive.

- h 22. The Commission of the European Communities notes that art 1(2) of Directive 83/183 excludes 'motor vehicle registration fees' from the scope of the directive. In contrast to taxes which are intended to contribute to the financing of the public administration, 'fees' constitute the consideration for services provided by the public authorities. According to the Commission, *autovero* is not a 'fee' charged on registration but a consumption tax prohibited by art 1(1) of that directive in connection with a transfer of residence. That prohibition relates to taxes whose chargeable event is the importation of property in connection with a transfer of residence.

- i 23. The Commission submits that tax has already been charged on the registration of the vehicle and its bringing into use in the state of origin. Freedom of movement would be compromised if the member state of destination could charge tax again on that basis. The provisions of Directive

83/183 must be interpreted in the light of the fundamental right to freedom of movement enshrined in art 18 EC (formerly art 8a of the EC Treaty) for citizens of the European Union. a

### *Findings of the court*

24. It must first be examined whether, as Ms Lindfors and the Commission claim, *autovero* falls within the scope of art 1(1) of Directive 83/183. It should be noted in this respect that the name given to a tax in national law is not as such decisive for the assessment of whether the tax in question is one referred to in that provision. b

25. Reading paras 1 and 2 of the Law on Car Tax together shows that *autovero* is payable before the registration or bringing into use of a private vehicle in Finland. It is apparent from the case file, in particular from para 2 of that law and the observations of the Finnish government and Ms Lindfors, that, with the exception of temporary import, the use of a vehicle on the Finnish road system entails the charging of *autovero*. Thus the government explains that the determining circumstance for the charging of that tax is the use of the car in traffic, even though the tax is usually charged on the occasion of registration. Ms Lindfors similarly confirms that the Law on Car Tax is based on the principle that any use of the vehicle, however minimal, entails the charging of the tax. c  
d

26. In those circumstances, a tax such as *autovero* cannot be regarded as a tax connected with importation falling within the scope of the exemption laid down in art 1(1) of Directive 83/183. The chargeable event for that tax is the use of a vehicle on Finnish territory, which is not necessarily connected with the act of importation (see, to that effect, *Weigel v Finanzlandesdirektion für Vorarlberg* Case C-387/01 [2004] 3 CMLR 931 (para 47)). e

27. It follows that a tax with the characteristics of *autovero* does not fall within the scope of the tax exemption laid down in art 1(1) of Directive 83/183. f

28. That conclusion is supported by art 1(2) of Directive 83/183. Since *autovero* is payable as a result of the use of a vehicle in Finland, taxes such as that at issue in the main proceedings constitute '[s]pecific ... duties and taxes connected with the use of ... property within the country' within the meaning of that provision. g

29. Nor can Ms Lindfors base her argument on the scope of Directive 83/182, which concerns tax exemptions applicable on the temporary import of certain means of transport. The circumstance that, in accordance with art 1 of that directive, a citizen of the Union who temporarily imports a vehicle into Finland is exempted from *autovero* does not allow the conclusion that that tax is within the tax exemption established by Directive 83/183, which relates to the permanent import of vehicles. h

30. The proposal for a directive 98/C 108/12 does not allow Directive 83/183 to be interpreted as Ms Lindfors and the Commission do. On the contrary, it is apparent from the fourth, fifth and seventh recitals in the preamble to that proposal that the adoption of a directive prohibiting the member states from imposing, as stated in art 1 of the proposal, 'excise duties, registration taxes or other consumption taxes ... on private motor vehicles registered in other Member States and brought into that Member State permanently in connection with the transfer of normal residence of a private individual' has i

a become necessary precisely because of the inadequacy of the rules laid down by Directive 83/183, as Advocate General Tizzano pointed out in his opinion in *Weigel's case* (para 52).

31. It is true that, as the Commission points out, *autovero* is capable of having a negative influence on decisions of citizens of the Union to exercise their right to freedom of movement as enshrined in particular by art 18 EC.

b 32. Although the national court has formally limited its question to the interpretation of art 1 of Directive 83/183, that does not preclude the court from providing the national court with all those elements for the interpretation of Community law which may be of assistance in adjudicating on the case pending before it, whether or not that court has specifically referred to them in its question (see, to that effect, *SARPP—Société d'application et de recherches en Pharmacologie et Phytothérapie SARL v Chambre syndicale des raffineurs et conditioneurs de sucre de France* Case C-241/89 [1990] ECR I-4695 (para 8), *Verband Sozialer Wettbewerb eV v Clinique Laboratories SNC* Case C-315/92 [1994] ECR I-317 (para 7), *Consorzio per la Tutela del Formaggio Gorgonzola v Käserei Champignon Hofmeister GmbH & Co KG* Case C-87/97 [1999] ECR I-1301 (para 16) and *Weigel's case* (para 44)).

d 33. The court must therefore examine the effect of art 18 EC, so that the national court can assess whether the application of *autovero* in a case such as that in the main proceedings is compatible with the requirements deriving from that provision.

e 34. It has already been held that the EC Treaty offers no guarantee to a citizen of the Union that transferring his activities to a member state other than that in which he previously resided will be neutral as regards taxation. Given the disparities in the tax legislation of the member states, such a transfer may be to the citizen's advantage in terms of indirect taxation or not, according to circumstance. It follows that, in principle, any disadvantage, by comparison with the situation in which that citizen carried on activities prior to that transfer, is not contrary to art 18 EC, provided that the legislation concerned does not place that citizen at a disadvantage as compared with those already subject to such a tax (see *Weigel's case* (para 55)).

f 35. The case file shows that the Law on Car Tax provides, in para 25(1), for a tax reduction of up to FIM 80,000 (€13,455) *inter alia* for citizens of the Union exercising their right to freedom of movement in connection with a transfer of residence to Finland. It will be for the national court to ascertain whether the application of that provision and any other provisions of national law is capable of ensuring that, as regards that tax, Ms Lindfors is not placed in a less favourable position than that of citizens who have been permanently resident in Finland. Should the national court find that such a less favourable situation exists, it will have to examine whether that difference in treatment is justified by objective considerations independent of the residence of the persons concerned and proportionate to the legitimate aim pursued by national law (see *D'Hoop v Office National de l'Emploi* Case C-224/98 [2003] All ER (EC) 527, [2002] ECR I-6191 (para 36)).

h 36. In the light of all the foregoing, the national court's question must be answered as follows:

i Article 1 of Directive 83/183 must be interpreted as not precluding, in connection with a transfer of residence of the owner of a vehicle from one member state to another, a tax such as that laid down by the Law on Car Tax from being charged before the registration or bringing into use of the vehicle in the member state to which residence is transferred. However, having regard



to the requirements deriving from art 18 EC, it is for the national court to ascertain whether the application of national law is capable of ensuring that, as regards that tax, that owner is not placed in a less favourable situation than that of citizens who have been permanently resident in the member state in question and, if necessary, whether such a difference of treatment is justified by objective considerations independent of the residence of the persons concerned and proportionate to the legitimate aim pursued by national law.

#### COSTS

37. The costs incurred by the Finnish, Danish and Greek governments and by the Commission, which have submitted observations to the court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds, the Court of Justice (First Chamber), in answer to the question referred to it by the Korkein hallinto-oikeus by order of 10 October 2002, hereby rules:

Article 1 of Council Directive (EEC) 83/183 (on tax exemptions applicable to permanent imports from a member state of the personal property of individuals) must be interpreted as not precluding, in connection with a transfer of residence of the owner of a vehicle from one member state to another, a tax such as that laid down by the Autoverolaki (1482/1994) (Law on Car Tax) from being charged before the registration or bringing into use of the vehicle in the member state to which residence is transferred. However, having regard to the requirements deriving from art 18 EC (formerly art 8a of the EC Treaty), it is for the national court to ascertain whether the application of national law is capable of ensuring that, as regards that tax, that owner is not placed in a less favourable situation than that of citizens who have been permanently resident in the member state in question and, if necessary, whether such a difference of treatment is justified by objective considerations independent of the residence of the persons concerned and proportionate to the legitimate aim pursued by national law.

**Evans v Secretary of State for the  
Environment, Transport and the  
Regions and another**

(Case C-63/01)

COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES (FIFTH CHAMBER)

JUDGES JANN (RAPPORTEUR) (ACTING FOR THE PRESIDENT OF THE FIFTH CHAMBER), EDWARD AND VON BAHR

ADVOCATE GENERAL ALBER

11 JULY, 24 OCTOBER 2002, 4 DECEMBER 2003

*Motor insurance – Motor Insurers' Bureau – Liability of bureau to satisfy judgment against uninsured driver – Bureau agreeing with Secretary of State to satisfy awards of damages made against uninsured drivers – Agreement intended to give effect to European Community directive – Compatibility of agreement with directive – Whether nature of bureau sufficient to comply with directive – Whether procedural arrangements of bureau sufficient to ensure protection to which victims entitled under directive – Whether bureau required to pay interest on awards of compensation to victims – Whether bureau required to reimburse costs incurred by victims in processing applications for compensation – Whether directive properly transposed – Council Directive (EEC) 84/5, art 1(4).*

In the United Kingdom, the Motor Insurers' Bureau (MIB) was a private law entity whose main purpose was to pay compensation to victims of accidents caused by uninsured or untraced drivers. In order to implement art 1(4)<sup>a</sup> of Second Council Directive (EEC) 84/5 (on the approximation of the laws of the member states relating to insurance against civil liability in respect of the use of motor vehicles)—which directive required member states to set up or to authorise a body with aims corresponding to those of the MIB—a number of agreements had been concluded between the Secretary of State and the MIB. Victims were able to apply to the MIB, which was to award payment of an amount of compensation to be assessed in the same way that a court would assess damages which the victim would be able to recover from an untraced driver. Further, the victim had a right of appeal to an arbitrator against any decision of the MIB and, in certain cases, the victim might appeal thereafter to a court, with further rights of appeal to successive levels of jurisdiction. However, the agreement made no express provision for the payment of interest on the compensation awarded or for reimbursement of costs incurred in the proceedings before the MIB. In the main proceedings, the claimant had applied for, and had been granted, compensation under the agreement, but his appeals against the level of the award to the arbitrator and to the courts had been dismissed. Thereafter, he commenced proceedings against the Secretary of State, submitting that the United Kingdom had failed adequately to transpose the directive. The national court decided to stay the proceedings and refer a number of questions for preliminary ruling to the Court of Justice of the European Communities under art 234 EC (formerly art 177 of the EC Treaty),

<sup>a</sup> Article 1(4) of the directive is set out at judgment para 4, below

concerning: (i) the nature of the body which the member states were required to establish in order to implement the directive; (ii) the remedies which had to be available to victims; (iii) whether interest was payable on the sums awarded by the body; (iv) whether costs incurred by victims pursuing claims for compensation had to be reimbursed; and (v) possible liability for failure correctly to transpose the directive. a

**Held** – (1) A body was to be regarded as authorised by a member state within the meaning of art 1(4) of the directive where its obligation to provide compensation to victims derived from an agreement concluded between that body and a public authority of the member state and where victims might apply to the body for the compensation guaranteed to them by the directive. Although legislative action on the part of each member state was not necessarily required in order to implement a directive, it was essential for national law to guarantee that the national authorities would effectively apply the directive in full, that the legal position under national law was sufficiently precise and clear, that individuals were made fully aware of all their rights and, where appropriate, that they might rely on them before the national courts. So far as relevant to the main proceedings, the directive contained no provision concerning the legal status of the body or the detailed arrangements for its authorisation. Further, it expressly allowed the member states to regard compensation by the body as subsidiary and enabled them to make provision for the settlement of claims between that body and those responsible for the accident and for relations with other insurers or social security bodies required to compensate the victim in respect of the same accident. Therefore, the fact that the source of the obligation was in an agreement concluded between the body and a public authority was immaterial (see judgment paras 32, 34, 35, 37, below). b

(2) The procedural arrangements of the MIB were sufficient to provide the protection to which victims were entitled under the directive, save to the extent that the procedure had to guarantee that, both in dealings with the MIB and before the arbitrator, victims were made aware of, and given the opportunity to comment on, any matter that might be used against them. Whether that reservation had been fulfilled remained to be determined by the national court. Since the directive had confined itself to laying down minimum procedural requirements, it was for the domestic legal system of each member state to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions intended to safeguard rights derived under Community law. However, such rules as were adopted had to fulfil the requirements of the principles of equivalence and effectiveness. So far as the principle of effectiveness was concerned, each case had to be analysed by reference to the role of the particular provision in the procedure, its progress and its special features, viewed as a whole, before the various national instances. Further, the basic principles of the domestic judicial system, such as protection of the rights of the defence, the principle of legal certainty and the proper conduct of procedure, had to be taken into consideration, where appropriate. In the main proceedings, although the MIB was not a court, the procedure established gave victims the advantages of speed and economy of legal costs, and the procedural arrangements laid down by national law did not render it practically impossible or excessively difficult to exercise the right to compensation conferred on victims by the directive. Therefore, those rules complied with the principle of effectiveness. Further, in the light of the c  
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- a objective pursued by the directive—which was to provide a simple mechanism for compensating victims—the cumulative effect of the possibilities of review available under the procedure and practical advantages associated with it conferred on victims a level of protection corresponding to that provided for by that directive (see judgment paras 44–46, 53–58, below).
- b (3) On the proper interpretation of art 1(4) of the directive, compensation paid by the authorised body had to take account of the effluxion of time until actual payment of the sums awarded. Although the directive contained no provision concerning interest, compensation for the purposes of the directive was intended, so far as possible, to provide restitution for the victim of an accident, taking account of factors, such as the effluxion of time, which might reduce its value. However, in order to compensate for the loss suffered by
- c victims as a result of the effluxion of time, member states were free to choose between awarding interest or paying compensation in the form of aggregate sums which took account of the effluxion of time (see judgment paras 65–68, 70, 71, below); *Grifoni v European Atomic Energy Community* Case C-308/87 [1994] ECR I-341 and *Marshall v Southampton and South West Hampshire Area Health Authority (No 2)* Case C-271/91 [1993] 4 All ER 586 applied.
- d (4) On the proper interpretation of art 1(4) of the directive, compensation paid by the authorised body was not required to include reimbursement of the costs incurred by victims in connection with the processing of their application, save to the extent to which such reimbursement was necessary to safeguard the rights derived by victims from the directive in conformity with
- e the principles of equivalence and effectiveness. The directive contained no provision concerning reimbursement of costs. Further, in the views of most of the member states, reimbursement of costs was a procedural matter. Therefore, in the absence of Community rules governing the matter, it was for the domestic legal system of each member state to lay down the detailed
- f procedural rules governing actions for safeguarding rights which individuals derive from Community law, in conformity with the principles of equivalence and effectiveness (see judgment paras 74–76, 77, below).
- g (5) If examination by the national court of the existing compensation system disclosed a defect in the transposition of the directive and, if that defect had adversely affected the claimant in the main proceedings, it was incumbent on the national court to determine whether the breach of the obligation of
- h transposition was sufficiently serious for the member state to be required to make reparation to the claimant. In that determination, all the factors characterising the situation had to be taken into account, including, in particular, the clarity and precision of the rule infringed, whether the infringement or the damage caused was intentional or involuntary, whether
- i any error of law was excusable or inexcusable, and whether the fact that the position taken by a Community institution had contributed to the adoption or maintenance of national measures or practices contrary to Community law. In principle, those criteria had to be applied by the national courts in accordance with the guidelines laid down by the Court of Justice (see judgment paras 83–88, below); *Haim v Kassenzahnärztliche Vereinigung Nordrhein* Case C-424/97 [2000] ECR I-5123, *Brasserie du Pêcheur SA v Germany*, *R v Secretary of State for Transport, ex p Factortame Ltd* Joined cases C-46/93 and C-48/93 [1996] All ER (EC) 301 and *Francovich v Italy* Joined cases C-6/90 and C-9/90 [1991] ECR I-5357 followed.

## Notes

For awards under the Motor Insurers' Bureau (Compensation of Victims of Untraced Drivers) Agreement, see 25 *Halsbury's Laws* (4th edn 2003 reissue) para 760.

## Cases cited

- Airey v Ireland* (1979) 2 EHRR 305, [1979] ECHR 6289/73, ECt HR. a
- Aprile Srl (in liq) v Amministrazione delle Finanze dello Stato* (No 2) Case C-228/96 [2000] 1 WLR 126, [1998] ECR I-7141, ECJ.
- Borker* (Reference for a preliminary decision brought by) Case 138/80 [1980] ECR 1975, ECJ.
- Brasserie du Pêcheur SA v Germany, R v Secretary of State for Transport, ex p Factortame Ltd* Joined cases C-46/93 and C-48/93 [1996] All ER (EC) 301, [1996] QB 404, [1996] 2 WLR 506, [1996] ECR I-1029, ECJ. c
- Brinkmann Tabakfabriken GmbH v Skatteministeriet* Case C-319/96 [1998] ECR I-5255, ECJ.
- Broekmeulen v Huisarts Registratie Commissie* Case 246/80 [1981] ECR 2311, ECJ.
- Bryan v UK* (1996) 21 EHRR 342, [1995] ECHR 19178/91, ECt HR. d
- Comet BV v Produktschap voor Siergewassen* Case 45/76 [1976] ECR 2043, ECJ.
- Coote v Granada Hospitality Ltd* Case C-185/97 [1998] All ER (EC) 865, [1998] ECR I-5199, ECJ.
- Dillenkofer v Germany* Joined cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94 [1996] All ER (EC) 917, [1997] QB 259, [1997] 2 WLR 253, [1996] ECR I-4845, ECJ. e
- Dorsch Consult Ingenieurgesellschaft mbH v Bundesbaugesellschaft Berlin mbH* Case C-54/96 [1998] All ER (EC) 262, [1997] ECR I-4961, ECJ.
- EC Commission v Belgium* Case 247/85 [1987] ECR 3029, ECJ.
- EC Commission v Germany* Case 29/84 [1985] ECR 1661, ECJ.
- EC Commission v Netherlands* Case C-190/90 [1992] ECR I-3265, ECJ. f
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- Edilizia Industriale Siderurgica Srl (Edis) v Ministero delle Finanze* Case C-231/96 [1998] ECR I-4951, ECJ.
- European Commission v France* Case C-197/96 [1997] ECR I-1489, ECJ.
- European Commission v France* Case C-354/98 [1999] ECR I-4927, ECJ. g
- European Commission v Germany* Case C-217/97 [1999] ECR I-5087, ECJ.
- European Commission v Germany* Case C-96/95 [1997] ECR I-1653, ECJ.
- European Commission v Greece* Case C-365/93 [1995] ECR I-499, ECJ.
- European Commission v Netherlands* Case C-144/99 [2001] ECR I-3541, ECJ.
- Ferreira v Cia de Seguros Mundial Confianca SA* Case C-348/98 [2000] ECR I-6711, ECJ. h
- Francovich v Italy* Joined cases C-6/90 and C-9/90 [1991] ECR I-5357, ECJ.
- Grifoni v European Atomic Energy Community* Case C-308/87 [1994] ECR I-341, ECJ.
- Haim v Kassenzahnärztliche Vereinigung Nordrhein* Case C-424/97 [2000] ECR I-5123, ECJ. i
- Ireks-Arkady GmbH v Council of Ministers and Commission of the European Communities* Case C-238/78 [1979] ECR 2955, ECJ.
- Johnston v Chief Constable of the Royal Ulster Constabulary* Case 222/84 [1986] 3 All ER 135, [1987] QB 129, [1986] 3 WLR 1038, [1986] ECR 1651, ECJ.
- Konle v Austria* Case C-302/97 [1999] ECR I-3099, ECJ.

- a* *Marleasing SA v La Comercial Internacional de Alimentación SA* Case C-106/89 [1990] ECR I-4135, ECJ.  
*Marshall v Southampton and South West Hampshire Area Health Authority (No 2)* Case C-271/91 [1993] 4 All ER 586, [1994] QB 126, [1993] ECR I-4367, ECJ.  
*Nordsee Deutsche Hochseefischerei GmbH v Reederei Mond Hochseefischerei Nordstern AG & Co KG* Case 102/81 [1982] ECR 1095, ECJ.
- b* *Peterbroeck Van Campenhout & Cie (SCS) v Belgium* Case C-312/93 [1996] All ER (EC) 242, [1995] ECR I-4599, ECJ.  
*R v HM Treasury, ex p British Telecommunications plc* Case C-392/93 [1996] All ER (EC) 411, [1996] QB 615, [1996] 3 WLR 203, [1996] ECR I-1631, ECJ.  
*R v Ministry of Agriculture, Fisheries and Food, ex p Hedley Lomas (Ireland) Ltd* Case C-5/94 [1996] All ER (EC) 493, [1996] ECR I-2553, ECJ.
- c* *R v Secretary of State for Social Security, ex p Sutton* Case C-66/95 [1997] All ER (EC) 497, [1997] ECR I-2163, ECJ.  
*Rechberger v Austria* Case C-140/97 [1999] ECR I-3499, ECJ.  
*Rewe-Zentralfinanz eG v Landwirtschaftskammer für das Saarland* Case 33/76 [1976] ECR 1989, ECJ.
- d* *Scarth v UK* [1999] ECHR 33745/96, ECt HR.  
*Svenska Staten v Stockholm Lindopark AB, Stockholm Lindopark AB v Svenska Staten* Case C-150/99 [2001] STC 103, [2001] ECR I-493, ECJ.  
*Union Nationale des Entraîneurs et Cadres Techniques Professionnels du Football (Unectef) v Heylens* Case 222/86 [1987] ECR 4097, ECJ.
- e* *Upjohn Ltd v Licensing Authority* Case C-120/97 (2000) 51 BMLR 206, [1999] 1 WLR 927, [1999] ECR I-223, ECJ.  
*Van Schijndel v Stichting Pensioenfonds voor Fysiotherapeuten* Joined cases C-430/93 and C-431/93 [1996] All ER (EC) 259, [1995] ECR I-4705, ECJ.  
*White v White* [2001] UKHL 9, [2001] 2 All ER 43, [2001] 1 WLR 481.  
*Withers v Delaney* Case C-158/01 [2002] ECR I-8301, ECJ.
- f*

## Reference

- By order of 17 May 2000, the High Court of Justice of England and Wales, Queen's Bench Division, referred to the Court of Justice of the European Communities for a preliminary ruling under art 234 EC (formerly art 177 of the EC Treaty) five questions (set out at judgment para 19, below) on the interpretation of art 1(4) of Second Council Directive (EEC) 84/5 (on the approximation of the laws of the member states relating to insurance against civil liability in respect of the use of motor vehicles) (hereinafter the Second Directive). Those questions were raised in proceedings between Samuel Sidney Evans and the Secretary of State for the Environment, Transport and the Regions (hereinafter the Secretary of State) and the Motor Insurers' Bureau (hereinafter the MIB) concerning compensation for injuries suffered by Mr Evans in a road traffic accident involving an unidentified vehicle. written observations submitted on behalf of: Samuel Evans by R Plender QC and D Broatch, Barrister; the Motor Insurers' Bureau by D O'Brien QC and F Randolph, Barrister; the United Kingdom government by G Amodeo, acting as agent, P Roth QC and H Davies, Barrister; the Commission of the European Communities by C Tufvesson, C Ladenburger and M Shotter, acting as agents. Oral observations were submitted on behalf of: Samuel Evans, represented by R Plender and D Broatch; of the Motor Insurers' Bureau, represented by D O'Brien and F Randolph; of the United Kingdom government, represented by J E Collins, acting as agent, P Roth and H Davies; and of the Commission,
- g*
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represented by M Shotter. The language of the case was English. The facts are set out in the opinion of the Advocate General. a

24 October 2002. **The Advocate General (S Alber)** delivered the following opinion<sup>1</sup>.

## I—INTRODUCTION b

1. The present reference for a preliminary ruling submitted by the High Court of Justice of England and Wales, Queen's Bench Division, raises questions concerning the interpretation and application of the directives governing compulsory insurance against civil liability in respect of motor vehicles. The question in particular arises as to whether interest and costs are to be included in the compensation for injuries caused by an untraced vehicle which is provided by a body designated by a member state for that purpose. Clarification is also sought as to whether the solution adopted in Great Britain satisfies Community law requirements as to effective legal protection, whether the body responsible for compensation can be regarded as having been properly authorised within the meaning of the relevant directive, and whether possible shortcomings in the transposition of the relevant directive may constitute such a sufficiently serious breach of a member state's obligations as to found a claim for compensation against the defaulting state in accordance with principles of Community law. c  
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## II—LEGAL FRAMEWORK e

### A—Provisions of Community law

*Council Directive (EEC) 72/166 (on the approximation of the laws of member states relating to insurance against civil liability in respect of the use of motor vehicles, and to the enforcement of the obligation to insure against such liability)*<sup>2</sup> (the *First Directive*) f

2. Article 3(1) of the First Directive provides:

'Each Member State shall, subject to Article 4, take all appropriate measures to ensure that civil liability in respect of the use of vehicles normally based in its territory is covered by insurance. The extent of the liability covered and the terms and conditions of the cover shall be determined on the basis of these measures.' g

*Council Directive (EEC) 84/5 (on the approximation of the laws of the member states relating to insurance against civil liability in respect of the use of motor vehicles)*<sup>3</sup> (the *Second Directive*)

3. Article 1(1) and (4) of the Second Directive provides: h

'1. The insurance referred to in Article 3(1) of Directive 72/166/EEC shall cover compulsorily both damage to property and personal injuries.

2. ...<sup>4</sup>

4. Each Member State shall set up or authorize a body with the task of providing compensation, at least up to the limits of the insurance obligation for damage to property or personal injuries caused by an i

1 Original language: German.

2 OJ English Sp Edn 1972 (II) p 360.

3 OJ 1984 L8 p 17.

4 Article 1(2) sets out the minimum amounts for compensation cover.

a unidentified vehicle or a vehicle for which the insurance obligation provided for in paragraph 1 has not been satisfied. This provision shall be without prejudice to the right of the Member States to regard compensation by that body as subsidiary or non-subsidiary and the right to make provision for the settlement of claims between that body and the person or persons responsible for the accident and other insurers or social security bodies required to compensate the victim in respect of the same accident.

b The victim may in any case apply directly to the body which, on the basis of information provided at its request by the victim, shall be obliged to give him a reasoned reply regarding the payment of any compensation ...

c Member States may limit or exclude the payment of compensation by that body in the event of damage to property by an unidentified vehicle.

They may also authorize, in the case of damage to property caused by an uninsured vehicle an excess of not more than 500 ECU for which the victim may be responsible.

d Furthermore, each Member State shall apply its laws, regulations and administrative provisions to the payment of compensation by this body, without prejudice to any other practice which is more favourable to the victim.'

#### *B—Rules of the member state*

e 4. In view of the lack of cover for personal injuries caused by uninsured or untraced drivers, the Motor Insurers' Bureau was established in 1946 in Great Britain by insurers providing compulsory motor vehicle insurance in agreement with the Ministry of Transport. The Motor Insurers' Bureau (the MIB) is a private law entity whose members are private law insurance companies offering motor vehicle insurance.

f 5. The obligation to pay compensation for injuries caused by uninsured or untraced drivers results from agreements concluded between the MIB and the Secretary of State for the Environment, Transport and the Regions<sup>5</sup>. The agreements have been frequently amended or adapted over the course of the years. Reference should be made at this point to the Motor Insurers' Bureau (Compensation of Victims of Uninsured Drivers) Agreement<sup>6</sup> of 21 December 1988 and to the Motor Insurers' Bureau (Compensation of Victims of Untraced Drivers) Agreement of 22 November 1972, in its 1977 amended version, which is the agreement in issue in the present case. This latter agreement will hereinafter be referred to as the Agreement on Untraced Drivers or simply as the Agreement.

g 6. The 1972 Agreement material to the present dispute provides essentially as follows:

h —The Agreement is to apply to any case in which an application is made to the MIB for a payment in respect of the death of or bodily injury to any person caused by or arising out of the use of a motor vehicle on a road in Great Britain where, subject to certain conditions which are not relevant to this case, the applicant for the payment is unable to trace any person responsible for the death or injury (cl 1).

i —On any application in a case to which the Agreement applies, the MIB is to award payment of an amount which is to be assessed in the same way as a

<sup>5</sup> Hereinafter also referred to as 'the Secretary of State for Transport'.

<sup>6</sup> Hereinafter also referred to as 'the Agreement on Uninsured Drivers'.

court, applying as appropriate the laws in force in Great Britain, would assess the damages which the applicant would have been entitled to recover from the untraced person (cl 3). a

—The MIB must cause any application for a payment under the Agreement to be investigated and decide whether to make an award (cl 7).

—Where the MIB decides to make an award, it must notify the applicant of the amount it proposes to pay and the way in which that amount has been calculated. Where the applicant decides to accept the award, the MIB must pay to the applicant the amount of the award (c11 9 and 10). b

—The applicant is to have a right of appeal to an arbitrator against any decision of the MIB (cl 11).

—Before lodging an appeal, the applicant may make comments to the MIB on its decision and may supply further evidence relating to the application. The MIB may investigate that new evidence and must inform the applicant of the result of such investigation and of any change in its decision (cl 13). c

—On appeal, the arbitrator is to decide whether the MIB should make an award under the Agreement and, if so, the amount which it should award to the applicant (cl 16). d

—The arbitrator is to be selected from two panels of Queen's Counsel appointed respectively by the Lord Chancellor and the Lord Advocate (cl 18).

—The arbitrator is to decide the appeal on the documents submitted to him, although he may ask the MIB to make any further investigation which he considers desirable, and the applicant may submit comments on the findings of such investigation (cl 17). e

—Each party to the appeal is to bear its own costs (cl 21). The MIB is to pay the arbitrator's fees, except where it appears to the arbitrator that there were no reasonable grounds for the appeal, in which case he may decide that his fee ought to be paid by the applicant (cl 22).

7. The Agreement makes no express provision for payment of interest on the compensation awarded or for reimbursement of costs incurred in the proceedings before the MIB. f

### III—FACTS AND PROCEDURE

8. The claimant in the national proceedings, Samuel Sidney Evans (the claimant), was injured in a road traffic accident on 25 December 1991. He was struck by a car while bending down on the roadside into his parked car in order to locate and remove a parcel. The driver of the vehicle which struck him could not be traced. g

9. On 11 June 1992 the claimant applied for compensation from the MIB on foot of the Agreement. The MIB informed the claimant on 11 January 1996 that it had decided to set compensation at £50,000. The claimant appealed to an arbitrator against that decision in accordance with the procedure set out in the Agreement. h

10. On 27 August 1996 the arbitrator gave her decision. She decided that the claimant's damages on a full liability basis should be £58,286. In view of the victim's contributory negligence—presumably being on the roadside when removing items from his vehicle—those damages were to be reduced by 20%, resulting in an award of £46,629. Taking into account certain evidence, specifically video footage subsequently taken by a private detective purporting to show that the claimant's impediment in walking was not so significant, the arbitration decision proceeded on the basis that the claimant had been i



a dishonest and for that reason ordered him to pay the arbitrator's fees (reference is made in this connection to cl 22, cited in para 6, above). No interest was payable on the compensation.

11. The MIB paid to the claimant the amount of £46,629 together with £770 for the costs of his legal representation and an ex gratia payment of £150 and value added tax.

b 12. The claimant applied on 16 September 1996 to the Commercial Court for leave to appeal against the arbitration decision. He was granted leave to appeal on 16 December 1996 in regard to the question whether the arbitrator had jurisdiction to award interest. His appeal was dismissed on 29 July 1997. A further appeal brought by the claimant was dismissed by the Court of Appeal on 30 September 1998. The Court of Appeal ([1999] 1 CMLR 1251) stated that what the United Kingdom had done by way of implementation of the Second Directive 'did not bring into existence any entity or relationship which enabled the Directive to be enforced against anybody (save possibly in the *Francovich* sense against itself)'. On 18 January 1999 the House of Lords refused leave for a further appeal.

c 13. On 25 February 1999 the claimant commenced proceedings against the Secretary of State for the Environment, Transport and the Regions, that is to say, the Ministry responsible, on grounds of failure to implement, or defective implementation of, the First and Second Directives. The claimant first of all argues that the United Kingdom has failed to set up or authorise a body—at any rate in a form complying with the principle of legal certainty—with the task of providing compensation in accordance with art 1(4) of the Second Directive. Had that directive been correctly implemented, no court could otherwise have ruled that the MIB was not under an obligation to award compensation in accordance with the First or Second Directives. The claimant further argued that the relevant Agreement between the MIB and the Secretary of State for Transport does not provide for compensation 'at least up to the limits of the insurance obligation'—as is set out in the directive—that it confers no right on victims of untraced drivers to bring a claim against the MIB, and that it grants them no access to judicial bodies.

d 14. The claimant contends that he has suffered loss as a result of the defects in implementation and that those defects constitute a sufficiently grave and manifest breach of Community law to found a right for him to recover damages from the Secretary of State.

e 15. It was against this background that the High Court, by order of 17 May 2000, referred the following questions to the court for a preliminary ruling:

f (1) On the proper interpretation of Council Directive 84/5/EEC of 30 December 1983 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles (the Second Motor Insurance Directive):

g (a) must the arrangements concerning the provision of compensation by the body established or authorised pursuant to Article 1(4) include provision for the payment of interest on the sums found to be payable for the damage to property or personal injuries?

h (b) if the answer to question (a) is yes, from what date and on what basis should such interest be calculated?

i (2) On the proper interpretation of Article 1(4) of the Second Motor Insurance Directive, in circumstances where the compensating body itself

has an obligation to investigate the victim's injury and loss (and to incur the costs thereof, including the cost of medical and other reports): **a**

(a) must the arrangements concerning the provision of compensation by the body include provision for the payment of the costs incurred by a victim in preparing and making his application to that body for compensation? **b**

(b) if the answer to question (a) is yes, on what basis are those costs to be calculated in a case where that body has made an offer to the victim in excess of the amount that he finally recovers, which offer the victim declined to accept? **b**

(3) On the proper interpretation of Article 1(4) of the Second Motor Insurance Directive, if the victim's application for compensation is determined by a body that is not a court, must he have a full right to appeal against that determination to a court, on both the facts and the law, rather than an appeal to an independent arbitrator having the following principal characteristics: **c**

(i) the victim may appeal to the arbitrator on both the facts and the law;

(ii) when giving notice of appeal, the victim may make further representations and adduce further evidence to the compensating body upon which the compensating body may alter its award prior to the appeal; **d**

(iii) the victim is provided in advance with a copy of all the material to be provided to the arbitrator and is given the opportunity to add any material that he wishes in response;

(iv) the arbitrator makes an award, without an oral hearing, in which he or she decides what award the compensating body ought to make and gives reasons for that decision; **e**

(v) if the victim is dissatisfied, he is entitled to appeal from the arbitrator to the Courts but he may do so only on the grounds of serious irregularity affecting the arbitration or on a question of law (including whether there was any evidence to support any particular conclusion of the arbitrator or whether any particular conclusion was one to which no arbitrator could reasonably come upon the evidence), and in the case of an appeal on a question of law, permission to appeal must be obtained from the Court which will not be given unless the decision of the arbitrator is obviously wrong and it is just and proper in all the circumstances for the Court to determine the question. **f**

(4) If the answer to questions (1)(a) and/or (2)(a) and/or (3) is yes, has a Member State duly authorised a body under Article 1(4) of the Second Motor Insurance Directive when an existing body has the task of providing compensation to victims pursuant only to an agreement with the relevant authority of the Member State that does not correspond to the Second Motor Insurance Directive in those respects, and: **g**

(a) that agreement creates a legal obligation owed to the relevant authority of the Member State to provide compensation to victims which is directly enforceable by the relevant authority and does not give such victims a directly enforceable legal right to claim against that body, but the victim may apply to the Court for an order that the authority should enforce the agreement if the authority were to fail to do so; and **h**

(b) that body carries out that obligation by accepting and paying claims from victims in accordance with that agreement; and **i**

a (c) the Member State considered in good faith that the provision of that agreement gave at least as good protection to victims as the requirements of the Second Motor Insurance Directive?

b (5) If the answer to any of questions (1)(a) or (2)(a) or (3) is yes, and/or if the answer to question (4) is no, does a failure to comply with the Second Motor Insurance Directive in that respect constitute a sufficiently serious breach by the Member State to give rise to liability for damages as a matter of Community law if it is established that such damage was caused?

c 16. The claimant, the United Kingdom government, which is also representing the defendant in the main proceedings, the MIB, as intervener in the main proceedings in support of the form of order sought by the defendant, and the Commission of the European Communities took part in the procedure before the court.

#### IV—ANALYSIS

d 17. Counsel for the claimant pointed out during the oral procedure that, irrespective of the content and order of the questions submitted for preliminary ruling, the claimant's view is that the United Kingdom has failed to implement, or failed correctly to implement, the Second Directive in its national law. Central to the case, it is submitted, is the question whether a member state is under an obligation to pay compensation to a private individual who belongs to the group of persons deriving entitlement under the directive, in the case where the member state has failed to take such steps as would enable those persons to invoke the directive against any other party whomsoever.

e 18. For reasons of clarity, however, the questions submitted for preliminary ruling will be examined according to their given order.

#### f 1. *Payment of interest and reimbursement of costs—the first and second questions*

##### *Submissions of the parties*

19. The arguments relating to the first and second questions are in large measure parallel, and may for that reason be set out together.

g 20. The claimant takes the view that a textual interpretation of art 1(1) and (4) of the Second Directive in conjunction with art 3(1) of the First Directive shows that, where personal injuries are caused by an untraced driver, the authorised body must provide compensation—at least up to the limits of the insurance obligation—in a similar amount and in accordance with the same conditions as the law of the member state concerned provides in the case of injuries caused by an identified and insured driver. This interpretation is supported by the fact that where the Second Directive intends victims of untraced drivers to be treated differently from victims of uninsured drivers it does so expressly, as in the case of damage to property.

h 21. Moreover, even if the Second Directive had not itself required equal treatment for victims of untraced drivers, on the one hand, and victims of insured or uninsured drivers, on the other hand, that obligation would in any event follow from the principle of equal treatment. In the United Kingdom, however, victims of untraced drivers are not treated on an equal footing with victims of drivers who are insured or insufficiently insured. Unlike the latter, and without objective justification, they do not receive damages that include interest and costs and they do not enjoy the same procedural guarantees, including access to the courts.



22. Citing the court's judgment in *Marshall v Southampton and South West Hampshire Area Health Authority (No 2)*<sup>7</sup>, in which the court ruled, with regard to discriminatory dismissal, that the award of interest must be regarded as an essential component of compensation, the claimant submits that that principle must also apply to the compensation payable to victims of untraced drivers pursuant to the Second Directive. a

23. The same considerations, he continues, apply equally to the award of costs. This is, moreover, supported by the case law of the European Court of Human Rights, which has held that the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) (the ECHR) is intended to guarantee rights that are practical and effective<sup>8</sup>. b

24. The United Kingdom government takes the view that the relevant provisions of the two directives demonstrate that their purpose is to provide specified minimum guarantees, but that they do not provide for uniformity in the legislation of member states. Neither directive contains any provision relating to the financial components of compensation or provides that the body responsible for paying that compensation is required to pay the same amount as the victim of an insured driver would receive before the courts of the member state. A difference in treatment of the two groups of persons in national law is, it submits, objectively justified by the fact that the body required to provide compensation is not a tortfeasor, still less a tortfeasor wrongfully withholding money that ought to have been paid to the claimant. The final subparagraph of art 1(4) of the Second Directive allows for a difference in treatment. c

25. Citing the court's judgment in *R v Secretary of State for Social Security, ex p Sutton*<sup>9</sup>, the United Kingdom government argues that there is no general principle of Community law that a requirement to pay a monetary amount by way of compensation due under Community law necessarily entails a requirement to pay interest. The same considerations, it continues, must also apply to the reimbursement of costs. d

26. The MIB essentially takes the same position as the United Kingdom government. The MIB first points out, however, that in English law damages are assessed by the courts at the time of judgment. Section 35A of the Supreme Court Act 1981 broke with common law in giving courts the power, under certain conditions, to award interest on claims for damages. That power, however, can be exercised only in court proceedings. e

27. The Commission argues in the first place that neither the First nor the Second Directive contains any express rule on the payment of interest or reimbursement of costs. Nor do they contain any provision as to whether interest and costs form part of compulsory insurance. f

28. The Commission goes on to examine whether art 1(4) of the Second Directive allows a member state to treat one category of victims less favourably than another. It takes the view in this regard that—subject to express exceptions—the Second Directive does, in the light of its overall objective, impose an obligation to ensure that victims of uninsured or untraced drivers are given the same degree of cover as victims covered by compulsory insurance. g

7 Case C-271/91 [1993] 4 All ER 586, [1993] ECR I-4367 (para 31).

8 See *Airey v Ireland* (1979) 2 EHRR 305.

9 Case C-66/95 [1997] All ER (EC) 497, [1997] ECR I-2163.

- a 29. The Commission concludes by examining whether a member state's national rules which make no provision for the award of interest to victims of untraced drivers runs counter to the concept of 'adequate compensation' which is the objective of the Second Directive. In that regard, it refers, first, to the court's case law in favour of awarding interest in the contexts of non-contractual liability of the Community<sup>10</sup> and equal treatment of men and women<sup>11</sup>. Second, the Commission refers to the objectives of the Second Directive as set out in the preamble thereto. Article 1(4), it observes, defines the areas in which member states have a discretion to limit compensation, none of which mentions excluding interest. In view of those factors, the Commission tends to the view that the award of interest in accordance with the applicable national rules must be regarded as an essential component of the compensation referred to in art 1(4) of the Second Directive.

### Appraisal

- d 30. In order to examine whether interest and costs form part of the amount which a body within the meaning of art 1(4) of the Second Directive must provide in respect of injuries caused by an untraced vehicle<sup>12</sup>, we must initially proceed on the basis of the wording of the First and Second Directives. Neither of those directives makes express reference to interest and costs. Article 1(1) of the Second Directive refers, for the purpose of determining the subject matter of the insurance, to art 3(1) of the First Directive. This latter provision, however, also states merely that each member state must take all appropriate measures to ensure that civil liability in respect of the use of vehicles normally based in its territory is covered by insurance. According to that provision, '[t]he extent of the liability covered and the terms and conditions of the cover shall be determined on the basis of these measures'.

- f 31. With regard to the scope of the claim to compensation against the body within the meaning of art 1(4) of the Second Directive, this latter provision states that compensation must be provided 'at least up to the limits of the insurance obligation'. With regard to the scope of compulsory insurance, the fifth recital in the preamble to the Second Directive states that 'the amounts in respect of which insurance is compulsory must in any event guarantee victims *adequate compensation* irrespective of the Member State in which the accident occurred'<sup>13</sup>. It is thus necessary to examine whether, in the light of the substance and purpose of the provisions, 'compulsory insurance' covers inclusion of interest and costs. It will in this connection also be necessary to consider whether a claim for compensation may, by its nature, possibly require payment of interest and costs.

- g 32. One must first proceed on the assumption that determination of the scope of the obligation to provide cover on the basis of the First and Second Directives is in principle a matter for the member states<sup>14</sup>. Under the First

10 See *Ireks-Arkady GmbH v Council of Ministers and Commission of the European Communities* Case C-238/78 [1979] ECR 2955 (para 20) and *Grifoni v European Atomic Energy Community* Case C-308/87 [1994] ECR I-341 (para 40).

11 See *Marshall's case* (cited in footnote 7, above) (para 31).

12 In what follows, I shall refer to untraced vehicles as well as to untraced drivers. The differences in terminology are attributable to the fact that the directives refer to vehicles, whereas the Agreements between the MIB and the Secretary of State for Transport make reference to drivers.

13 My emphasis.

14 See *Ferreira v Cia de Seguros Mundial Confianca SA* Case C-348/98 [2000] ECR I-6711 (para 32). See also the order of 14 October 2002 in *Withers v Delaney* Case C-158/01 [2002] ECR I-8301 (para 18).

Directive this task was left exclusively to the member states. This is expressed not only in art 3(1) of the First Directive, but also along the same lines in art 3(2), which provides that each member state must, for example, take all appropriate measures to ensure that a contract of insurance covers any loss or injury caused in the territory of the other member states, *in accordance with the legal provisions of those states*. a

33. The disparities in regard to the extent of the obligation of insurance cover in the member states<sup>15</sup> have resulted in that obligation being compulsorily extended, within the framework of the Second Directive, to cover also damage to property<sup>16</sup>. Minimum amounts for the cover of persons and damage to property were also laid down<sup>17</sup>. The Third Directive<sup>18</sup> goes even further in this direction by imposing minimum requirements in regard to the group of persons to be covered by insurance<sup>19</sup>. b

34. Beyond these more stringent minimum requirements, however, it must be possible to proceed on the basis that it continues to be a matter for the member states to determine the characteristics of a compensation claim. Article 1(4), final subparagraph, of the Second Directive also expressly states, with regard to the body providing compensation, that each member state must apply *its laws, regulations and administrative provisions* to the payment of compensation by that body, without prejudice to any other practice which is more favourable to the victim. c

35. One might conduct a comparative law study of the rules governing compulsory insurance in force in the member states for the purpose of determining whether the award of interest and costs is normally included in compulsory insurance. Even if this were to indicate that interest and costs are generally included within the scope of compulsory insurance cover, this result need not necessarily apply for all member states. The reference to member states' own laws, regulations and administrative provisions would otherwise serve no purpose. d

36. It is for that reason necessary to address the question whether the nature of the claim for compensation might possibly indicate whether interest and costs have to be awarded. It is in principle a civil law claim to compensation that underlies compulsory insurance cover in respect of motor vehicles. The statutorily prescribed duty to have insurance cover is linked to this civil law claim and serves as the economic safeguard for a well-founded claim to compensation. e

37. A question may arise as to whether the legal nature of a claim changes in the case where the compensation for damage to property or personal injuries that have been suffered is to be provided by a body as defined in art 1(4) of the Second Directive. One can imagine various possibilities as to how a member state complies with its obligation to set up or authorise a body within the meaning of that provision. This could be an administrative body, a public entity or, as in the present case, an entity established under private law. The member f

15 See the third recital in the preamble to the Second Directive. g

16 See the fourth recital in the preamble to, and art 1(1) of, the Second Directive. h

17 See the fifth recital in the preamble to, and art 1(2) of, the Second Directive. i

18 Third Council Directive (EEC) 90/232 (on the approximation of the laws of the member states relating to insurance against civil liability in respect of the use of motor vehicles) (OJ 1990 L129 p 33).

19 See art 1 of Directive 90/232.



a state must in any event confer the task on that body. It is thus conceivable that the nature of the claim will depend on the body against which it may be brought.

38. Article 1(4) of the Second Directive, however, expressly states: 'This provision shall be without prejudice to the right of the Member States to regard compensation by that body as subsidiary or non-subsidiary and the right to make provision for the settlement of claims between that body and the person or persons responsible for the accident ...'

39. This wording indicates that the method of proceeding vis-à-vis the body cannot be considered in isolation from the original claim for compensation. This argues in favour of treating any derived claims as also being claims in civil law. This approach is further reinforced by the fact that in the present case the legal context is one of private law. Thus, the agreements between the MIB and the Secretary of State for Transport are private law agreements and the MIB is an entity established under private law. For the purposes of further examination, therefore, we should for the moment proceed on the assumption that the case involves a private law claim for compensation.

40. The court's case law provides some indications as to the degree to which interest constitutes a necessary component in a claim for compensation. *Marshall's case*<sup>20</sup>, to which the parties refer, concerned 'adequate reparation'<sup>21</sup> for the loss and damage sustained as the result of dismissal which discriminated on grounds of sex, and thus related to a claim for compensation in civil law. The legal system of the member state concerned in that case laid down an upper limit for compensation of that kind. The courts, moreover, did not appear to have the power to award interest on the amounts of compensation<sup>22</sup>. The court ruled in this regard 'that full compensation for the loss and damage sustained as a result of discriminatory dismissal cannot leave out of account factors, such as the effluxion of time, which may in fact reduce its value. The award of interest, in accordance with the applicable national rules, must therefore be regarded as an essential component of compensation for the purposes of restoring real equality of treatment.'<sup>23</sup>

41. The *Ireks-Arkady case*<sup>24</sup> concerned the extent in principle of entitlement to interest in the context of a claim for compensation resulting from the Community's non-contractual liability under the second paragraph of art 215 of the EEC Treaty (now art 288 EC). In a judgment confirming the duty to provide compensation, the court derived the existence of entitlement to interest from the general principles of law common to the legal systems of the member states<sup>25</sup>.

42. The court reached the same conclusion in *Grifoni's case*<sup>26</sup>. The event occasioning injury which led to the dispute in that case was an accident. The court ruled: '... compensation for loss is intended so far as possible to provide restitution for the victim of an accident. Accordingly, it is necessary to take

i 20 Cited in footnote 7, above.

21 See *Marshall's case* (cited in footnote 7, above) (para 30).

22 See *Marshall's case* (cited in footnote 7, above) (para 6).

23 See *Marshall's case* (cited in footnote 7, above) (para 31).

24 Cited in footnote 10, above.

25 See the *Ireks-Arkady case* (cited in footnote 10, above) (para 20 and para 2 of the operative part).

26 Cited in footnote 10, above.

account of inflation since the event occasioning loss.<sup>27</sup> The court recognised a right to interest with effect from the pronouncement of the judgment. a

43. The three cases just considered involved compensation claims resting on a variety of legal bases. Common to the judgments, however, is the fact that the court in principle recognised, under conditions to be determined in more detail, interest as being a characteristic of a claim for compensation.

44. In support, however, of the contention that interest is in fact not a necessary component of a claim for compensation, reference was made in the written procedure to the judgment in *Ex p Sutton*<sup>28</sup>. That judgment, however, concerned the question whether interest was payable on arrears of social security benefits in the case where failure to pay them timeously was attributable to procedures that discriminated on grounds of sex. The court ruled in this regard: '... amounts paid by way of social security benefit are not compensatory in nature'<sup>29</sup>, with the result that payment of interest cannot be required on the basis either of Article 6 of Directive 76/207 or of Article 6 of Directive 79/7.<sup>30</sup> The court left open the question whether entitlement to interest might follow from a claim under Community law establishing liability on the part of the member state, referring in that regard to national law.<sup>31</sup> b  
c  
d

45. As the present case, however, essentially involves a claim for compensation and not social security benefits, the *Sutton* judgment cannot be adduced as an argument for excluding from the outset a claim for interest. Rather, it may be inferred from the case law on compensation claims that has been set out<sup>32</sup> that interest does indeed form part of a claim for compensation.

46. Before applying this principle to the present case, it is first necessary to consider whether the objectives of the directives support this view. e

47. The directives on compulsory insurance cover for motor vehicles lay down minimum standards to protect victims of traffic accidents. The First Directive initially dealt only with the scope of insurance protection. This must be considered in the context of the declared objective of '[liberalising] the rules regarding the movement of persons and motor vehicles travelling between Member States'<sup>33</sup>. f

48. It was not until the Second Directive that victims of untraced vehicles were made the subject of Community law rules. Through the establishment or authorisation of a body having the task of providing compensation 'at least up to the limits of the insurance obligation'<sup>34</sup>, clear reference is being made to the normal obligation to compensate those injured by insured vehicles. The criterion for the scope of compensation to be provided is thus to be the compensation payable in cases of injury occasioned by insured vehicles. In so far as the directive makes exceptions to this rule, these are expressly mentioned and objectively justified. g

49. Only the fourth subparagraph of art 1(4) deals with the regulation of damage or injury caused by untraced vehicles. Member states may, under that provision, limit or exclude payment of compensation by that body in the event h

27 See *Grifoni's case* (cited in footnote 10, above) (para 40).

28 Cited in footnote 9, above.

29 My emphasis. i

30 See *Sutton's case* (cited in footnote 9, above) (para 27).

31 See *Sutton's case* (cited in footnote 9, above) (para 33 and the operative part).

32 See paras 40–42, above.

33 See the fifth recital in the preamble to the First Directive.

34 See art 1(4) of the Second Directive.

a of damage to property. As stated expressly in the preamble<sup>35</sup>, member states are given this possibility in order to counter the 'danger of fraud'.

50. This exception aside, we must proceed on the assumption that victims of untraced vehicles are compensated to the same extent as victims of traced and insured vehicles. The fact that this is a minimum requirement is evident, first of all, from the use of the phrase 'at least up to the limits of the insurance obligation'<sup>36</sup>. Second, the wording of the final subparagraph of art 1(4) of the Second Directive—which states 'without prejudice to any other practice which is more favourable to the victim'—suggests that minimum protection must be afforded by the directive to victims of untraced vehicles.

51. In order to be able to answer the question concerning award of interest and reimbursement of costs for the case in hand, the issue is thus how one proceeds in cases of damage or injury caused by insured vehicles. If interest and costs are paid as a matter of course in such cases, victims of accidents caused by untraced vehicles must also be entitled to receive such payments.

52. The United Kingdom government has submitted that there are objective reasons for the disparities in the treatment of victims of insured vehicles, on the one hand, and those of untraced vehicles, on the other. Against this, one might argue that, even though the procedure for obtaining compensation may in principle be different, the scope of compensation still may not be below that accorded to victims of properly insured vehicles.

53. The United Kingdom government's invocation of the final subparagraph of art 1(4) of the Second Directive, which states that 'Furthermore, each Member State shall apply its laws, regulations and administrative provisions to the payment of compensation by this body', leads to no other conclusion. That provision does, it is true, refer to the laws, regulations and administrative provisions of the member states. That said, however, the principles developed by the court in its established case law must be taken into account when giving effect to Community law, in casu the minimum protection afforded to victims of untraced motor vehicles.

54. This involves the principles of equivalence and effectiveness. These principles, recognised as such only in the more recent case law of the court<sup>37</sup>, are based on established case law stretching back far into the past<sup>38</sup>. Those principles state that proceedings to ensure the legal protection of rights which individuals derive from Community law must not be less favourable than the rules governing similar domestic actions and must not render virtually impossible or excessively difficult the exercise of rights conferred by Community law<sup>39</sup>.

55. If interest and costs are awarded in cases involving compulsory insurance before national courts in cases in which traffic accidents have been caused by insured vehicles, that must, in accordance with the principles just mentioned,

35 See the sixth recital in the preamble to the Second Directive.

36 See art 1(4) of the Second Directive; my emphasis.

37 See, for example, *Edilizia Industriale Siderurgica Srl (Edis) v Ministero delle Finanze* Case C-231/96 [1998] ECR I-4951 (para 34), *Aprile Srl (in liq) v Amministrazione delle Finanze dello Stato (No 2)* Case C-228/96 [2000] 1 WLR 126, [1998] ECR I-7141 (para 18), *Upjohn Ltd v Licensing Authority* Case C-120/97 (2000) 51 BMLR 206, [1999] ECR I-223 (para 32).

38 See, for example, *Rewe-Zentralfinanz eG v Landwirtschaftskammer für das Saarland* Case 33/76 [1976] ECR 1989 (para 5) and *Comet BV v Produktschap voor Siergewassen* Case 45/76 [1976] ECR 2043 (paras 12–16).

39 See *Peterbroeck Van Campenhout & Cie (SCS) v Belgium* Case C-312/93 [1996] All ER (EC) 242, [1995] ECR I-4599 (para 12) and the case law there cited.



also apply in compensation proceedings brought by victims of untraced vehicles. This requirement follows from the Second Directive in conjunction with the principles governing the application of Community law. a

56. This result cannot be altered by the fact that the MIB was in existence well before the Second Directive was adopted and that the agreement between the MIB and the Secretary of State for Transport relating to untraced drivers already existed some considerable time before the Second Directive entered into force. Article 1(4) of the Second Directive makes express reference to authorisation of a body, thus raising a presumption that such bodies and associated regulatory provisions may already exist in some member states. This, however, does not release the legislative authorities of the member states from their duty to provide the minimum standard for compensation rules required by the directive. In so far as victims of untraced vehicles are in a worse position than victims of properly insured vehicles, the problem might be one of incorrect transposition of the directive, an issue to which I shall be returning. b

57. As an interim conclusion with regard to the first and second questions, it may be stated that interest and costs are a necessary component of compensation claims brought by victims of untraced vehicles if and to the extent to which such interest and costs form part of claims for compensation brought by victims of properly insured and identified vehicles. This finding holds good in regard to both the substance and the payment details. c

58. The United Kingdom government and the MIB argue that under the system of domestic law interest and costs do not really form part of a claim for compensation but that the *courts* have been statutorily empowered to award interest. d

59. In this connection, an economic approach is called for in the comparison of the scope of compensation in respect of damage or injury caused by untraced vehicles, on the one hand, and damage or injury caused by properly insured vehicles, on the other. If, in respect of the same damage or injury, a lower amount is in principle payable depending on the person who has caused that damage or injury, that cannot, when considered against the background of the requirements of Community law, be justified by arguments based on the domestic legal system. e

60. The objection put forward by the United Kingdom government and the MIB to the effect that interest can be awarded by courts alone implies further that no interest is in principle awarded in respect of periods prior to the delivery of a judgment. f

61. The crucial point in the calculation of interest on a compensation claim is essentially the point in time taken as the reference point. This may be the event occasioning the damage or injury, but it may also be the delivery of a judgment, if, for example, the extent of damage, account being taken of the effluxion of time<sup>40</sup>, is defined in the judgment. It is also in this sense that one may presumably construe the above<sup>41</sup> judgments in the *Ireks-Arkady* case<sup>42</sup> and *Grifoni's* case<sup>43</sup>. The procedures normally obtaining in the member state concerned may in principle be applied provided that the outcome is not less favourable for legal positions that are based on Community law. g

40 See *Marshall's* case (cited in footnote 7, above) (para 31).

41 See paras 41 and 42.

42 Cited in footnote 10, above.

43 Cited in footnote 10, above. h

a 62. If this is applied to the present case, however, a problem will arise if interest is awarded only by courts but access to courts is rendered unduly difficult. The procedure might then in itself pose a problem in Community law terms. I shall return to this problematic area in what follows.

b 63. In cl 3 of the agreement applying in the present proceedings (see para 6, above), it is stated, however, that compensation to be paid by the MIB is to be assessed in the same way as a court would assess damages. The objection that interest can, if at all, be awarded only by a court may not therefore preclude a calculation of compensation which is in line with Community law.

c 64. For the sake of completeness, it should also be pointed out that, in the case of the payment of compensation under the agreement concerning uninsured drivers interest and costs may also be brought into the calculation. The fact that it is not the competent insurance company but rather a collective body which is liable for payment can therefore not serve as objective justification for a different calculation of compensation under the agreement in regard to untraced drivers.

d (2) *The arbitration procedure—third question*

*Submissions of the parties*

e 65. The claimant submits that the arbitration procedure provided for by the Agreement on Untraced Drivers satisfies neither the requirements of effective judicial control, as developed by the court in its judgment in *Johnston v Chief Constable of the Royal Ulster Constabulary*<sup>44</sup>, nor those under art 6 of the ECHR<sup>45</sup> relating to the right to a 'fair trial'<sup>46</sup>. There is no hearing and an appeal against the arbitrator's decision is possible only on grounds of serious irregularity affecting the arbitration or on a question of law, subject, in the latter case, to the condition that leave to appeal is granted.

f 66. The difference in treatment in procedural terms, the claimant argues, also constitutes an infringement of the principle of equal treatment, which requires that victims of untraced drivers be afforded the same judicial protection in the United Kingdom as is afforded to victims of insured or uninsured drivers. The fact that the victim of an untraced driver has no driver to sue cannot constitute objective justification for discriminatory treatment. Moreover, the sole purpose of such discriminatory treatment in respect of victims of untraced drivers is to save costs.

g 67. The *United Kingdom government* and the MIB submit first of all that art 1(4) of the Second Directive prescribes only minimal procedural requirements. The victim must refer directly to the body responsible. The directive otherwise refers to the laws, regulations and administrative provisions of the member states.

h 68. With regard to the principle of effective judicial protection, the United Kingdom government argues that the legal procedures available to victims of untraced drivers, far from rendering the legal protection of such victims impossible or excessively difficult to enforce, provide them with multiple levels

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<sup>44</sup> Case 222/84 [1986] 3 All ER 135, [1986] ECR 1651 (paras 18, 19).

<sup>45</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 (the ECHR).

<sup>46</sup> See the judgment of the European Court of Human Rights (the Court of Human Rights) of 22 July 1999 in *Scarth v UK* [1999] ECHR 33745/96.

of protection. The fact that there is no hearing before the arbitrator did not prevent the claimant from setting out his case in full or from responding to the allegations of contributory negligence. a

69. As regards the principle of equal treatment, victims of untraced drivers are in several respects better placed than victims of uninsured drivers. The procedure adopted is liable to result in a speedier and less costly resolution than court proceedings. b

70. Both the United Kingdom government and the MIB express doubts, in regard to art 6 of the ECHR, as to whether the main proceedings involve 'civil rights and obligations'. In any event, according to the case law of the Court of Human Rights<sup>47</sup>, the proceedings must be considered a whole, including the role of any appellate courts. Even if the procedure before the MIB did not comply in full with the requirements of art 6 of the ECHR, that before the arbitrator does in any event comply with those requirements. The arbitrator's independence and impartiality are guaranteed and he exercises unlimited jurisdiction subject to supervision by the High Court. In view of the fact that no hearing takes place before the arbitrator, counsel for the United Kingdom government did, none the less, express some doubt during the oral procedure as to whether the arbitration procedure is compatible with art 6 of the ECHR. c

71. The *Commission* takes the view that art 1(4) of the Second Directive confers a right to compensation on victims of injuries caused by untraced drivers and that member states must therefore guarantee effective judicial protection of that right. The Commission goes on to consider whether the arbitration procedure satisfies the requirements of art 6 of the ECHR. On the basis of the information provided in the order for reference, and subject to the need for further clarification, it takes the view that the criteria developed by the Court of Human Rights point to some shortcomings in the arbitration procedure. These shortcomings relate in particular to the status of the arbitrator, in regard to his independence, the lack of any hearing and the very limited scope of the right of appeal against the arbitrator's award. d

### *Appraisal*

72. By its third question, the High Court is seeking to ascertain whether the procedure to be followed under the agreement for obtaining compensation satisfies the requirements of Community law with regard to effective legal protection. Examination in this connection, however, is not confined to the procedure before the MIB, as set out in the agreement, for setting in motion the arbitration procedure, but also relates to the associated possibility of challenging the arbitration award, within certain limits, before ordinary courts, as demonstrated by part V of the third question in the reference. e

73. In order to address these issues, it is first necessary to examine the position under Community law, the vindication of which calls for legal protection. The starting point here is art 1(4) of the Second Directive, which should be read in conjunction with the sixth recital in the preamble to that Directive. The material passages are worded as follows: f

'Each Member State shall set up or authorize a body with the task of providing compensation ... for damage to property or personal injuries caused by an unidentified vehicle or a vehicle for which the insurance obligation ... has not been satisfied ...' g

47 See *Bryan v UK* (1996) 21 EHRR 342. h



- a The victim may in any case apply directly to the body which ... shall be obliged to give him a reasoned reply regarding the payment of any compensation.'

The sixth recital provides:

- b '... it is necessary to make provision for a body to guarantee that the victim will not remain without compensation where the vehicle which caused the accident is uninsured or unidentified ... it is important ... that the victim of such an accident should be able to apply directly to that body as a first point of contact ...'

- c 74. Apart from the possibility given to member states to impose a subsidiary status on the activity of this body<sup>48</sup>, a victim has a right to compensation at least up to the limits of the insurance obligation. This is a clearly designated legal position which Community law confers on those persons coming within the directive's definition.

- d 75. In order to give effect to this entitlement, effective legal protection must be guaranteed. While the directive does not expressly refer to a requirement of legal protection for this entitlement, this none the less follows from the general principles governing the application of Community law.

- e 76. The court has already on numerous occasions had the opportunity to set out its views on the principle of effective legal protection as a general legal principle in Community law. It was thus called on in *Johnston's case*<sup>49</sup> and *Coote v Granada Hospitality Ltd*<sup>50</sup> to address these issues against the background of the application of art 6 of the directive on equal treatment for men and women with regard to employment<sup>51</sup>. As the court ruled on this point in *Johnston's case*, the 'requirement of judicial control stipulated by that article reflects a general principle of law which underlies the constitutional traditions common to the member states. That principle is also laid down in arts 6 and 13 of the [ECHR]. As ... the court has recognised in its decisions, the principles on which that Convention is based must be taken into consideration in Community law'.<sup>52</sup>

- f 77. The court further stated in *Johnston's case*: 'It is for the member states to ensure effective judicial control as regards compliance with the applicable provisions of Community law and of national legislation intended to give effect to the rights for which the Directive provides.'<sup>53</sup>

- g 78. These fundamental considerations are in no way limited to the specific context of the Equal Treatment Directive but extend also to other areas of law, as the general formulation of the findings shows. In the context of the fundamental Community law on access to employment, the court, in *Union*

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48 See the second sentence of art 1(4).

49 Cited in footnote 44, above.

50 Case C-185/97 [1998] All ER (EC) 865, [1998] ECR I-5199.

i 51 Council Directive (EEC) 76/207 (on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions) (OJ 1976 L39 p 40) (the Equal Treatment Directive).

52 See *Johnston's case* (cited in footnote 44, above) (para 18) and *Coote's case* (cited in footnote 50, above) (para 21).

53 See *Johnston's case* (cited in footnote 44, above) (para 19) and *Coote's case* (cited in footnote 50, above) (para 22).

*Nationale des Entraîneurs et Cadres Techniques Professionnels du Football (Unectef) v Heylens*<sup>54</sup>, referred, for example, to the statements of principle made in *Johnston's* case. a

79. Reference may be made to art 6 of the ECHR with regard to the substantive requirements of the principle of effective legal protection. The first sentence of art 6(1) provides: 'In the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.' b

80. Reference should also be made to art 47 of the Charter of Fundamental Rights<sup>55</sup>, which, admittedly, does not yet have any binding legal effect. It can, however, be used as a standard of comparison, at least in so far as it addresses generally recognised principles of law. According to its art 51, the Charter is also to apply to member states when implementing Union law. The first and second paragraphs of art 47 of the Charter provide as follows: c

'Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. d

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law ...' e

81. Thus, the principle of effective legal protection laid down in Community law, on the one hand, contains the requirements set out in the provisions just cited and, on the other, imposes on courts and tribunals of the member states a duty to co-operate in guaranteeing that legal protection<sup>56</sup>. f

82. In order now to consider in detail whether the procedure enabling victims of untraced vehicles to obtain compensation satisfies the requirements of Community law, it is first necessary to examine the procedural requirements laid down by the Directive and also any further requirements resulting from the principle of effective legal protection. g

83. The second subparagraph of art 1(4) of the Second Directive must be treated as a minimum procedural requirement, stating as it does that the victim may in any case apply directly to the body, which must give him a reasoned reply regarding the payment of any compensation. These minimum conditions are satisfied inasmuch as an injured person may, under the agreement, directly have recourse to the MIB<sup>57</sup>, which must examine the application<sup>58</sup> and make a determination<sup>59</sup>. The United Kingdom government takes the view that no more extensive procedural requirements can be derived from the directive. h

84. As already indicated above, the directive also gives an injured person a substantive right, vindication of which by the courts also follows from Community law. It is thus necessary to examine whether the factors pointing to effective legal protection are present. Article 6 of the ECHR, already i

<sup>54</sup> Case 222/86 [1987] ECR 4097 (para 14).

<sup>55</sup> OJ 2000 C364 p 1.

<sup>56</sup> See the *Peterbroeck* case (cited in footnote 39, above) (para 12).

<sup>57</sup> Clause 1 states: '... this Agreement applies in any case in which an application is made to the MIB for a payment in respect of the death of or bodily injury to any person caused by or arising out of the use of a motor vehicle on a road in Great Britain ...' See also para 6, above.

<sup>58</sup> Clause 7 provides: 'MIB shall cause any application made to them for a payment under this Agreement to be investigated ...' See also para 6, above.

<sup>59</sup> Clause 9 provides: 'MIB shall notify their decision to the applicant ...' See also para 6, above.

a incorporated into Community law, and art 47 of the Fundamental Rights Charter, which cover in large measure the same substantive ground, may serve as a guideline for this purpose.

b 85. For the purpose of casting doubt on this method of proceeding, however, the United Kingdom government has pointed out that it is already questionable whether the rights of a victim are 'civil rights' within the meaning of art 6 of the ECHR. In the examination of the nature of the claim, for the purpose of drawing any conclusions as to the right to interest<sup>60</sup>, the civil law context of the claim for compensation was considered. On this basis, one ought here to be able to proceed on the basis of a claim in civil law. However, even if the claim is, for whatever reason, a claim for compensation under public law, this could not provide justification if the person injured remains deprived of legal protection in its enforcement. Moreover, no comparable restriction on civil law claims can be inferred from art 47 of the Fundamental Rights Charter either. It is thus sufficient if what is in issue is a right 'guaranteed by the law of the Union'. A claim for compensation under art 1(4) of the Second Directive must unquestionably be treated as being such a right.

d 86. A feature common to art 6 of the ECHR and art 47 of the Fundamental Rights Charter is that legal protection must be guaranteed by an independent and impartial court or tribunal established by law and also operating publicly in accordance with fair procedure.

e 87. The right of objection before the MIB, which initially concerns only a review of the proposed decision in the light of any further evidence adduced by the victim, does not meet the requirements of judicial control as thus defined. The first step in the objection procedure is comparable to administrative appeal proceedings. Neither the complete independence nor the impartiality of the body providing compensation can be assumed. The MIB takes a decision which—in so far as the victim accepts it—it must allow to be enforced against itself and which places it under obligations. However, the introduction of the right of objection under the agreement, which, as already pointed out<sup>61</sup>, is of a private law nature, cannot be classified as 'established by law'.

f 88. This would, however, have no negative implications if an avenue of legal redress against such a decision were available. In this it is necessary to agree with the United Kingdom government that the possibilities of legal protection must be considered from an overall perspective. As a first step, the focus must therefore be turned to the arbitration procedure, but consideration must not merely stop there.

g 89. First of all, the question arises as to whether the arbitration procedure provided for in the agreement is a judicial procedure. On the basis of the court's case law regarding the definition of the constituent factors that identify a court or tribunal for the purposes of art 177 of the EC Treaty (now art 234 EC), five identifying criteria may be mentioned. These are establishment on a statutory basis as a permanent body, mandatory jurisdiction, adversarial procedure and the application of legal rules<sup>62</sup>.

h 90. If we proceed on the basis that the arbitration procedure is laid down in the agreement between the MIB and the Secretary of State for Transport, the establishment of a tribunal on a statutory basis is already questionable. On the

60 See para 36 et seq. above.

61 See para 39, above.

62 See *Broekmeulen v Huisarts Registratie Commissie* Case 246/80 [1981] ECR 2311.



other hand, a tribunal need not necessarily be linked to the judicial organisation of the member state concerned<sup>63</sup>. However, if the arbitrator operates within the framework of the Arbitration Acts<sup>64</sup>, that might argue in favour of the tribunal having a legal basis.

91. Under the agreement between the MIB and the Secretary of State for Transport, an arbitrator is appointed for arbitration proceedings on an ad hoc basis. It is therefore extremely problematic to consider this as a 'permanent body' unless one is to treat the existence of lists of potential arbitrators among the Queen's Counsel as a permanent body, recourse to the lists or invocation of the tribunal alone being dependent on practical requirements.

92. In contrast, the further characteristic of *mandatory* jurisdiction is satisfied—assuming that jurisdiction is accepted as such—given that—so far as one can conclude from all of the submissions in the present case—it is not possible to choose any other manner of challenging a decision of the MIB by way of judicial proceedings<sup>65</sup>.

93. On the other hand, it seems extremely doubtful whether arbitration proceedings can be described as adversarial. Both parties—the MIB and the person injured—can, it is true, set out their respective views in the knowledge of the other's submissions. In the course of the present proceedings before the court, it became clear that the claimant was accused of dishonest conduct when he brought his appeal and that he had no opportunity to refute that allegation. This amounts to a procedural defect which is problematic in several respects.

94. Under the rules of procedural law governing civil proceedings, to which applies the principle that the parties determine the facts and evidence forming the basis for a decision (*Beibringungsgrundsatz*), a tribunal may not base its decision on any circumstances not raised by the parties in the proceedings and on which the opposing party has been unable to state its views. Even if one wished to attribute—conditionally—a public law character to the arbitration procedure as a continuation of the quasi-administrative procedure before the MIB, the claimant's rights of defence<sup>66</sup> will have been infringed. Even in proceedings to which the principle of judicial inquiry<sup>67</sup> applies, the rights of defence must be guaranteed in such a way that a party can set out its views on circumstances and matters of which it stands accused.

95. With regard, finally, to the fifth criterion, 'the application of legal rules', this will be satisfied if the tribunal decides in accordance with law and statute but not if it reaches its decisions on the basis of fairness. For a final decision on whether this fifth criterion is satisfied, it will be necessary to address this question again at a later stage. The decision on costs in the arbitration decision against the claimant, on the grounds of his alleged dishonesty—see in this regard cl 22 of the agreement, cited in para 6, above—without the claimant having had any opportunity to address that issue, suggests that considerations of fairness may be made to form the basis of the decision.

63 See, for example, with regard to the judicial nature of the Conseil des Avocats, *Reference for a preliminary decision brought by Borker* Case 138/80 [1980] ECR 1975.

64 See in this context paras 111 and 114 of the reference for a preliminary ruling.

65 See *Dorsch Consult Ingenieurgesellschaft mbH v Bundesbaugesellschaft Berlin mbH* Case C-54/96 [1998] All ER (EC) 262, [1997] ECR I-4961 (paras 28, 29).

66 On protection of the rights of defence as a criterion to be taken into account, see *Joined Cases C-430/93 and C-431/93 van Schijndel and van Veen* [1995] ECR I-4705 (para 19).

67 Generally in public law disputes and criminal proceedings.

a 96. As an interim conclusion, it may thus be held that the arbitration tribunal does not satisfy in full the relatively strict criteria which art 177 of the EC Treaty imposes on a court or tribunal.

b 97. With regard, now, to the characteristics of impartiality and independence following from art 6 of the ECHR in conjunction with art 47 of the Fundamental Rights Charter, one must, it seems, proceed, according to the submissions of the parties to the present proceedings, on the basis that the Queen's Counsel featuring on the lists described provide every guarantee as to their independence. That notwithstanding, the question still arises as to whether, in view of their procedural situation and their proximity to the MIB, they also provide the same guarantee as to their impartiality. The arbitrator can require from the MIB any more extensive investigation which is considered appropriate. There is accordingly what may be described as a form of negotiating level between the arbitrator and the MIB. Once the arbitrator has taken his arbitration decision, this is in the first instance forwarded to the MIB alone, which is then responsible for its further transmission to the victim.

c 98. Before the arbitrator, moreover, there is no public hearing within the meaning of art 6 of the ECHR in conjunction with art 47 of the Fundamental Rights Charter inasmuch as the arbitrator acts on the basis of the documents before him (see cl 17, cited in para 6, above). The procedural co-operation between the arbitrator and the MIB cannot be regarded as constituting a public hearing. The victim is not involved in these negotiations in the way that adversarial procedure requires. The principle of orality in judicial proceedings is to this extent related to the principle that proceedings should be conducted in public. Finally, the manner in which the decision is notified cannot be regarded as being a public pronouncement for the purposes of art 6 of the ECHR. The public nature of the proceedings does not therefore appear to be adequately guaranteed.

d 99. The arbitration procedure under the agreement must for those reasons be brought into question in several respects.

e 100. In its judgment in *Nordsee Deutsche Hochseefischerei GmbH v Reederei Mond Hochseefischerei Nordstern AG & Co KG*<sup>68</sup>, the court has already once been called on to set out its views on the judicial nature of a private arbitration tribunal in regard to art 177 of the EC Treaty. The court ruled in that case that attention must be paid to the particularities of the individual arbitration proceedings. The court there concluded that the arbitration tribunal lacked judicial capacity on the grounds, first, that, when the contract was entered into, the parties were free to leave potential disputes to be resolved by the ordinary courts<sup>69</sup>, and, second, that the public authorities were not involved in the decision to opt for arbitration and were not called on to intervene automatically in the proceedings before the arbitrator<sup>70</sup>.

f 101. If one considers the arbitration proceedings in the present case against this background, it will be noticed that the public authorities, in the form of the Secretary of State for Transport, were fully involved in the decision to choose the avenue of arbitration proceedings. On the other hand, anyone who may have been injured is obliged to seek legal protection within the framework

68 Case 102/81 [1982] ECR 1095.

69 See the *Nordsee* case (cited in footnote 68, above) (para 11).

70 See the *Nordsee* case (cited in footnote 68, above) (para 12).

of an agreement in the establishment of which he played no role and which was negotiated between parties entirely separate from him and over which he had no influence. a

102. In the light of all of the doubts just outlined as to the establishment and procedure of the arbitration tribunal, the crucial question is therefore what form the further legal protection of the injured party might take.

103. As point (v) of the third question referred suggests, and as is confirmed by the parties' concordant submissions in this regard, a victim can appeal to the ordinary courts against the arbitration decision. However, there is no unrestricted appeal procedure, access to the courts and the scope of review being subject to several limiting conditions. b

104. As outlined by the High Court, the situation is as follows. The arbitration decision may be challenged on grounds of serious irregularities adversely affecting it or on issues of law, which include that as to whether a specific finding of the arbitrator was supported by evidence or whether, on the basis of the available evidence, an arbitrator could not reasonably have reached a particular conclusion. An appeal on questions of law requires judicial leave, which will be granted only if the arbitration decision is obviously wrong and it appears just and proper in the circumstances to have the matter judicially determined. c

105. These restrictive conditions governing access to the courts have features of a pure review as to legal issues or plausibility. Judicial review and the granting of leave to appeal are matters frequently reserved to the higher courts in appeal proceedings. Examination of an appeal submitted as to whether the arbitration decision is obviously wrong and whether it would, in all the circumstances, be just and proper to obtain a judicial decision would have a further restrictive effect. Access to the ordinary courts is rendered considerably more difficult for a person injured by an untraced vehicle. This is extremely problematic in the light of the requirements of effective legal protection. d

106. If one takes account of the fact that this stage of the proceedings actually concerns first instance proceedings before an ordinary court, this will not meet the requirements of effective legal protection. It must be possible for the injured person to secure, at least before one court, full judicial protection with regard to issues of fact and law. e

107. A comparison of this avenue of legal redress with the legal protection guaranteed to victims of insured or uninsured drivers of traced vehicles—for whom the ordinary avenues of legal redress remain open—shows that the legal protection available for victims of untraced drivers remains far behind the latter. While the possibilities of legal protection for both groups of persons need not, from the perspective of Community law, be absolutely identical, the legal protection must none the less be qualitatively equivalent. In the context of the present case, this means that a guarantee of recourse to the ordinary courts must be provided. f

108. In view of the fact that the case involves a civil-law dispute concerning compensation, in which the injured party and the insurance body stand opposed, I consider a stage for the determination of facts to be indispensable. Nor does the judgment in the *Upjohn* case<sup>71</sup> run counter to this finding. In that case the court held that judicial competence for a full review of facts was not indispensable. The facts of that case, however, were entirely different. The authority responsible in the *Upjohn* case for granting or revoking authorisation g

<sup>71</sup> Cited in footnote 37, above. h



a for medicinal products was required to carry out complex assessments in the medico-pharmacological field<sup>72</sup>. This called for a certain discretionary scope, particularly in view of the fact that an applicant could, by means of a fresh application, secure a reappraisal of the decision taken by the administrative authority<sup>73</sup>.

b 109. In justification of the existing rules, the United Kingdom government and the MIB have pointed out that these injury cases are disposed of under those rules in what is generally a more rapid and cost-effective manner.

c 110. The event giving rise to injury, which resulted in the present proceedings, occurred on 25 December 1991. Almost five years later, on 27 August 1996, the arbitrator issued her decision. Up to that point there had not yet been any mention of bringing the matter before an ordinary court.

c 111. Even if the procedure under the agreement might have been quicker and more cost-effective than compulsory insurance proceedings before ordinary courts, this still does not amount to sufficient justification for depriving injured parties of effective legal protection in the form of a determination of the facts by an ordinary court.

d 112. Finally, it will be a matter for the High Court to assess the shortcomings in the legal protection and to draw the legal consequences therefrom. In this it will have to take account of the fact that the absence of judicial review, covering issues of fact and law, of an arbitrator's findings in a claim resulting from the Second Directive fails to satisfy the Community law requirements as to effective legal protection.

e (3) *Correct implementation of the directive—fourth question*

*Submissions of the parties*

f 113. The *claimant* argues that the Second Directive has not been correctly implemented where the member state fails to impose on the authorised body an obligation to provide compensation to victims of untraced drivers to the same degree as applies with regard to compulsory insurance under the First Directive. The Second Directive has not been implemented in the United Kingdom with the binding force necessary to satisfy the principle of legal certainty. Apart from the fact that the compensation provided for by the Agreement is not in all respects the same as that provided for by the Second Directive, victims have to rely on an agreement to which they are not a party and to rely on the simple practice of the MIB of failing to take before the courts the point that the Agreement confers no rights on victims which can be enforced against it.

g 114. The *United Kingdom government* and the *MIB* take the view that there is no need to reply to the fourth question. They point out, however, that it is for the member state concerned to choose the forms and methods for implementing a directive. Where the national provisions already in force comply with the directive they do not require further amendment. That is what happened in the United Kingdom with regard to implementation of the Second Directive: the Agreement meets the requirements of precision, clarity and transparency and thus satisfies the principle of legal certainty.

i 115. In its written observations, the *Commission* expresses its opinion that the MIB is an authorised body within the meaning of art 1(4) of the Second Directive, as it has been entrusted by the authorities of the member state with

72 See the *Upjohn* case (cited in footnote 37, above) (para 33).

73 See the *Upjohn* case (cited in footnote 37, above) (para 40).

the role provided for in the Second Directive and not only has the capacity, but is also obliged, to compensate victims. Victims can also apply directly to that body, which must provide them with a reasoned reply. Further, a legal procedure is provided for in the event that a victim is not satisfied with the compensation offered. a

116. During the oral procedure, however, the Commission's agent expressed some misgivings based on the case of *White v White*<sup>74</sup>, cited by the parties, and the judgment of the Court of Appeal dismissing the claimant's appeal<sup>75</sup>. To the extent to which the member state's legal system classifies the MIB as an exclusively private body and treats the agreement between it and the Secretary of State as being purely private in nature, with the result that there is no obligation whatever to apply the criteria laid down in the Second Directive, the MIB is not in fact properly authorised within the meaning of art 1(4) of the Second Directive. b  
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### *Appraisal*

117. By its fourth question, the High Court is seeking to ascertain whether the United Kingdom has complied with its obligation under art 1(4) of the Second Directive to authorise a body with responsibility for providing compensation in respect of damage or injuries caused by an untraced or uninsured motor vehicle. In issue is whether there is such compliance in the case where, pursuant to an agreement with the competent authority, a pre-existing body is required to assume responsibility for such damage or injuries but victims have no directly enforceable claim in law against that body. The High Court also asks whether the determinant factor in answering that question is the fact that the member state considered in good faith that that agreement provided protection for victims that was at least as effective as that provided by the Second Directive. d  
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118. The MIB's establishment dates back to 1946 and the first generation of agreements on compensation for victims of uninsured or untraced drivers originates from that period. There was thus provision in the United Kingdom, long before the Second Directive was adopted, for compensation for the victims of traffic accidents where those responsible were uninsured or could not be traced. f

119. According to the documents on the case file, a consultation process was initiated by the United Kingdom government, following adoption of the Second Directive on 30 December 1983, into the issue of whether separate implementing measures were required to transpose the directive. This examination concluded that the existing protection for victims was fully adequate and that more extensive transposition measures were therefore not required in that regard. This appraisal was apparently shared by the Commission, as it raised no objections in regard to transposition of the Second Directive. In view of the fact that—as the parties to the present proceedings have confirmed unanimously—the MIB has always in practice consistently satisfied its obligations under the two agreements dealing with uninsured and untraced drivers, there were also no grounds for doubts as to whether the Second Directive had been correctly transposed. g  
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<sup>74</sup> Judgment of the House of Lords of 1 March 2001 [2001] UKHL 9, [2001] 2 All ER 43, [2001] 1 WLR 481.

<sup>75</sup> See para 12, above.

a 120. The view that no additional entities had to be set up in order to implement the Second Directive also found support in the wording of art 1(4) of the Second Directive, which expressly refers to the possibility of authorising an already existing body. This explains why no formal legal measure was adopted in the United Kingdom to transpose the Second Directive, even though the period for transposition expired on 31 December 1987, pursuant to art 5(1) of the Second Directive, and the Commission has also not expressed any criticism of this fact in almost 15 years.

b 121. However, the fact that there must still be a problem regarding transposition of the Second Directive is evidenced not only by the present case but also by the House of Lords judgment of 1 March 2001 in *White v White*<sup>76</sup>, which has been mentioned on several occasions in these proceedings and which concerned the parallel agreement concerning uninsured drivers. c The House of Lords ruled that it was not in a position, as required under the court's *Marleasing* case law<sup>77</sup>, to construe the agreement in such a way as to give effect to the substance of the directive (see para 127, below). The House of Lords justified this view on the ground that the agreement in issue was a d contract under private law, even though one of the contracting parties was a state body. The contracting parties were therefore bound only by that to which they had agreed. The House of Lords held that the *Marleasing* principles had for that reason to be left out of account, although it had expressly stated at another point in its judgment that the 1988 MIB Agreement had been concluded with a view to implementing the directive<sup>78</sup>.

e 122. The Court of Appeal judgment, by which an appeal brought by the claimant was dismissed at a procedural stage preceding the present proceedings, is also instructive in the present context. The Court of Appeal held that what the United Kingdom had done by way of implementation of the Directive did not bring into existence 'any entity or relationship' which enabled the directive to be enforced against anybody (save possibly in the *Francovich* f sense against the United Kingdom itself)<sup>79</sup>.

123. The claimant accordingly takes the view in the present proceedings that the United Kingdom has not implemented the Second Directive.

g 124. The duties devolving on member states in the implementation of a directive have been laid down in settled case law. The main features may be recapitulated at this point. With regard to the third paragraph of art 189 of the EC Treaty (now the third paragraph of art 249 EC), the court laid down the following basic principles:

h 'It follows from that provision that the implementation of a directive does not necessarily require legislative action in each Member State. In particular, the existence of general principles of constitutional or administrative law may render implementation by specific legislation superfluous, provided however that those principles guarantee that the national authorities will in fact apply the directive fully and that, where the directive is intended to create rights for individuals, the legal position arising from those principles is sufficiently precise and clear and the persons concerned are made fully aware of their rights and, where i

76 Cited in footnote 74, above.

77 *Marleasing SA v La Comercial Internacional de Alimentación SA* Case C-106/89 [1990] ECR I-4135.

78 'The MIB-Agreement was entered into with the specific intention of giving effect to the Directive.'

79 See in this connection *Francovich v Italy* Joined cases C-6/90 and C-9/90 [1991] ECR I-5357.



appropriate, afforded the possibility of relying on them before the national courts. That last condition is of particular importance where the directive in question is intended to accord rights to nationals of other Member States because those nationals are not normally aware of such principles.<sup>80</sup> a

125. This case law has been confirmed in numerous judgments<sup>81</sup>. However, the court was also obliged, in a separate context, to point out that '[i]n order to secure the full implementation of directives in law and not only in fact, Member States must establish a *specific legal framework* in the area in question'<sup>82</sup>. b

126. In regard to the requirement of legal certainty, the court has held: 'Accordingly, the provisions of a directive must be implemented with unquestionable binding force and with the specificity, precision and clarity required in order to satisfy the requirement of legal certainty, under which, in the case of a directive intended to confer rights on individuals, persons concerned must be enabled to ascertain the full extent of their rights ...'<sup>83</sup> The court has used similar terms to reiterate this view in subsequent judgments<sup>84</sup>. c

127. In its judgment in the *Marleasing* case<sup>85</sup>, the court confirmed that the obligation on member states to secure the objective laid down in a directive is binding on 'all the authorities of Member States including, for matters within their jurisdiction, the courts. It follows that, in applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter and thereby comply with the third paragraph of Article 189 of the [EEC] Treaty'.<sup>86</sup> d

128. As has already been indicated in the discussion of the third question, the purpose of the Second Directive is to enable persons injured by uninsured or untraced motor vehicles to bring a claim against a body in the member state concerned. In so far as art 249 EC leaves it to national bodies to choose the form and the means for achieving the directive's binding objective, an agreement between a public authority and a private law entity forming the basis of the rights of victims is not per se objectionable. Those rights must, however, be identifiable and pursuable with the requisite clarity and certainty. e

129. During the oral procedure counsel for the claimant pointed out the substantive discrepancies between the Second Directive and the agreement, not all of which, however, are the subject of the present proceedings. Fundamental importance does, none the less, attach to the questions relating to the injured person's claim and its enforceability. f

130. Thus, as the relationship between an injured person and the MIB has been described by all parties, injured persons have in fact no claim against the MIB. True, the MIB does not appear to refuse compensation despite g

<sup>80</sup> See *EC Commission v Germany* Case 29/84 [1985] ECR 1661 (para 23). See also, along the same lines, *European Commission v Germany* Case C-96/95 [1997] ECR I-1653 (para 35).

<sup>81</sup> See *EC Commission v Belgium* Case 247/85 [1987] ECR 3029 (para 9); see also, along the same lines, *EC Commission v Netherlands* Case C-190/90 [1992] ECR I-3265 (para 17) and *European Commission v Germany* Case C-217/97 [1999] ECR I-5087 (paras 31, 32). i

<sup>82</sup> See *EC Commission v Netherlands* Case C-339/87 [1990] ECR I-851 (para 25); my emphasis.

<sup>83</sup> See *European Commission v France* Case C-197/96 [1997] ECR I-1489 (para 15).

<sup>84</sup> See *European Commission v France* Case C-354/98 [1999] ECR I-4927 (para 11).

<sup>85</sup> Cited in footnote 77, above.

<sup>86</sup> See the *Marleasing* case (cited in footnote 77, above) (para 8).

a the absence of any contractual relationship in law with the injured person in view of the fact that it is obligated to provide compensation on foot of the agreement with the Secretary of State for Transport. However, should the injured person consider that he is adversely affected, he must, if necessary, institute judicial proceedings against the Secretary of State to force the latter to insist on compliance with the agreement.

b 131. This approach is fraught with so many imponderables that it fails to satisfy the requirements of legal certainty outlined above. This finding is reinforced by the problems associated with legal protection discussed in connection with the third question.

c 132. The situation, however, becomes totally unacceptable against the background of the attitude of the national courts of the member states. It would have been at least necessary for the national courts to carry out, at any rate with regard to the substantive rights of injured persons within the meaning of the *Marleasing* case law, an interpretation of the legal positions resulting from the agreements between the MIB and the Secretary of State for Transport in the light of the Second Directive, particularly in view of the fact that the House of Lords proceeded on the basis that the 1988 Agreement concerning uninsured drivers had been concluded with the intention of giving effect to the Second Directive.

d 133. As the British courts find that they are unable, in view of the structure of the legal relations, to proceed in such a manner, it becomes clear that the Second Directive was not implemented in national law in the United Kingdom with the requisite precision and clarity. The requirements of legal certainty have therefore not been satisfied.

e 134. The High Court, finally, also wished to know whether, for the purpose of answering the question, any significance attaches to the fact that the member state believed in good faith that the Directive had been correctly transposed. Determining whether a directive has been transposed in a member state's national law is in principle a matter of objective examination. The good faith, or bad faith, of a member state is an irrelevant factor in a determination as to whether the requirements posited by Community law have or have not been adequately met by transposition. In view, however, of any potential claim for compensation, this question may well assume significance.

f 135. The answer to the fourth question must therefore be that there is no proper implementation of the Second Directive in a member state's national law so long as an injured person does not have an enforceable claim against the body on which the authorities of the member state have conferred responsibility for compensating victims of untraced (or uninsured) motor vehicles.

g

h (4) *Liability of the member state to pay damages—fifth question*

*Submissions of the parties*

i 136. According to the *claimant*, the conditions necessary to establish a claim for damages against the United Kingdom for failure to implement the Second Directive are satisfied. The result prescribed by the directive entails the grant of rights to individuals, namely victims of untraced or uninsured drivers, a class to which the claimant clearly belongs. The content of that right is identifiable from the provisions of the directive and concerns compensation from an authorised body. It is not necessary for the Court of Justice to examine whether a causal nexus has been established; that is a matter for the national court of

the member state. Finally, the breach is sufficiently serious because the United Kingdom has failed to adopt any measures to implement the directive. a

137. The *United Kingdom government* argues that the alleged breaches in regard to interest and costs raise a number of questions. Even if the court should not wish to go along with its argument, the breach of Community law is not sufficiently serious for the United Kingdom to incur liability for damages. Similarly, it was reasonable for the United Kingdom to assume that the procedures in place satisfied the requirements of effective judicial control. Finally, even if one were to assume that the body was not approved in such a manner as to satisfy the requirements of the directive, that did not in any event cause the claimant any loss. b

138. The *MIB* takes the view that the reply to the fifth question is a matter for the defendant in the main proceedings. c

139. In the opinion of the *Commission*, it is for the national court to decide whether there has been a sufficiently serious breach of Community law in this case. It points out, however, that the Second Directive makes no mention of interest and costs and that there is no case law on those points. The Commission states, furthermore, that it has not previously raised this issue in regard to the implementation of the Second Directive and that the question whether the arbitration procedure is compatible with the dictates of effective legal protection requires additional clarification. d

### *Appraisal*

140. By its fifth question, the High Court is seeking to determine whether the defects in implementing the Second Directive constitute a sufficiently serious breach of Community law as to lead to a claim for damages against the member state concerned. e

141. As will be evident from the foregoing submissions, numerous misgivings arise with regard to the transposition of the Second Directive and the practical application of the measures defined as constituting implementation. First, the scope of the compensation must be measured against the amounts of compensation regularly payable in the context of compulsory insurance, with the result that it is extremely probable that interest and costs have been improperly excluded from the calculation of compensation on the basis of the agreement. Further, the avenue of legal redress available to an injured person does not satisfy in every respect the requirements of effective legal protection. Finally, defects may be identified in the authorisation of the *MIB* as the body under art 1(4) of the Second Directive in so far as injured persons have no direct right of claim against that body such as would also entitle them to institute judicial proceedings. f

142. It may therefore be assumed that these shortcomings constitute a breach of Community law with regard to the implementation of a directive. It is, however, questionable whether this breach can lead to a claim for damages against the member state. g

143. The court's case law on Community law-based compensation claims against a member state dates back to the *Francovich* judgment<sup>87</sup>. (The proceedings in that case resulted from the failure by the Italian authorities to implement timeously in national law the directive on the approximation of the laws of the member states relating to the protection of employees in the event h

<sup>87</sup> Cited in footnote 79, above (para 41). i



a of the insolvency of their employer.)<sup>88</sup> The court there set out as follows the basic principles underlying state liability:

'The full effectiveness of Community rules would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain redress when their rights are infringed by a breach of Community law for which a Member State can be held responsible.

b The possibility of obtaining redress from the Member State is particularly indispensable where, as in this case, the full effectiveness of Community rules is subject to prior action on the part of the State and where, consequently, in the absence of such action, individuals cannot enforce before the national courts the rights conferred upon them by Community law.<sup>89</sup>

144. The conditions governing a right to reparation depend in this regard 'on the nature of the breach of Community law giving rise to the loss and damage'<sup>90</sup>.

d 145. Where there has been a breach of the third paragraph of art 189 of the EEC Treaty, which was the basis on which the court proceeded in *Francovich*, three prior conditions must be satisfied before there can be a right to reparation:

e 'The first of those conditions is that the result prescribed by the directive should entail the grant of rights to individuals. The second condition is that it should be possible to identify the content of those rights on the basis of the provisions of the directive. Finally, the third condition is the existence of a causal link between the breach of the State's obligation and the loss and damage suffered by the injured parties.'<sup>91</sup>

f 146. The court has since defined these principles in greater detail in a number of cases<sup>92</sup>. In the judgment in *Brasserie du Pêcheur*<sup>93</sup>, the first issue facing the court was to determine whether a claim seeking to establish state liability could also arise through a breach of *primary law* by the national legislature<sup>94</sup>. The court in principle answered that question affirmatively<sup>95</sup>. That case also provided the court with its first opportunity to rule that the breach must be sufficiently serious.

88 Council Directive (EEC) 80/987 (OJ 1980 L283 p 23).

89 See paras 33 and 34 of the judgment in *Francovich* (cited in footnote 79, above).

90 See para 38 of *Francovich* (cited in footnote 79, above).

91 See para 40 of *Francovich* (cited in footnote 79, above).

h 92 See *Brasserie du Pêcheur SA v Germany*, R v Secretary of State for Transport, ex p Factortame Ltd Joined cases C-46/93 and C-48/93 [1996] All ER (EC) 301, [1996] ECR I-1029, R v HM Treasury, ex p British Telecommunications plc Case C-392/93 [1996] All ER (EC) 411, [1996] ECR I-1631, R v Ministry of Agriculture, Fisheries and Food, ex p Hedley Lomas (Ireland) Ltd Case C-5/94 [1996] All ER (EC) 493, [1996] ECR I-2553, Dillenkofer v Germany Joined cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94 [1996] All ER (EC) 917, [1996] ECR I-4845, *Brinkmann Tabakfabriken GmbH v Skatteministeriet* Case C-319/96 [1998] ECR I-5255, *Konle v Austria* Case C-302/97 [1999] ECR I-3099, *Rechberger v Austria* Case C-140/97 [1999] ECR I-3499, *Haim v Kassenzahnärztliche Vereinigung Nordrhein* Case C-424/97 [2000] ECR I-5123 and *Svenska Statens v Stockholm Lindopark AB, Stockholm Lindopark AB v Svenska Statens* Case C-150/99 [2001] STC 103, [2001] ECR I-493.

93 Cited in footnote 92, above.

94 In issue was the breach of arts 30 and 52 of the EEC Treaty. See paras 23 and 36 of the judgment in *Brasserie du Pêcheur* (cited in footnote 92, above).

95 See *Brasserie du Pêcheur* (cited in footnote 92, above) (paras 40, 41).

147. With regard to the criterion of 'a sufficiently serious breach', the court stated that 'the member state ... concerned [must have] manifestly and gravely disregarded the limits on its discretion'.<sup>96</sup> 'The factors which the competent court may take into consideration include the clarity and precision of the rule breached, the measure of discretion left by that rule to the national or Community authorities, whether the infringement and the damage caused was intentional or involuntary, whether any error of law was excusable or inexcusable, the fact that the position taken by a Community institution may have contributed towards the omission, and the adoption or retention of national measures or practices contrary to Community law.'<sup>97</sup>

148. Responding to the question whether fault is a constituent factor in a claim seeking to establish liability, the court stated that this is not required as such but that 'certain objective and subjective factors connected with the concept of fault under a national legal system may well be relevant for the purpose of determining whether or not a given breach of Community law is serious'.<sup>98</sup>

149. In its judgment in the *British Telecommunications* case<sup>99</sup>, the court also applied the comparatively narrower conditions laid down in *Brasserie du Pêcheur* to a case involving the inadequate transposition of a directive as the event giving rise to damage.

150. In its judgment in *Ex p Hedley Lomas*<sup>100</sup>, however, the court made it clear that even the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach where 'at the time when it committed the infringement, the member state in question was not called upon to make any legislative choices and had only considerably reduced, or even no, discretion'.<sup>101</sup>

151. In *Dillenkofer's* case<sup>102</sup>, a case in which, as in *Francovich*, there had been a failure to adopt measures for the transposition of a directive within the prescribed period, for which reason the claimant considers that these judgments have a bearing on the present case, the court explained that 'the condition that there should be a sufficiently serious breach, although not expressly mentioned in *Francovich*, was nevertheless evident from the circumstances of that case'.<sup>103</sup>

152. To that extent it must be regarded as settled that a sufficiently serious breach is a prerequisite in every case of a potential claim for damages against a member state.

153. Basing itself on the statements concerning a considerably reduced, or even an absence of any, discretion in its judgment in *Ex p Hedley Lomas*, the court stated as follows in *Dillenkofer's* case: 'So where, as in *Francovich*, a member state fails, in breach of the third paragraph of art 189 of the Treaty, to take any of the measures necessary to achieve the result prescribed by a directive

96 See *Brasserie du Pêcheur* (cited in footnote 92, above) (para 55).

97 See *Brasserie du Pêcheur* (cited in footnote 92, above) (para 56).

98 See *Brasserie du Pêcheur* (cited in footnote 92, above) (para 78).

99 Cited in footnote 92, above (para 40).

100 Cited in footnote 92, above.

101 See *Ex p Hedley Lomas* (cited in footnote 92, above) (para 28). See also the subsequent judgment in the *Stockholm Lindöpark* case (cited in footnote 92, above) (para 40).

102 Cited in footnote 92, above.

103 *Dillenkofer's* case (cited in footnote 92, above) (para 23).

a within the period it lays down, that member state manifestly and gravely disregards the limits on its discretion.<sup>104</sup>

154. In order to reply to the fifth question, it is thus necessary to determine whether the breaches of Community law indicated constitute, whether individually or in their totality, a sufficiently serious breach. On the basis of the *Francovich* and *Dillenkofer* judgments, one might, along with the claimant, take  
b the view that the inactivity on the United Kingdom's part amounts to a manifest and grave disregard by that member state of the limits placed on the exercise of its discretion<sup>105</sup>.  
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Regarding being had, however, to the fact that the member state was able to have recourse to an existing infrastructure which at least in part was expressly in accordance with the directive, this view of the matter does appear to be unsatisfactory. The question thus arises as to the extent to which the legislature of the member state was obliged to take steps to achieve the purpose prescribed by the directive<sup>106</sup>.

155. There was clearly no further need for the establishment of a body within the meaning of art 1(4) of the Second Directive. That directive does, however, confer on an individual victim a right to compensation against that  
d body, as has already been set out above<sup>107</sup>. In order to found and enforce a claim it is not sufficient that a potential victim can somehow or other bring the matter before the body. The directive is precise and clear in regard to this position in law. As the agreements concluded between the MIB and the Secretary of State for Transport do not confer a legal position with those attributes on a victim, the national legislature ought to have taken appropriate  
e measures. Action on its part was necessary to establish a judicially enforceable claim in favour of the victim at least up to the limits of the insurance obligation. Whether this ought to have been achieved by legislation or by a substantive adjustment of the agreement is a decision ultimately falling within the discretion of the member state. To that extent the directive confers a degree of organisational discretion on the member state. That  
f notwithstanding, the member state ought to have laid down in mandatory terms, with regard to both substantive and procedural law, the obligation as to results deriving from the directive in regard to the victim's legal position.

156. As there was already a functioning infrastructure in place, the problem initially remained concealed, and this was also the reason why the Commission took no steps to challenge the lack of action on the part of the United  
g Kingdom in regard to the directive. Those facts do not, however, mean that that inactivity did not amount to a breach of the duty devolving on the member state to adopt the necessary measures under the third paragraph of art 249 EC.

157. Appraisal of the questions whether damage has been suffered by the  
h claimant—and, if so, to what degree—and whether any such damage was causally linked to the breach of duty is a matter for the national court. By virtue of the fact that the United Kingdom has failed to ensure that persons injured by untraced vehicles have an enforceable claim, at least up to the limits of the insurance obligation, against the body defined in art 1(4) of the Second Directive, that member state has committed a sufficiently serious breach of  
i

104 *Dillenkofer's case* (cited in footnote 92, above) (para 26; my emphasis).

105 *Dillenkofer's case* (cited in footnote 92, above) (para 26).

106 *Dillenkofer's case* (cited in footnote 92, above) (paras 26, 47).

107 See para 74 et seq, above.



Community law within the meaning of the court's case law on claims for compensation brought against member states. a

#### V—CONCLUSION

158. In the light of the foregoing considerations, I propose that the Court of Justice reply as follows to the questions submitted for preliminary ruling: b

(1) Interest and costs are a necessary component of compensation claims brought by victims of untraced vehicles if and to the extent to which interest and costs form part of claims for compensation brought by victims of properly insured and identified vehicles. This finding holds good in regard to both the substance and the payment details.

(2) In the circumstances outlined in the third question, a victim must, on grounds of effective legal protection, have the right to appeal to an ordinary court on questions of fact and law. c

(3) Regard being had to the rights of victims, the Second Directive has not been transposed in the national law of the member state with the precision and clarity necessary to satisfy the requirement of legal certainty. d

(4) By virtue of the fact that it has failed to ensure that persons injured by untraced vehicles have an enforceable claim, at least up to the limits of the insurance obligation, against the body defined in art 1(4) of the Second Directive, the United Kingdom has committed a sufficiently serious breach of Community law.

4 December 2003. **The COURT OF JUSTICE (Fifth Chamber)** delivered the following judgment. e

1. By order of 17 May 2000, received at the Court of Justice of the European Communities on 13 February 2001, the High Court of Justice of England and Wales, Queen's Bench Division, referred to the Court of Justice for a preliminary ruling under art 234 EC (formerly art 177 of the EC Treaty) five questions on the interpretation of art 1(4) of Second Council Directive (EEC) 84/5 (on the approximation of the laws of the member states relating to insurance against civil liability in respect of the use of motor vehicles) (OJ 1984 L8 p 17), hereinafter the Second Directive). f

2. Those questions were raised in proceedings between Samuel Evans and the Secretary of State for the Environment, Transport and the Regions (hereinafter the Secretary of State) and the Motor Insurers' Bureau (hereinafter the MIB) concerning compensation for injuries suffered by Mr Evans in a road traffic accident involving an unidentified vehicle. g

#### LEGAL BACKGROUND

##### *Community legislation*

3. Article 3(1) of Council Directive (EEC) 72/166 (on the approximation of the laws of the member states relating to insurance against civil liability in respect of the use of motor vehicles, and to the enforcement of the obligation to insure against such liability) (OJ English Sp Edn 1972 (II) p 360, hereinafter the First Directive), provides: h

'1. Each Member State shall, subject to Article 4, take all appropriate measures to ensure that civil liability in respect of the use of vehicles normally based in its territory is covered by insurance. The extent of the liability covered and the terms and conditions of the cover shall be determined on the basis of these measures.'

i

*a* 4. Article 1 of the Second Directive is worded as follows:

1. The insurance referred to in Article 3(1) of Directive 72/166/EEC shall cover compulsorily both damage to property and personal injuries.

*b* 2. Without prejudice to any higher guarantees which Member States may lay down, each Member State shall require that the amounts for which such insurance is compulsory are at least:

—in the case of personal injury, 350 000 ECU where there is only one victim; where more than one victim is involved in a single claim, this amount shall be multiplied by the number of victims,

—in the case of damage to property 100 000 ECU per claim, whatever the number of victims.

*c* Member States may, in place of the above minimum amounts, provide for a minimum amount of 500 000 ECU for personal injury where more than one victim is involved in a single claim or, in the case of personal injury and damage to property, a minimum overall amount of 600 000 ECU per claim whatever the number of victims or the nature of the damage ...

*d* 4. Each Member State shall set up or authorize a body with the task of providing compensation, at least up to the limits of the insurance obligation for damage to property or personal injuries caused by an unidentified vehicle or a vehicle for which the insurance obligation provided for in paragraph 1 has not been satisfied. This provision shall be without prejudice to the right of the Member States to regard compensation by that body as subsidiary or non-subsidiary and the right to make provision for the settlement of claims between that body and the person or persons responsible for the accident and other insurers or social security bodies required to compensate the victim in respect of the same accident.

*e* The victim may in any case apply directly to the body which, on the basis of information provided at its request by the victim, shall be obliged to give him a reasoned reply regarding the payment of any compensation.

*f* However, Member States may exclude the payment of compensation by that body in respect of persons who voluntarily entered the vehicle which caused the damage or injury when the body can prove that they knew it was uninsured.

*g* Member States may limit or exclude the payment of compensation by that body in the event of damage to property by an unidentified vehicle.

They may also authorize, in the case of damage to property caused by an uninsured vehicle an excess of not more than 500 ECU for which the victim may be responsible.

*h* Furthermore, each Member State shall apply its laws, regulations and administrative provisions to the payment of compensation by this body, without prejudice to any other practice which is more favourable to the victim.'

*i*

*National legislation*

5. In the United Kingdom, art 1(4) of the Second Directive was implemented by means of a number of agreements between the Secretary of State and the MIB.

6. The MIB is a private law entity of which all insurance companies which offer motor vehicle insurance in the United Kingdom are members. Its main purpose is to pay compensation to victims of accidents caused by uninsured or untraced drivers. a

7. The compensation scheme, which was set up before the United Kingdom acceded to the Community, is based on two series of agreements between the Secretary of State and the MIB: the Motor Insurers' Bureau (Compensation of Victims of Uninsured Drivers) Agreement and the Motor Insurers' Bureau (Compensation of Victims of Untraced Drivers) Agreement (hereinafter the Agreement). b

8. The provisions of the Agreement relevant to this case are as follows:

—The Agreement is to apply to any case in which an application is made to the MIB for a payment in respect of the death of or bodily injury to any person caused by or arising out of the use of a motor vehicle on a road in Great Britain where, subject to certain conditions which are not relevant to this case, the applicant for the payment is unable to trace any person responsible for the death or injury (cl 1). c

—On any application in a case to which the Agreement applies, the MIB is to award payment of an amount which is to be assessed in the same way as a court, applying as appropriate the laws in force, would assess the damages which the applicant would have been entitled to recover from the untraced person (cl 3). d

—The MIB must cause any application for a payment under the Agreement to be investigated and decide whether to make an award (cl 7). e

—The MIB is required to give the applicant a reasoned reply regarding the payment of any compensation. Where the MIB decides to make an award, it must notify the applicant of the amount it proposes to pay and the way in which that amount has been calculated. Where the applicant decides to accept the award, the MIB must pay to the applicant the amount of the award (ccl 9 and 10). f

—The applicant is to have a right of appeal to an arbitrator against any decision of the MIB (cl 11).

—Before lodging an appeal, the applicant may make comments to the MIB on its decision and may supply further evidence relating to the application. The MIB may investigate that new evidence and must inform the applicant of the result of such investigation and of any change in its decision (cl 13). g

—On appeal, the arbitrator is to decide whether the MIB should make an award under the Agreement and, if so, the amount which it should award to the applicant (cl 16).

—The arbitrator is to be selected from two panels of Queen's Counsel appointed respectively by the Lord Chancellor and the Lord Advocate (cl 18). h

—The arbitrator is to decide the appeal on the documents submitted to him, although he may ask the MIB to make any further investigation which he considers desirable, and the applicant may submit comments on the findings of such investigation (cl 17).

—Each party to the appeal is to bear its own costs (cl 21). The MIB is to pay the arbitrator's fees, except where it appears to the arbitrator that there were no reasonable grounds for the appeal, in which case he may decide that his fee ought to be paid by the applicant (cl 22). i

9. The Agreement makes no express provision for payment of interest on the compensation awarded or for reimbursement of costs incurred in the proceedings before the MIB.



- a** THE MAIN PROCEEDINGS AND THE QUESTIONS REFERRED TO THE COURT
10. On 25 December 1991, Mr Evans was struck by a vehicle which was never traced, causing him physical injury.
11. On 11 June 1992, Mr Evans submitted a request for compensation under the Agreement.
- b** 12. On 11 January 1996, the MIB informed Mr Evans that it had decided to make an award of £50 000.
13. Mr Evans appealed against that decision.
14. On 27 August 1996 the arbitrator made her award. She considered that Mr Evans' damages on a full liability basis would have been £58,286 but that that figure should be reduced by 20% by reason of his contributory negligence, resulting in an award of £46,629. Taking into account certain evidence, the arbitrator also took the view that Mr Evans had been dishonest and therefore ordered him to pay the fees of the arbitration. She did not award him interest on the damages.
- c** 15. The MIB paid Mr Evans the sum of £46,629, together with his representative's costs of £770 and an ex gratia payment of £150, plus VAT.
- d** 16. In December 1996, Mr Evans was granted leave to appeal to the High Court against the arbitrator's refusal to award him interest. His appeal was dismissed. In September 1998, the Court of Appeal (England and Wales) (Civil Division) dismissed a further appeal by Mr Evans ([1999] 1 CMLR 1251). In January 1999, the House of Lords refused his application for leave to appeal.
- e** 17. On 25 February 1999, Mr Evans commenced proceedings against the Secretary of State for the Environment, Transport and the Regions, who was responsible for the implementation of the First and Second Directives by the United Kingdom. Mr Evans submitted, in essence, that the United Kingdom had failed to implement the Second Directive or had done so inadequately in the following respects:
- f** —the Agreement makes no provision for payment of interest on the damages awarded;
- the Agreement also fails to make provision for payment of the costs incurred by victims in proceedings for compensation;
- victims' access to court is insufficient in that they have a full right of appeal against the determination of the MIB only to an arbitrator and not to a court;
- g** —the United Kingdom has not duly authorised a body to provide compensation for victims of untraced drivers, as required by the Second Directive, since the Agreement does not create rights which such victims can enforce directly against the MIB.
- h** 18. Mr Evans maintains that those defects in the transposition of the Second Directive adversely affected him and constitute a sufficiently grave and manifest breach of Community law to found a right to recover damages from the Secretary of State.
19. It was in those circumstances that the High Court of Justice stayed proceedings and referred the following questions to the Court of Justice for a preliminary ruling:
- i** (1) On the proper interpretation of Council Directive 84/5/EEC of 30 December 1983 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles (the Second Motor Insurance Directive):
- (a) must the arrangements concerning the provision of compensation by the body established or authorised pursuant to Article 1(4) include

provision for the payment of interest on the sums found to be payable for the damage to property or personal injuries? a

(b) if the answer to question (a) is yes, from what date and on what basis should such interest be calculated?

(2) On the proper interpretation of Article 1(4) of the Second Motor Insurance Directive, in circumstances where the compensating body itself has an obligation to investigate the victim's injury and loss (and to incur the costs thereof, including the cost of medical and other reports): b

(a) must the arrangements concerning the provision of compensation by the body include provision for the payment of the costs incurred by a victim in preparing and making his application to that body for compensation? c

(b) if the answer to question (a) is yes, on what basis are those costs to be calculated in a case where that body has made an offer to the victim in excess of the amount that he finally recovers, which offer the victim declined to accept? c

(3) On the proper interpretation of Article 1(4) of the Second Motor Insurance Directive, if the victim's application for compensation is determined by a body that is not a court, must he have a full right to appeal against that determination to a court, on both the facts and the law, rather than an appeal to an independent arbitrator having the following principal characteristics: d

(i) the victim may appeal to the arbitrator on both the facts and the law; e  
(ii) when giving notice of appeal, the victim may make further representations and adduce further evidence to the compensating body upon which the compensating body may alter its award prior to the appeal;  
(iii) the victim is provided in advance with a copy of all the material to be provided to the arbitrator and is given the opportunity to add any material that he wishes in response;

(iv) the arbitrator makes an award, without an oral hearing, in which he or she decides what award the compensating body ought to make and gives reasons for that decision; f

(v) if the victim is dissatisfied, he is entitled to appeal from the arbitrator to the Courts but he may do so only on the grounds of serious irregularity affecting the arbitration or on a question of law (including whether there was any evidence to support any particular conclusion of the arbitrator or whether any particular conclusion was one to which no arbitrator could reasonably come upon the evidence), and in the case of an appeal on a question of law, permission to appeal must be obtained from the Court which will not be given unless the decision of the arbitrator is obviously wrong and it is just and proper in all the circumstances for the Court to determine the question. g

(4) If the answer to questions (1)(a) and/or (2)(a) and/or (3) is yes, has a Member State duly authorised a body under Article 1(4) of the Second Motor Insurance Directive when an existing body has the task of providing compensation to victims pursuant only to an agreement with the relevant authority of the Member State that does not correspond to the Second Motor Insurance Directive in those respects, and: h

(a) that agreement creates a legal obligation owed to the relevant authority of the Member State to provide compensation to victims which is directly enforceable by the relevant authority and does not give such victims a directly enforceable legal right to claim against that body, but the i

- a* victim may apply to the Court for an order that the authority should enforce the agreement if the authority were to fail to do so; and
- (b) that body carries out that obligation by accepting and paying claims from victims in accordance with that agreement; and
- (c) the Member State considered in good faith that the provision of that agreement gave at least as good protection to victims as the requirements of the Second Motor Insurance Directive?
- b*
- (5) If the answer to any of questions (1)(a) or (2)(a) or (3) is yes, and/or if the answer to question (4) is no, does a failure to comply with the Second Motor Insurance Directive in that respect constitute a sufficiently serious breach by the Member State to give rise to liability for damages as a matter of Community law if it is established that such damage was caused?
- c*

#### THE QUESTIONS REFERRED TO THE COURT

20. The questions referred to the court, which it is appropriate to consider together, raise a number of problems concerning the nature of the body which the member states are required to establish in order to implement the Second Directive (fourth question), the remedies which must be available to victims of damage or injury caused by unidentified vehicles or vehicles for which the insurance obligation has not been satisfied (hereinafter insufficiently insured vehicles) (third and fourth questions), the need to provide for interest to be payable on sums paid to victims by the above-mentioned body (first question), the need to provide for reimbursement of costs incurred by victims pursuing claims for compensation (second question) and the possible liability of the member state concerned for failure to transpose the Second Directive correctly (fifth question).
- d*
- e*

#### *Preliminary observations*

- f* 21. It is appropriate, first, to consider the nature of the system established by the Second Directive for the benefit of victims of damage or injury caused by unidentified or insufficiently insured vehicles.

22. In contrast to victims of damage or injury caused by an identified vehicle, victims injured by an unidentified vehicle are normally unable to enforce their claims in legal proceedings for compensation because of the impossibility of identifying the person against whom proceedings should be brought.
- g*

23. In the case of an insufficiently insured vehicle, even if the victim is able to identify the person against whom legal proceedings should be brought, such proceedings are often liable to be fruitless because the defendant does not have the requisite financial resources to comply with the judgment given against him, or even to pay the costs incurred in the proceedings.
- h*

24. It is against that background that the first subparagraph of art 1(4) of the Second Directive provides that each member state is to set up or authorise a body with the task of providing compensation, at least up to the limits of the insurance obligation for damage to property or personal injuries caused by an unidentified or insufficiently insured vehicle.

- i* 25. The insurance obligation laid down in art 3(1) of the First Directive covers civil liability in respect of the use of vehicles, at least on the basis of the minimum amounts of cover set by the Community legislature.

26. As regards the extent of the insurance obligation, the fifth recital in the preamble to the Second Directive indicates that the amounts of compulsory insurance cover must in any event guarantee victims adequate compensation.



27. It is thus clear that the Community legislature's intention was to entitle victims of damage or injury caused by unidentified or insufficiently insured vehicles to protection equivalent to, and as effective as, that available to persons injured by identified and insured vehicles. a

28. It must nevertheless be emphasised that, to meet the requirements of the Second Directive, the body responsible for awarding compensation does not necessarily have to be placed, as far as civil liability is concerned, on the same footing as a defendant such as the driver of an identified and sufficiently insured vehicle. b

*The nature of the body referred to in art 1(4) of the Second Directive*

*Observations submitted to the court* c

29. According to Mr Evans, the Second Directive has not been implemented in the United Kingdom with the binding force necessary to satisfy the principle of legal certainty. Apart from the fact that the compensation provided for by the Agreement is not the same in all respects as that provided for by that directive, victims have to rely on an agreement to which they are not parties and on the MIB's practice of failing to take before the courts the point that the Agreement confers no rights on victims which can be enforced against it. d

30. The MIB and the United Kingdom government point out that it is for the member states to choose the form of the measures to be adopted for implementing a directive and that, where national provisions already in force comply with those of the directive, they do not need to be amended. In their view, the existing system enables victims of damage or injury caused by unidentified vehicles to make application to the MIB directly. e

31. In the Commission's view, the MIB appears to be an authorised body within the meaning of art 1(4) of the Second Directive since it has been entrusted by the public authorities with the role provided for in the Second Directive; it not only has the capacity to pay, but is obliged to pay, compensation to victims; victims have the right to apply directly to that body; and the body is obliged to provide a reasoned reply. At the hearing, however, it expressed doubts as to the possibility of interpreting and applying the Agreement in such a way as to ensure that victims enjoy all the rights conferred on them by the Second Directive. f

*Findings of the court* g

32. The first subparagraph of art 4(1) of the Second Directive contains no provision concerning the legal status of the body or the detailed arrangements for its authorisation. It expressly allows the member states to regard compensation by the body as subsidiary and enables them to make provision for the settlement of claims between that body and those responsible for the accident and for relations with other insurers or social security bodies required to compensate the victim in respect of the same accident. h

33. The second subparagraph of art 1(4) makes it clear, however, that a victim of damage or injury caused by an unidentified or insufficiently insured vehicle must be able to apply directly to the authorised body responsible for paying compensation to him. i

34. The fact that the source of the obligation of the body in question lies in an agreement concluded between it and a public authority is immaterial, provided that that agreement is interpreted and applied as obliging that body to provide victims with the compensation guaranteed to them by the Second

- a Directive and as enabling victims to address themselves directly to the body responsible for providing such compensation.

35. As to whether it is sufficient, for the purposes of transposing the Second Directive, to rely on an existing body, it must be borne in mind that, whilst legislative action on the part of each member state is not necessarily required in order to implement a directive, it is essential for national law to guarantee that the national authorities will effectively apply the directive in full, that the legal position under national law should be sufficiently precise and clear and that individuals are made fully aware of all their rights and, where appropriate, may rely on them before the national courts (see *European Commission v Greece* Case C-365/93 [1995] ECR I-499 (para 9) and *European Commission v Netherlands* Case C-144/99 [2001] ECR I-3541 (para 17)).

c 36. As the court has already made clear, the last-mentioned condition is of particular importance where the directive in question is intended to accord rights to nationals of other member states (see *Commission v Greece*, cited above (para 9) and *Commission v Netherlands*, cited above (para 18)). That is the position in relation to the Second Directive, which is intended in particular, according to the fifth recital in its preamble, to guarantee victims adequate protection, irrespective of the member state in which the accident occurred.

d 37. In those circumstances, it must be held that a body may be regarded as authorised by a member state within the meaning of art 1(4) of the Second Directive where its obligation to provide compensation to victims of damage or injury caused by unidentified or insufficiently insured vehicles derives from an agreement concluded between that body and a public authority of the member state, provided that the agreement is interpreted and applied as obliging the body to provide victims with the compensation guaranteed to them by the Second Directive and provided that victims may apply directly to that body.

f  
*The remedies available to victims*

*Observations submitted to the court*

38. Mr Evans submits that the arbitration procedure under the Agreement does not comply with the requirements of the principle of effective judicial control, as developed in the case law of the Court of Justice (see *Johnston v Chief Constable of the Royal Ulster Constabulary* Case 222/84 [1986] 3 All ER 135, [1986] ECR 1651 (paras 18, 19)), or those of the right to a fair trial under art 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) (hereinafter the ECHR). The victim is not granted an oral hearing and can appeal against the arbitrator's award only on the ground of serious irregularity affecting the arbitration or on a question of law, and in the latter case leave to appeal must be obtained.

h 39. Those procedural rules also constitute, in his view, a breach of the principle of equal treatment, which requires that the member states afford to victims of damage or injury caused by unidentified vehicles the same judicial protection as that enjoyed by victims injured by vehicles which have been identified, and, in the United Kingdom, the latter are entitled to bring proceedings directly before a court.

i 40. The MIB and the United Kingdom government submit, as a preliminary point, that art 1(4) of the Second Directive prescribes only minimum procedural requirements, namely that a victim of damage or injury caused by

an unidentified vehicle must be able to apply directly to the body responsible for awarding compensation. For the rest, the Second Directive refers to the legal systems of the member states. a

41. The United Kingdom government observes that the procedures adopted for dealing with an application for compensation submitted by victims of damage or injury caused by an unidentified vehicle, far from rendering impossible or excessively difficult the exercise of the rights accruing to victims under the directive, offer them multiple levels of protection. A victim of damage or injury caused by an unidentified vehicle is, in certain respects, in a more favourable situation than a victim injured by an identified but uninsured vehicle, since the procedure available often makes it possible to settle the dispute in a speedier and less costly manner than by recourse to court proceedings. b  
c

42. The MIB and the United Kingdom government also contend that, according to the case law of the European Court of Human Rights, the question whether a procedure meets the requirements of art 6 of the ECHR must be considered as a whole, including the role of any appellate court (see *Bryan v UK* (1996) 21 EHRR 342). d

43. In the Commission's view, it is for the member states to ensure effective judicial control of the rights which the Second Directive is intended to confer on the victims of unidentified vehicles. It considers the procedure established in the United Kingdom and concludes that application of the criteria developed by the European Court of Human Rights might disclose the existence of shortcomings in the system in force, particularly as regards the status of the arbitrator, the lack of any hearing to establish the facts and the limitations imposed on the right to appeal against the arbitration award. e

#### *Findings of the court*

44. The second subparagraph of art 1(4) of the Second Directive confines itself to laying down minimum procedural requirements by providing that victims of damage or injury caused by unidentified or insufficiently insured vehicles must be able to apply directly to the body responsible for providing them with compensation (see paras 32–34, above) and that that body is required to give a reasoned reply concerning the action taken by it. According to the information available to the court, cl 9 of the Agreement meets the latter obligation. f  
g

45. It is settled case law that in the absence of Community rules governing the matter it is for the domestic legal system of each member state to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law, provided, however, that such rules are not less favourable than those governing similar domestic actions (the principle of equivalence) and do not render virtually impossible or excessively difficult the exercise of rights conferred by Community law (the principle of effectiveness) (see, in particular, *Upjohn Ltd v Licensing Authority* Case C-120/97 (2000) 51 BMLR 206, [1999] ECR I-223 (para 32)). h

46. As regards application of the principle of effectiveness, each case which raises the question whether a national procedural provision renders application of Community law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national instances. In the light of that analysis, the basic principles of the domestic judicial system, such i



a as protection of the rights of the defence, the principle of legal certainty and the proper conduct of procedure, must, where appropriate, be taken into consideration (see *Van Schijndel v Stichting Pensioenfonds voor Fysiotherapeuten* Joined cases C-430/93 and C-431/93 [1996] All ER (EC) 259, [1995] ECR I-4705 (para 19)).

b 47. According to the observations submitted to the court, the procedure established by the Agreement comprises several phases.

48. It is to be observed at the outset that, although the MIB is not a court, it is nevertheless required to determine the amount of the compensation which it is to pay under the same conditions as those under which a court would, pursuant to the provisions in force in the United Kingdom, determine the amount of damages which a victim would be entitled to obtain from a person identified as responsible.

c 49. Among the various arrangements for review provided for by the Agreement, the victim may, first, apply for re-examination of the decision taken by the MIB. However, that application must be submitted to the MIB, which itself decides whether it is appropriate to amend its own decision.

d 50. Second, the victim has a right of appeal to an arbitrator. According to the information before the court, the arbitrator is appointed under conditions which ensure that he is independent and that he makes his award after making his own assessment of the information in the file. The file must contain, among other things, all the documents lodged by the victim and all comments made by the victim in connection with both the application for compensation and, if appropriate, the application for review. The arbitrator may call on the MIB to undertake additional investigations, on which the victim is entitled to submit his comments.

e 51. Third, under the general rules on arbitration laid down by the Arbitration Acts, the victim may, in certain cases, appeal against the award to the High Court of Justice. That right of appeal is automatically available to a victim who alleges a serious irregularity affecting the arbitration. That right is also available to the victim, albeit subject to leave being granted by the High Court, if he alleges infringement of a rule of law, which may include the question whether there was any evidence to support any particular conclusion of the arbitrator or whether any particular conclusion was one to which no arbitrator could reasonably have come upon the evidence considered.

f 52. Fourth, a victim may, subject to obtaining leave from the competent court, subsequently appeal to the Court of Appeal and then to the House of Lords.

g 53. As the United Kingdom government observes, the procedure thus established by the Agreement gives the victim the advantages of speed and economy of legal costs. The United Kingdom government claimed, without being contradicted, that the bulk of the costs incurred in relation to applications for compensation and gathering of relevant evidence are borne by the MIB, which makes contact with all the witnesses to the accident to obtain statements from them and endeavours to obtain all necessary medical or other expert evidence.

h 54. In the light of all the foregoing considerations, it must be held that the procedural arrangements laid down by the national law in question do not render it practically impossible or excessively difficult to exercise the right to compensation conferred on victims of damage or injury caused by unidentified or insufficiently insured vehicles by the Second Directive and thus comply with the principle of effectiveness referred to in paras 45 and 46, above.

55. In view of the objective pursued by the Second Directive which, as stated in paras 21–28, above, is to provide a simple mechanism for compensating victims, it further appears that the cumulative effect of the possibilities of review available under the procedure established in the United Kingdom and also the practical advantages associated with that procedure confer on victims of damage or injury caused by unidentified or insufficiently insured vehicles a level of protection corresponding to that provided for by that directive. a

56. Nevertheless it is important to stress that the procedure established must guarantee that, both in dealings with the MIB and before the arbitrator, victims are made aware of any matter that might be used against them and have an opportunity to submit their comments thereon. b

57. It is for the national court to determine whether those conditions have been fulfilled in this case. c

58. Subject to that reservation, it must be held that procedural arrangements such as those adopted in the United Kingdom are sufficient to provide the protection to which victims of damage or injury caused by unidentified or insufficiently insured vehicles are entitled under the Second Directive. d

#### *Payment of interest on sums paid by way of compensation*

##### *Observations of the court*

59. According to Mr Evans, a textual interpretation of art 1(1) and (4) and art 3(1) of the Second Directive shows that that directive requires victims of damage or injury caused by an unidentified vehicle and victims of damage or injury caused by identified and insured vehicles are treated in the same way. Moreover, even if the Second Directive did not impose that rule, that obligation would stem from the general principle of equal treatment. However, that requirement is not fulfilled in the United Kingdom. In contrast to victims of identified and insured vehicles, victims of untraced vehicles do not obtain compensation that includes interest. e

60. Referring to the judgment in *Marshall v Southampton and South West Hampshire Area Health Authority (No 2)* Case C-271/91 [1993] 4 All ER 586, [1993] ECR I-4367 (para 31), in which the court held, with regard to discriminatory dismissal, that the award of interest must be regarded as an essential component of compensation, Mr Evans considers that that principle must apply to the compensation to be paid under the Second Directive to victims of damage or injury caused by unidentified vehicles. f

61. The MIB states, as a preliminary point, that, in English law, damages and interest are assessed by the courts at the time of judgment, taking into account any fluctuations in monetary value up to that point. Section 35A of the Supreme Court Act 1981 admittedly gave the courts the power, under certain conditions, to award interest on damages, but that power can be exercised only in court proceedings. g

62. The MIB and the United Kingdom government submit that the aim of the two directives at issue is to provide specified minimum guarantees, but that they do not provide for uniformity in the legislation of the member states. Neither directive contains any provision relating to the financial components of the compensation or requires equal treatment as between victims of identified vehicles and victims of unidentified vehicles. h

63. The MIB and the United Kingdom government also claim that there is no general principle of Community law that a requirement to pay a monetary amount by way of compensation due under Community law necessarily entails a requirement to pay interest. i

- a 64. The Commission refers to the absence, in both the First and Second Directives, of any express provision obliging the member states to require the body responsible for paying compensation to victims of damage or injury caused by unidentified vehicles to pay interest to them. However, on the basis of a purposive interpretation of that directive and having regard to the case law of the court relating to non-contractual liability of the Community (b *Ireks-Arkady GmbH v Council of Ministers and Commission of the European Communities* Case C-238/78 [1979] ECR 2955 (para 20) and *Grifoni v EAEC* Case C-308/87 [1994] ECR I-341 (para 40)) and relating to equal treatment for men and women (*Marshall's case*, cited above (para 31)), it inclines towards the view that the award of interest, under the applicable national rules, must be regarded as an essential component of the compensation referred to in art 1(4) c of the Second Directive.

*Findings of the court*

- d 65. First, it must be observed that the Second Directive contains no provision concerning interest on sums awarded by way of compensation for damage or injury caused by unidentified or insufficiently insured vehicles.

66. Under art 1(4) of the Second Directive, the body responsible for paying compensation for such damage or injuries must do so at least up to the limits of the insurance obligation, so as to guarantee victims adequate compensation.

- e 67. However, compensation for loss is intended so far as possible to provide restitution for the victim of an accident (see *Grifoni's case*, cited above (para 40)).

68. Accordingly, compensation for loss cannot leave out of account factors, such as the effluxion of time, which may in fact reduce its value (see, to that effect, *Marshall's case*, cited above (para 31)).

- f 69. In the absence of Community rules it is for the member states to decide on the rules to be applied to areas covered by the Second Directive and in particular the question of the effluxion of time and definition of the period to be taken into account to guarantee the victims of damage or injury caused by unidentified or insufficiently insured vehicles the adequate compensation which that directive seeks to provide.

- g 70. In that connection, the member states are free, in order to compensate for the loss suffered by victims as a result of the effluxion of time, to choose between awarding interest or paying compensation in the form of aggregate sums which take account of the effluxion of time.

- h 71. Accordingly, art 1(4) of the Second Directive is to be interpreted as meaning that the compensation awarded for damage or injuries caused by an unidentified or insufficiently insured vehicle, paid by the body authorised for that purpose, must take account of the effluxion of time until actual payment of the sums awarded in order to guarantee adequate compensation for the victims. It is incumbent on the member states to lay down the rules to be applied for that purpose.

*Reimbursement of costs incurred in connection with the application for compensation*

- i *Observations submitted to the court*

72. Mr Evans submits that payment of the costs incurred in relation to an application for compensation constitutes an essential component of the right to compensation. He also relies on the case law of the European Court of Human Rights, according to which the ECHR is intended to guarantee rights that are practical and effective (see *Airey v Ireland* (1979) 2 EHRR 305).



73. The other parties which have submitted observations repeat mutatis mutandis the considerations set out in connection with the first question regarding the award of interest as a component of the right to compensation (see paras 60–63 of this judgment). a

*Findings of the court*

74. First, it is to be observed that the Second Directive contains no provision concerning reimbursement of costs incurred by the victims of damage or injury caused by unidentified or insufficiently insured vehicles in connection with their application to the body responsible for awarding compensation. b

75. The view of most of the member states is that the question of reimbursement of costs incurred in connection with the procedure for obtaining compensation is a procedural matter. c

76. As pointed out in para 45 of this judgment, in the absence of Community rules governing the matter, it is for the domestic legal system of each member state to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law, in conformity with the principles of equivalence and effectiveness. d

77. It is incumbent on the national court to verify whether, under the procedural arrangements adopted in the United Kingdom, those principles are complied with. In particular, it should assess whether, in view of the less advantageous position in which victims find themselves vis-à-vis the MIB and the conditions under which such victims are able to submit their comments on matters that may be used against them, it appears reasonable, or indeed necessary, for them to be given legal assistance. e

78. In those circumstances, art 1(4) of the Second Directive is to be interpreted as meaning that compensation awarded for damage or injury caused by an unidentified or insufficiently insured vehicle, paid by the body authorised for that purpose, is not required to include reimbursement of the costs incurred by victims in connection with the processing of their application for compensation except to the extent to which such reimbursement is necessary to safeguard the rights derived by victims from the Second Directive in conformity with the principles of equivalence and effectiveness. It is for the national court to consider whether that is the case under the procedural arrangements adopted in the member state concerned. f g

*Possible liability on the part of the member state concerned*

*Observations submitted to the court*

79. Mr Evans submits that the conditions necessary to establish a claim for damages against the United Kingdom for failure to implement the Second Directive are satisfied. The result prescribed by the directive manifestly entails the grant of a right to individuals, the victims of untraced or uninsured vehicles, a class to which the claimant clearly belongs. The extent of that right, namely entitlement to compensation from an authorised body, can be identified from the provisions of the directive. It is not necessary for the court to consider the question of causality, this being a matter for the national court. Finally, the breach is sufficiently serious because the United Kingdom has failed to adopt any measure whatsoever to implement the directive. h i

80. For the United Kingdom government, the first two alleged breaches, resulting from the absence of provisions concerning the award of interest and of provisions concerning reimbursement of expenses in connection with

- a applications for compensation, at the very least raise certain questions. Also, it was reasonable for the United Kingdom to consider that the procedure established satisfied the requirement of effective judicial control. Finally, the alleged breach, consisting in failure properly to authorise the body responsible for compensating victims of damage or injury caused by unidentified vehicles, even if proved, would not in any event have caused Mr Evans to suffer any loss.
- b 81. The Commission considers that it is for the national court to establish whether in this case there has been a sufficiently serious breach of Community law. In that connection, it emphasises, however, that there is no mention of interest and costs, as such, relating to the application for compensation in the Second Directive, that there is no case law on those points and that the Commission has never previously raised them in relation to transposition of the Second Directive. It adds that the issue of the compatibility of the system established in the United Kingdom with the right of access to the courts calls for further clarification.
- c

*Findings of the court*

- d 82. First, as the court has repeatedly held, the principle of liability on the part of a member state for damage caused to individuals as a result of breaches of Community law for which the State is responsible is inherent in the system of the Treaty (see, in particular, *Francovich v Italy* Joined cases C-6/90 and C-9/90 [1991] ECR I-5357 (para 35), *Brasserie du Pêcheur SA v Germany*, *R v Secretary of State for Transport, ex p Factortame Ltd* Joined cases C-46/93 and C-48/93 [1996] All ER (EC) 301, [1996] ECR I-1029 (para 31) and *Haim v Kassenzahnärztliche Vereinigung Nordrhein* Case C-424/97 [2000] ECR I-5123 (para 26)).
- e 83. As to the conditions to be satisfied for a member state to be required to make reparation for loss and damage caused to individuals as a result of breaches of Community law for which the state is responsible, the court has held that these are threefold: the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation incumbent on the state and the loss or damage sustained by the injured parties (*Haim's case*, cited above (para 36)).
- f 84. If in light of the examination to be undertaken by the national court in accordance with the guidance given by the court, the compensation system set up in the United Kingdom is found to be subject to one or more defects of transposition, then it will be incumbent on the national court to determine whether or not those defects have adversely affected Mr Evans.
- g 85. If they have, it will then be necessary to determine whether the non-fulfilment of the United Kingdom's obligation to transpose the Second Directive is sufficiently serious.
- h 86. In that connection, all the factors which characterise the situation must be taken into account. Those factors include, in particular, the clarity and precision of the rule infringed, whether the infringement or the damage caused was intentional or involuntary, whether any error of law was excusable or inexcusable, and the fact that the position taken by a Community institution may have contributed towards the adoption or maintenance of national measures or practices contrary to Community law (see *Haim's case*, cited above (para 43)).
- i 87. Those criteria must in principle be applied by the national courts in accordance with the guidelines laid down by the court (see, in particular, *Brasserie du Pêcheur*, cited above (paras 55–58)).

88. Accordingly, it is incumbent on the national court, if examination of the existing compensation system discloses a defect in transposition of the Second Directive and if that defect has adversely affected Mr Evans, to determine whether the breach of that obligation of transposition is sufficiently serious. a

#### COSTS

89. The costs incurred by the United Kingdom government and by the Commission, which have submitted observations to the court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. b

On those grounds, the Court of Justice (Fifth Chamber), in answer to the questions referred to it by the High Court of Justice of England and Wales, Queen's Bench Division, by order of 17 May 2000, hereby rules: c

(1) Article 1(4) of Second Council Directive (EEC) 84/5 (on the approximation of the laws of the member states relating to insurance against civil liability in respect of the use of motor vehicles is to be interpreted as meaning that: d

—A body may be regarded as authorised by a member state within the meaning of that provision where its obligation to provide compensation to victims of damage or injury caused by unidentified or insufficiently insured vehicles derives from an agreement concluded between that body and a public authority of the member state, provided that the agreement is interpreted and applied as obliging the body to provide victims with the compensation guaranteed to them by Directive 84/5 and provided that victims may apply directly to that body. e

—Procedural arrangements such as those adopted in the United Kingdom are sufficient to provide the protection to which victims of damage or injury caused by unidentified or insufficiently insured vehicles are entitled under Directive 84/5. f

—The compensation awarded for damage or injuries caused by an unidentified or insufficiently insured vehicle, paid by the body authorised for that purpose, must take account of the effluxion of time until actual payment of the sums awarded in order to guarantee adequate compensation for the victims. It is incumbent on the member states to lay down the rules to be applied for that purpose. g

—The compensation awarded for damage or injury caused by an unidentified or insufficiently insured vehicle, paid by the body authorised for that purpose, is not required to include reimbursement of the costs incurred by victims in connection with the processing of their application for compensation except to the extent to which such reimbursement is necessary to safeguard the rights derived by victims from Directive 84/5 in conformity with the principles of equivalence and effectiveness. It is for the national court to consider whether that is the case under the procedural arrangements adopted in the member state concerned. h

(2) It is incumbent on the national court, if examination of the existing compensation system discloses a defect in transposition of Directive 84/5 and if that defect has adversely affected Mr Evans, to determine whether the breach of that obligation of transposition is sufficiently serious. i



a

Verein für Konsumenteninformation  
v European Commission (supported  
by Bank für Arbeit und Wirtschaft  
b AG and others, intervening)  
(Case T-2/03)

c

COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES (FIRST CHAMBER,  
EXTENDED COMPOSITION)  
JUDGES VESTERDORF (PRESIDENT), JAEGER, MENGOZZI, MARTINS RIBEIRO AND  
LABUCKA  
28 SEPTEMBER 2004, 13 APRIL 2005

d

*European Community – Community institutions – Access to information – Public  
access to Commission documents – Applicant seeking access to administrative file  
relating to previous decision – Commission refusing access on grounds effort involved in  
examination of documents disproportionate – Applicant seeking annulment of decision  
to refuse access – Whether Commission’s refusal infringing Community legislation in  
respect of rights of access to documents – Parliament and Council Regulation (EC)  
e 1049/2001 – Commission Decision D (2002) 330472.*

f

Verein für Konsumenteninformation (VKI) was a consumer organisation  
constituted under Austrian law. In order to facilitate its task of safeguarding the  
interests of consumers, VKI had the right to bring proceedings before  
the Austrian civil courts in order to assert certain financial claims of consumers  
assigned to it. By Decision (EC) 2004/138 (relating to a proceedings under  
art 81 of the EC Treaty), the Commission found that eight Austrian banks had  
participated, over a number of years, in a cartel known as the ‘Lombard Club’  
covering almost the whole of Austria (the Lombard Club decision). The  
Commission imposed fines on those banks, including in particular Bank für  
Arbeit und Wirtschaft AG (BAWAG), Österreichische Volksbanken AG (ÖVAG)  
g and Niederösterreichische Landesbank-Hypothekenbank AG (NÖ-Hypobank).  
The VKI was conducting several sets of proceedings against BAWAG before the  
Austrian courts, on the basis that BAWAG had charged its customers too much  
interest over a number of years. VKI requested authorisation from the  
Commission to consult the administrative file relating to the Lombard Club  
h decision. In support of its request, VKI stated, inter alia, that in order to secure  
damages for the consumers on whose behalf it was acting, it had to be able to  
put forward specific claims regarding both the illegality of BAWAG’s conduct  
under competition law and the effects of that conduct. To that end,  
consultation of the Lombard Club file would have been a significant, or even  
indispensable, help to it. The Commission, basing its decision on Parliament  
i and Council Regulation (EC) 1049/2001 (regarding access to European  
Parliament, Council and Commission documents), rejected VKI’s request in its  
entirety, and in due course adopted Decision D (2002) 330472 (relating to a  
request for access to the administrative file in Case COMP/36.571/D-1,  
Austrian banks—‘Lombard Club’) (the contested decision), which confirmed  
the rejection. VKI brought an action before the Court of First Instance of the

European Communities seeking annulment of the contested decision and an order for the production and examination of the file in question with a view to determining whether its claims were well founded. VKI submitted, *inter alia*, that it was incompatible with the right of access to documents and, in particular, with Regulation 1049/2001 to refuse access to the whole of an administrative file without having first actually examined each of the documents contained in the file. VKI further maintained that the Commission should, at the very least, have granted it partial access to the file. The Commission submitted that examination of the various documents and parts of documents had not taken place since the effort involved in such an operation would have been disproportionate.

**Held** – Where an institution received a request for access under Regulation 1049/2001 it was required, in principle, to carry out a concrete, individual assessment of the documents referred to in the request. The principle of proportionality required measures adopted by Community institutions not to exceed the limits of what was appropriate and necessary in order to attain the objectives pursued; when there is a choice between several appropriate measures recourse had to be had to the least onerous, and the disadvantages caused had not to be disproportionate to the aims pursued. Refusal by an institution to examine concretely and individually the documents covered by a request for access constituted, in principle, a manifest breach of the principle of proportionality. It had to be noted, however, that where a request related to a very large number of documents, the institution's right to seek a 'fair solution' together with the applicant, pursuant to art 6(3) of Regulation 1049/2001, reflected the possibility of account being taken, albeit in a particularly limited way, of the need, where appropriate, to reconcile the interests of the applicant with those of good administration. An institution had therefore to retain the right, in particular cases where concrete, individual examination of the documents would entail an unreasonable amount of administrative work, to balance the interest in public access to the documents against the burden of work so caused, in order to safeguard, in those particular cases, the interests of good administration. It was only in exceptional cases and only where the administrative burden entailed by a concrete, individual examination of the documents proved to be particularly heavy, thereby exceeding the limits of what might reasonably be required, that a derogation from that obligation to examine the documents might be permissible. In the instant case, there were a number of factors which suggested that concrete, individual examination of all the documents in the Lombard Club file might represent a very large amount of work. However, it was not apparent from the reasons for the contested decision that the Commission had assessed, in a concrete, specific and detailed manner, on the one hand, the other conceivable options for limiting its workload and, on the other, the reasons which could allow it to avoid carrying out any examination rather than adopting, where appropriate, a measure less restrictive of the applicant's right of access. In particular, it was not apparent from the contested decision that, as regards the identification of the documents contained in a file arranged in chronological order, that the Commission had specifically examined the option of asking the banks involved in the Lombard Club file to provide it with the dates of the documents submitted by them, which might possibly have enabled it to find some of them more easily in its file. In addition, although the Commission had stated in its defence that drawing up a table of contents would have been a

- a* disproportionate task, the examination of that option had not been mentioned at all in the contested decision and therefore could not be considered to have been specifically examined. Finally, it was likewise not apparent from the contested decision that the Commission had evaluated the amount of work involved in identifying, then examining, individually and concretely, the few documents most likely to satisfy immediately and, where appropriate, partially
- b* in the first instance the applicant's interests. The outright refusal by the Commission to grant VKI access was therefore vitiated by an error of law. The contested decision would, accordingly, be annulled (see judgment paras 74, 99–102, 112, 122, 130–131, below).

### *c* Notes

For public access to Community documents, see 8(1) *Halsbury's Laws* (4th edn) (2003 reissue) para 470.

### Cases cited

- d* *Associazione Italiana Tecnico Economica del Cemento (AITEC) v European Commission* Joined cases T-447–449/93 [1995] ECR II-1971, CFI.
- British American Tobacco International (Investments) v European Commission* Case T-111/00 [2001] ECR II-2997, CFI.
- British Steel plc v European Commission* Case T-243/94 [1997] ECR II-1887, CFI.
- Chemie Linz GmbH v European Commission* Case C-245/92 P [1999] ECR I-4643, ECJ.
- e* *De Gezamenlijke Steenkolenmijnen in Limburg v ECSC High Authority* Case 30/59 [1961] ECR 1, ECJ.
- Denavit Nederland BV v European Commission* Case T-20/99 [2000] ECR II-3011, CFI.
- France v Monsanto Co* Case C-248/99 P [2002] ECR I-1, ECJ.
- f* *Hautala v EU Council* Case T-14/98 [1999] ECR II-2489, CFI; *affid* Case C-353/99 P [2002] 1 WLR 1930, [2001] ECR I-9565, ECJ.
- Interporc Im-und Export GmbH v European Commission* Case T-124/96 [1998] ECR II-231, CFI.
- Johnston v Chief Constable of the Royal Ulster Constabulary* Case 222/84 [1986] 3 All ER 135, [1987] QB 129, [1986] 3 WLR 1038, [1986] ECR 1651, ECJ.
- g* *JT's Corp Ltd v European Commission* Case T-123/99 [2000] ECR II-3269, CFI.
- Kuijer v EU Council* Case T-188/98 [2000] ECR II-1959, CFI.
- Kuijer v EU Council* Case T-211/00 [2003] All ER (EC) 276, [2002] ECR II-485, CFI.
- La Cinq SA v EC Commission* Case T-44/90 [1992] ECR II-1, CFI.
- h* *Métropole Télévision SA v European Commission* Joined cases T-528/93, T-542/93, T-543/93 and T-546/93 [1996] ECR II-649, CFI.
- R v Ministry of Agriculture, Fisheries and Food, ex p National Farmers' Union* Case C-157/96 [1998] ECR I-2211, ECJ.
- Royal Philips Electronics NV v European Commission* Case T-119/02 [2003] ECR II-1433, CFI.
- i* *Siderurgica Aristrain Madrid SL v European Commission* Case C-196/99 P [2003] ECR I-11049, ECJ.
- Tideland Signal Ltd v European Commission* Case T-211/02 [2002] ECR II-3781, CFI.
- Westdeutsche Landesbank Girozentrale v European Commission* Joined cases T-228/99 and T-233/99 [2003] ECR II-435, CFI.



WWF UK (Sweden intervening) v European Commission (France intervening) Case T-105/95 [1997] All ER (EC) 300, [1997] ECR II-313, CFI.

### Application

By application lodged at the Registry of the Court of First Instance on 7 January 2003, Verein für Konsumenteninformation (VKI), established in Vienna, Austria, brought an action for the annulment of Commission Decision D (2002) 330472 relating to a request for access to the administrative file in Case COMP/36.571/D-1, Austrian banks—'Lombard Club' (the contested decision). By order of 1 August 2003, the applications of Bank für Arbeit und Wirtschaft AG (BAWAG), established in Vienna, with an address for service in Luxembourg, Österreichische Volksbanken AG (ÖVAG), established in Vienna, and Niederösterreichische Landesbank-Hypothekenbank AG (NÖ-Hypobank), established in Sankt Pölten, Austria to intervene were allowed. VKI was represented by A Klauser, lawyer. The Commission of the European Communities was represented by S Rating and P Aalto, acting as agents, with an address for service in Luxembourg. BAWAG was represented by H-J Niemeyer, lawyer, with an address for service in Luxembourg. ÖVAG and NÖ-Hypobank were represented by R Roniger, A Ablasser and W Hemetsberger, lawyers. The language of the case was German. The facts are set out in the judgment of the court.

13 April 2005. **THE COURT OF FIRST INSTANCE (First Chamber, Extended Composition)** delivered the following judgment.

### LEGAL FRAMEWORK

1. European Parliament and Council Regulation (EC) 1049/2001 (regarding public access to European Parliament, Council and Commission documents) (OJ 2001 L145 p 43) defines the principles, conditions and limits governing the right of access to documents of those institutions, provided for in art 255 EC (formerly art 191a of the EC Treaty). That regulation has been applicable since 3 December 2001.

2. Commission Decision (EC, ECSC, Euratom) 2001/937 (amending its rules of procedure) (OJ 2001 L345 p 94) repealed Commission Decision (ECSC, EC, Euratom) 94/90 (on public access to Commission documents) (OJ 1994 L46 p 58), which ensured that effect was given, as regards the Commission of the European Communities, to the code of conduct on public access to Council and Commission documents (OJ 1993 L340 p 41; the code of conduct).

3. Article 2 of Regulation 1049/2001 provides:

'1. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, subject to the principles, conditions and limits defined in this Regulation ...

3. This Regulation shall apply to all documents held by an institution, that is to say, documents drawn up or received by it and in its possession, in all areas of activity of the European Union ...'

4. Article 3 of Regulation 1049/2001 lays down certain definitions as follows:

'For the purpose of this Regulation:

(a) "document" shall mean any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual

- a recording) concerning a matter relating to the policies, activities and decisions falling within the institution's sphere of responsibility;
- (b) "third party" shall mean any natural or legal person, or any entity outside the institution concerned, including the Member States, other Community or non-Community institutions and bodies and third countries.'
- b 5. Article 4 of Regulation 1049/2001, relating to the exceptions to the abovementioned right of access, states:
1. The institutions shall refuse access to a document where disclosure would undermine the protection of ...
- c (b) privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data.
2. The institutions shall refuse access to a document where disclosure would undermine the protection of:
- commercial interests of a natural or legal person, including intellectual property,
- d —court proceedings and legal advice,
- the purpose of inspections, investigations and audits, unless there is an overriding public interest in disclosure.
3. Access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.
- e Access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.
- f 4. As regards third-party documents, the institution shall consult the third party with a view to assessing whether an exception in paragraph 1 or 2 is applicable, unless it is clear that the document shall or shall not be disclosed ...
- g 6. If only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released ...'

#### BACKGROUND TO THE DISPUTE

- h 6. The Verein für Konsumenteninformation (the VKI or the applicant) is a consumer organisation constituted under Austrian law. In order to facilitate its task of safeguarding the interests of consumers, Austrian law confers on the VKI the right to bring proceedings before the Austrian civil courts in order to assert certain financial claims of consumers, which the latter have previously assigned to it.
- i 7. By Decision (EC) 2004/138 (relating to a proceeding under art 81 of the EC Treaty (now art 77 EC) (in Case COMP/36.571/D-1: Austrian banks—'Lombard Club')) (OJ 2004 L56 p 1), the Commission found that eight Austrian banks had participated, over a number of years, in a cartel known as the 'Lombard Club' covering almost the whole of Austria (the Lombard Club decision). In the Commission's view, the banks referred to had, within that cartel, inter alia, fixed jointly the interest rates for certain investments and

loans. The Commission therefore imposed fines totalling €124.26m on those banks, which included in particular the Bank für Arbeit und Wirtschaft AG (BAWAG), the Österreichische Volksbanken-AG (ÖVAG) and the Niederösterreichische Landesbank-Hypothekenbank AG (NÖ-Hypobank).

8. The VKI is currently conducting several sets of proceedings against BAWAG before the Austrian courts. In those proceedings, the VKI claims that, on account of an incorrect adjustment of the interest rates applicable to variable interest loans granted by BAWAG, the latter charged its customers too much interest over a number of years.

9. By letter of 14 June 2002, the applicant requested authorisation from the Commission to consult the administrative file relating to the Lombard Club decision. In support of its request, the VKI stated *inter alia* that, in order to secure damages for the consumers on whose behalf it was acting, it had to be able to put forward specific claims regarding both the illegality of BAWAG's conduct under competition law and the effects of that conduct. To that end, consultation of the Lombard Club file would have been a significant, or even indispensable, help to it.

10. By letter of 3 July 2002, the Commission asked the VKI to clarify its request and, in particular, its legal basis. In reply to that letter, the VKI stated, by letter of 8 July 2002, that its request was based *inter alia* on art 255(1) and (2) EC, on Regulation 1049/2001, on the provisions implementing that regulation and on art 42 of the Charter of Fundamental Rights of the European Union (OJ 2000 C364 p 1; the Charter of Fundamental Rights), as well as on arts 5 and 10 EC (formerly arts 3b and 5 of the EC Treaty).

11. On 24 July 2002, at a meeting with the Commission's staff, the representatives of the VKI raised the possibility that the applicant could give an undertaking in writing to use the information obtained solely for the purpose of asserting consumers' claims in the national proceedings against BAWAG.

12. By letter of 12 August 2002, the VKI supplemented its request by confirming that it was prepared to give the undertaking mentioned at the meeting on 24 July 2002.

13. By letter of 12 September 2002, the Commission, basing its decision on Regulation 1049/2001, rejected the VKI's request in its entirety.

14. On 26 September 2002, the VKI made a confirmatory request as referred to in art 7(2) of Regulation 1049/2001, in which it stated, *inter alia*, while maintaining its request, that it was not interested primarily in the Commission's internal documents.

15. On 14 October 2002, the Commission acknowledged receipt of that confirmatory request and informed the applicant that, owing to the number of documents requested, the time limit for replying which was applicable to the processing of its request was extended by 15 working days.

16. On 18 December 2002, the Commission adopted Decision D (2002) 330472 (relating to a request for access to the administrative file in Case COMP/36.571/D-1, Austrian banks—'Lombard Club') (the contested decision). The contested decision confirms the rejection of 12 September 2002.

17. In the contested decision, the Commission divided, in the first place, the documents in the Lombard Club file, except for the internal documents, into 11 separate categories. Excluding internal documents, that file contains more than 47,000 pages.

18. In the second place, the Commission detailed the reasons on which it based its view that each of the categories previously identified was covered by one or more of the exceptions provided for by Regulation 1049/2001.



- a 19. In the third place, the Commission took the view that, in cases where the application of certain exceptions would necessitate a balancing of the conflicting interests, the VKI had not referred to an overriding public interest in the access requested.
- b 20. In the fourth place, the Commission listed the reasons why partial access was not possible in this case. In the Commission's view, a detailed examination of each document, which was necessary for any partial consultation, would have represented an excessive and disproportionate amount of work for it.
- c 21. In the fifth place, the Commission took the view that no consultation of third parties in order to consider possible access to the documents of which they were the authors was necessary in this case since, pursuant to art 4(4) of Regulation 1049/2001, it was clear that those documents did not have to be disclosed.
22. The Commission concluded in the contested decision that the applicant's request for access had to be rejected in its entirety.

#### PROCEDURE BEFORE THE COURT OF FIRST INSTANCE

- d 23. By application lodged at the Registry of the Court of First Instance on 7 January 2003, the VKI brought an action for annulment of the contested decision. By separate document lodged on the same day, it applied to have that action adjudicated on under an expedited procedure in accordance with art 76a of the Rules of Procedure of the Court of First Instance.
- e 24. By separate document lodged on 8 January 2003, the VKI applied for legal aid.
25. On 20 January 2003, the Commission lodged its observations on the application for an expedited procedure.
- f 26. The First Chamber of the Court of First Instance, to which the case was assigned by decision of 20 January 2003, rejected the application for an expedited procedure by a decision of 28 January 2003, which was notified to the applicant on the following day.
27. On 18 February 2003, the Commission lodged its observations on the application for legal aid.
28. On 10 March 2003, the Commission lodged its defence.
29. The applicant's application for legal aid was rejected by order of the President of the Court of 14 March 2003.
- g 30. By letter of 1 April 2003, the applicant waived its right to lodge a reply.
31. On 15 April 2003, BAWAG lodged an application to intervene in support of the form of order sought by the Commission. The Kingdom of Sweden and the Republic of Finland applied, on 16 and 25 April respectively, to intervene in support of the form of order sought by the VKI. Finally, on 29 April 2003,
- h ÖVAG and NÖ-Hypobank jointly applied to intervene in support of the form of order sought by the Commission.
32. By order of the President of the First Chamber of the Court of First Instance of 1 August 2003, the Republic of Finland and the Kingdom of Sweden were granted leave to intervene in support of the form of order sought by the applicant. In the same order, BAWAG, on the one hand, and ÖVAG and NÖ-Hypobank, on the other, were granted leave to intervene in support of the form of order sought by the Commission.
- i 33. Those applications having been made within the period prescribed in art 115(1) of the Rules of Procedure, the interveners received, pursuant to art 116(2) of the Rules of Procedure, a copy of every document served on the parties.

34. The Republic of Finland and the Kingdom of Sweden lodged, on 10 and 12 September 2003 respectively, applications to withdraw their interventions. a

35. On 26 September 2003, BAWAG, on the one hand, and ÖVAG and NÖ-Hypobank, on the other, lodged their statements in intervention.

36. Since the VKI and the Commission did not lodge any observations on the applications to withdraw lodged by the Republic of Finland and the Kingdom of Sweden, the President of the First Chamber, by order of 6 November 2003, removed from the file of this case the interventions of those interveners and ordered the VKI and the Commission to bear their own costs in respect of those interventions. b

37. On 14 November 2003, the applicant lodged its written observations on the statements in intervention, whereas those of the Commission were lodged on 11 November 2003. c

38. Pursuant to art 14 of the Rules of Procedure and acting on a proposal from the First Chamber, the court decided, after the parties had been heard in accordance with art 51 of those rules, to refer the case to a Chamber with an extended composition.

39. Upon hearing the Report of the Judge-Rapporteur, the court (First Chamber, Extended Composition) decided to open the oral procedure and, as a measure of organisation of procedure provided for in art 64 of the Rules of Procedure, put certain questions in writing to the Commission and the interveners. d

40. On 6 July 2004, the Commission and the interveners replied in writing to the court's questions. e

41. The parties presented oral argument and their replies to the court's questions at the hearing on 28 September 2004.

#### FORMS OF ORDER SOUGHT BY THE PARTIES

42. The applicant claims that the court should:

—annul the contested decision; f

—order the production of, and examine, the file in question with a view to determining whether the claims of the VKI are well founded;

—order the Commission to pay the costs.

43. The Commission contends that the court should:

—dismiss the action;

—order the applicant to pay the costs. g

44. BAWAG, in support of the Commission, submits that the court should:

—dismiss the action;

—order the applicant to pay the costs, including those incurred by the intervener.

45. Finally, ÖVAG and NÖ-Hypobank, in support of the Commission, submit that the court should: h

—dismiss the action;

—order the applicant to pay the costs.

#### LAW

*The framework of the dispute and the admissibility of certain arguments put forward by the interveners* i

46. It is not disputed that the Commission adopted the contested decision under Regulation 1049/2001.

47. The VKI's action is based, essentially, on six pleas. By its first plea, the VKI submits that it is incompatible with the right of access to documents and, in

- a particular, with Regulation 1049/2001 to refuse access to the whole of an administrative file without having first actually examined each of the documents contained in the file. In its second plea, the VKI claims that the Commission applied or interpreted incorrectly several of the exceptions provided for in art 4(1) and (2) of Regulation 1049/2001. In its third plea, the VKI argues that the Commission concluded unlawfully that the balance of the conflicting interests was not in favour of disclosure of the administrative file referred to by its request. In its fourth plea, the VKI maintains that the Commission should, at the very least, have granted it partial access to the file. By its fifth plea, the VKI claims that the failure to consult the banks which were the authors of certain documents constitutes an infringement of art 4(4) of Regulation 1049/2001. Finally, in its sixth plea, the applicant complains that the Commission infringed art 255 EC, art 42 of the Charter of Fundamental Rights and arts 5 and 10 EC.

48. In their statements in intervention, BAWAG, on the one hand, and ÖVAG and NÖ-Hypobank, on the other, put forward a number of arguments (the additional arguments) intended to show, in the first place, that Regulation 1049/2001 applies only to documents produced during the Community legislative process, in the second place, that the right of access to documents concerning competition cases was, at the material time, governed only by Council Regulation 17/62 (first regulation implementing arts [81 EC] and [82 EC] of the Treaty) (OJ English Sp Edn 1959–1962 p 87), in the third place, that an association with public law status does not enjoy the right of access provided for by Regulation 1049/2001, in the fourth place, that the VKI's request for access was unlawful under Regulation 1049/2001, in the fifth place, that Regulation 1049/2001 is contrary to art 255 EC in that it allows access to documents originating from third parties and, in the sixth place, that that regulation can apply only to documents which came into the possession of the institutions after it became applicable, that is, from 3 December 2001.

- f 49. The additional arguments thus seek to demonstrate, firstly, that Regulation 1049/2001 was not applicable in this case, or, secondly, that it was applied incorrectly by the Commission, or, thirdly, that it constitutes an unlawful legal basis for the contested decision.

- g 50. Consequently, if one or more of the additional arguments were to be accepted by the court, that would permit a finding that the contested decision is unlawful. However, it should be pointed out that the interveners were granted leave to intervene in this case in support of the form of order sought by the Commission and that, moreover, the latter contends that the action for annulment should be dismissed.

- h 51. When questioned in writing and at the hearing about the compatibility of the additional arguments with the form of order supported by the interveners, the latter replied in essence that, according to case law, an intervener is entitled to advance arguments which differ from or even conflict with those of the party which he supports (see *De Gezamenlijke Steenkolenmijnen in Limburg v ECSC High Authority* Case 30/59 [1961] ECR 1 at 17, 18 and *Westdeutsche Landesbank Girozentrale v European Commission* Joined cases T-228/99 and T-233/99 [2003] ECR II-435 (para 145)).

- i 52. However, under the fourth paragraph of art 40 of the Statute of the Court of Justice, which applies to the Court of First Instance by virtue of art 53 of that statute, an application to intervene must be limited to supporting the form of order sought by one of the parties. In addition, under art 116(3) of the Rules of Procedure, the intervener must accept the case as it finds it at



the time of its intervention. Although those provisions do not preclude an intervener from using arguments different from those used by the party it is supporting, that is nevertheless on the condition that they do not alter the framework of the dispute and that the intervention is still intended to support the form of order sought by that party (see, to that effect, *Chemie Linz GmbH v European Commission* Case C-245/92 P [1999] ECR I-4643 (para 32), *France v Monsanto Co* Case C-248/99 P [2002] ECR I-1 (para 56) and *Royal Philips Electronics NV v European Commission* Case T-119/02 [2003] ECR II-1433 (paras 203, 212)).

53. In this case, since, on the one hand, assuming that they are well founded, the additional arguments would permit a finding that the contested decision is unlawful and since, on the other hand, the form of order sought by the Commission is the dismissal of the action for annulment and is not supported by arguments seeking a declaration that the contested decision is unlawful, it is clear that consideration of the additional arguments would have the effect of altering the framework of the dispute as defined in the application and the defence (see, to that effect, *Associazione Italiana Tecnico Economica del Cemento (AITEC) v European Commission* Joined cases T-447-449/93 [1995] ECR II-1971 (para 122) and *British Steel plc v European Commission* Case T-243/94 [1997] ECR II-1887 (paras 72, 73)).

54. Moreover, the interveners' claim that the additional arguments support, in essence, the form of order sought by the Commission, namely, refusal of the access to documents requested by the applicant, must be rejected. Firstly, in this case, the Commission has certainly not contended that the requested access to the documents at issue should be refused regardless of the reasons for the contested decision, but only that the action for annulment should be dismissed. Secondly, it is not for the court, when reviewing the lawfulness of a measure, to assume the role of the Commission and determine whether access to the contested documents is to be refused for reasons other than those mentioned in the contested decision.

55. The additional arguments must therefore be rejected as inadmissible.

*The first plea, alleging failure to carry out a concrete examination of the documents referred to in the request for access, and the fourth plea, alleging infringement of the right to partial access*

56. The first and fourth pleas put forward by the applicant must be examined first and together.

#### *Arguments of the parties*

—The first plea, alleging failure to carry out a concrete examination of the documents referred to in the request for access

57. In its first plea, the VKI claims that, in the contested decision, the Commission, contrary to Regulation 1049/2001, exempted the whole of the Lombard Club file from the right of access without carrying out a concrete examination of each of the documents contained in that file. However, only actual circumstances applying to specific documents can justify an exception to the right of access to those documents.

58. In reply to the applicant's first plea, the Commission contends that, in this case, it is not necessary to determine whether it refused access to all the documents referred to in the request for access, but only whether it gave a proper statement of reasons for its refusal in respect of all those documents.

a However, the Commission certainly did not, in this case, exclude the whole of the Lombard Club file from the right of access but, on the contrary, explained why the reasons for refusal listed in art 4 of Regulation 1049/2002 precluded disclosure of the documents in that file.

b 59. The Commission adds that it is not contrary to Community law to refuse access to various categories of documents without examining each of the documents in those categories where, as in this case, the reasons for the Commission's refusal are stated in respect of each category. The court has expressly held that the Commission is entitled to subdivide a file into categories, to which it may then refuse access altogether, provided that it mentions the reasons for its refusal (see *WWF UK (Sweden intervening) v European Commission (France intervening)* Case T-105/95 [1997] All ER (EC) 300, [1997] ECR II-313 (para 64)).

c 60. Finally, the Commission points out that examination of the various documents and parts of documents within those categories did not take place since the effort involved in such an operation would have been disproportionate.

d —The fourth plea, alleging infringement of the right to partial access

e 61. The VKI submits that total refusal of access to the file would have been justified only if all the documents in it were covered by at least one of the exceptions in art 4 of Regulation 1049/2001. Since that condition was not satisfied in this case, the applicant should at least have been entitled to partial access. The Commission's 'commendable' concern to limit its workload cannot have the consequence of destroying the chances of compensation for the damage suffered by consumers as the result of a cartel.

f 62. The Commission challenges the validity of those arguments. It acknowledges that the case law of the Court of Justice and the Court of First Instance recognises the existence of a right of partial access to documents. The Commission none the less points out that such access may be refused where it involves a disproportionate effort for the institution concerned.

g 63. The effort required for a file of more than 47,000 pages is bound to be disproportionate. That is at the very least the case where, on the one hand, the number of documents likely to be made available in each relevant category is very small and, on the other hand, those documents are manifestly of no use. h Since the documents in the file are arranged in chronological order, any partial access would involve reviewing it in its entirety. Moreover, the task of drawing up a table of contents for the whole file would, having regard to the application of the exceptions in art 4 of Regulation 1049/2001, be just as disproportionate as partial access. The Commission concedes that the disproportionate nature of the effort involved does not in itself constitute a reason for refusal. However, where it is clear from an analysis of strictly-defined categories of documents that access must be refused, no additional examination of each document within the relevant category is justified.

i 64. Both BAWAG and ÖVAG and NÖ-Hypobank essentially support the arguments of the Commission. They point out that where an applicant has expressly indicated its interest in its request for access, it is disproportionate to require the institution to which that request is made to grant partial access to documents which do not serve the purpose of the request.

#### *Findings of the court*

65. It is common ground that the Commission did not carry out a concrete, individual examination of the documents comprising the Lombard Club file.

At the hearing, the Commission confirmed that, in response to the applicant's confirmatory request, it had divided the Lombard Club file, excluding the internal documents, into 11 separate categories of documents, although without examining each of the documents. It is also clear from the contested decision that, after defining those categories, the Commission considered that 'one or more exceptions provided for in art 4 of Regulation 1049/2001 appl[ied] to each category of document, without there being any overriding public interest in disclosure'. The Commission then stated that 'for reasons of proportionality, it [did] not appear either necessary or expedient to undertake an examination of the documents beyond the abovementioned categories'. The Commission further stated, 'as a subsidiary consideration', that publication of the Lombard Club decision was sufficient to 'safeguard' the interests of the applicant.

66. In the light of those considerations, it must therefore be determined whether the Commission was obliged, in principle, to carry out a concrete, individual examination of the documents referred to in the request for access, then, if so, to examine to what extent that obligation to examine could be qualified by certain exceptions based, *inter alia*, on the amount of work entailed by it.

—The obligation to carry out a concrete, individual examination

67. Article 2 of Regulation 1049/2001 defines the principle of the right of access to documents of the institutions. Article 4 of Regulation 1049/2001 sets out a number of exceptions to the right of access. Finally, arts 6 to 8 of Regulation 1049/2001 lay down certain procedures according to which a request for access must be processed.

68. The effect of those provisions is that the institution to which a request for access is made under Regulation 1049/2001 is obliged to examine and reply to that request and, in particular, to determine whether any of the exceptions referred to in art 4 of the regulation is applicable to the documents in question.

69. According to settled case law, the examination required for the purpose of processing a request for access to documents must be specific in nature. On the one hand, the mere fact that a document concerns an interest protected by an exception cannot justify application of that exception (see, to that effect, *Denkavit Nederland BV v European Commission* Case T-20/99 [2000] ECR II-3011 (para 45)). Such application may, in principle, be justified only if the institution has previously assessed, firstly, whether access to the document would specifically and actually undermine the protected interest and, secondly, in the circumstances referred to in art 4(2) and (3) of Regulation 1049/2001, there is no overriding public interest in disclosure. On the other hand, the risk of a protected interest being undermined must be reasonably foreseeable and not purely hypothetical (see, to that effect, *Kuijter v EU Council* Case T-211/00 [2003] All ER (EC) 276, [2002] ECR II-485 (para 56), 'Kuijter II'). Consequently, the examination which the institution must undertake in order to apply an exception must be carried out in a concrete manner and must be apparent from the reasons for the decision (see, to that effect, *Kuijter v EU Council* Case T-188/98 [2000] ECR II-1959 (para 38), 'Kuijter I' and *Hautala v EU Council* Case T-14/98 [1999] ECR II-2489 (para 67)).

70. That concrete examination must, moreover, be carried out in respect of each document referred to in the request for access. It is apparent from Regulation 1049/2001 that all the exceptions mentioned in art 4(1) to (3) are specified as being applicable to 'a document'.



a 71. The need for such a concrete, individual examination, as opposed to an abstract, general examination, is also confirmed by the case law concerning the application of the code of conduct.

b 72. On the one hand, the code of conduct, the principles of which were in part reproduced in art 4 of Regulation 1049/2001, contained a first category of exceptions requiring the institution to refuse access to a document where disclosure 'could undermine' the interests protected by those exceptions. The court has consistently held that the use of the conditional form 'could' means that before deciding on a request for access to documents the Commission must consider, 'for each document requested', whether, in the light of the information in its possession, disclosure is in fact likely to undermine one of the interests protected by the exceptions (see *Interporc Im-und Export GmbH v European Commission* Case T-124/96 [1998] ECR II-231 (para 52) and *JT's Corp Ltd v European Commission* Case T-123/99 [2000] ECR II-3269 (para 64)). In view of the fact that the conditional form is maintained in art 4(1) to (3) of Regulation 1049/2001, the case law developed in connection with the code of conduct is capable of being applied to Regulation 1049/2001. It must therefore be held that an institution is obliged to assess in a concrete and individual manner whether exceptions to the right of access apply to each of the documents referred to in a request.

e 73. On the other hand, as the Commission rightly points out, the court has in fact held, in essence, in its judgment in the *WWF UK* case, cited in para 59, above (para 64), that an institution is required to indicate, at the very least by reference to categories of documents, the reasons for which it considers that the documents detailed in the request received by it are related to a category of information covered by an exception. Nevertheless, regardless of whether the paragraph relied on by the Commission lays down only a rule that reasons must be stated, a concrete, individual examination is in any event necessary where, even if it is clear that a request for access refers to documents covered by an exception, only such an examination can enable the institution to assess the possibility of granting the applicant partial access under art 4(6) of Regulation 1049/2001. In the context of applying the code of conduct, the court has moreover already rejected as insufficient an assessment of documents by reference to categories rather than on the basis of the actual information contained in those documents, since the examination required of an institution must enable it to assess specifically whether an exception invoked actually applies to all the information contained in those documents (see the *JT's Corp* case, cited in para 72, above (para 46)).

g 74. It must therefore be concluded that where an institution receives a request for access under Regulation 1049/2001 it is required, in principle, to carry out a concrete, individual assessment of the content of the documents referred to in the request.

i 75. However, that approach, to be adopted in principle, does not mean that such an examination is required in all circumstances. Since the purpose of the concrete, individual examination which the institution must in principle undertake in response to a request for access made under Regulation 1049/2001 is to enable the institution in question to assess, on the one hand, the extent to which an exception to the right of access is applicable and, on the other, the possibility of partial access, such an examination may not be necessary where, due to the particular circumstances of the individual case, it is obvious that access must be refused or, on the contrary, granted. Such could be the case, inter alia, if certain documents were either, first, manifestly

covered in their entirety by an exception to the right of access or, conversely, manifestly accessible in their entirety, or, finally, had already been the subject of a concrete, individual assessment by the Commission in similar circumstances. a

76. In this case, it is common ground that the Commission based the contested decision on a general analysis by reference to categories of documents of the Lombard Club file. It is also established that the Commission did not carry out a concrete, individual examination of the documents referred to in the request for access in order to assess whether the exceptions relied on applied or whether partial access could be granted. b

77. It must therefore be examined whether the applicant's request related to documents in respect of which, by reason of the circumstances of the case, it was not necessary to carry out such a concrete, individual examination. c

78. In that regard, the Commission took the view, in the contested decision, that the documents referred to in the applicant's request were covered by four separate exceptions to the right of access.

79. The first of the exceptions relied on by the Commission concerns the protection of the purpose of inspections, referred to in the third indent of art 4(2) of Regulation 1049/2001. In the contested decision, the Commission justified the application of that exception on the basis, in essence, of two factors. d

80. Firstly, according to the Commission, the Lombard Club decision is the subject matter of a number of actions for annulment before the Court of First Instance which are still pending and on which the latter has therefore not yet ruled. Consequently, access by third parties to those documents could affect the new assessment it might be called upon to make if its decision were annulled and might lead the applicants to raise certain pleas in those actions. e

81. Secondly, according to the Commission, a large number of the documents in the file were provided by the undertakings penalised in the Lombard Club decision, either on the basis of the Commission Notice on the non-imposition or reduction of fines in cartel cases (OJ 1996 C207 p 4), which was applicable at the material time, or in connection with requests for information or investigations under arts 11 and 14 of Regulation 17/62. Consequently, allowing third parties access to those documents would deter undertakings from co-operating with the Commission and would be detrimental to inspections and investigations in future cases. The same reasoning applies to documents drawn up by third parties. f  
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82. The court is of the view, however, that the Commission was not entitled to reach such a general conclusion applicable to the whole of the Lombard Club file without having first carried out a concrete, individual examination of the documents comprising it.

83. Firstly, it is not clear from the contested decision that the Commission specifically ascertained that each document referred to in the request was in fact included in one of the 11 categories identified. On the contrary, the reasons for the contested decision, which were confirmed by the Commission at the hearing, indicate that the manner in which the Commission carried out that division was, at least in part, abstract. The Commission seems to have acted more on the basis of what it imagined the content of the documents in the Lombard Club file to be than on the basis of an actual examination. That division into categories therefore remains approximate, both from the point of view of its exhaustiveness and from the point of view of its accuracy. h  
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84. Secondly, the considerations set out by the Commission in the contested decision, as moreover in its defence, remain vague and general. In the absence

a of an individual examination, that is to say, document by document, they do not demonstrate with sufficient certainty and detail that the Commission's argument, even if well founded in principle, applies to all the documents in the Lombard Club file. The fears expressed by the Commission remain mere assertions and are, consequently, utterly hypothetical.

b 85. There is nothing to show that all the documents referred to in the request are clearly covered by the exception relied on. In point 1 of the contested decision, the Commission itself notes that 'the exception provided for in the third indent of Article 4(2) applies in large part to certain documents, or even in full to all the categories'.

c 86. It is true that, in the table which it attached to its defence, the Commission stated that, in its view, the exception relied on applied to all the documents referred to in the file. However, as is clear from the considerations set out in the preceding paragraph, that table contradicts the reasons for the contested decision.

d 87. Finally, and in any event, it is not apparent from the reasons given for the contested decision that each of the documents comprising the Lombard Club file, taken individually, is covered in its entirety by the exception referred to in the third indent of art 4(2) of Regulation 1049/2001. It is not clear that disclosure of any information contained in them would undermine the purposes of the Commission's inspections and investigations.

e 88. The absence of any concrete, individual examination of the documents referred to by the applicant's request is therefore not justified in the case of the documents allegedly covered by the first exception relied on by the Commission.

f 89. The same finding must apply with regard to the documents covered, according to the contested decision, by the second, third and fourth exceptions. Those exceptions relate to the protection of commercial interests (see the first indent of art 4(2) of Regulation 1049/2001), the protection of court proceedings (see the second indent of art 4(2)) and the protection of privacy and the integrity of the individual (see art 4(1)(b)). It is clear from points 2, 3, 10, 12 and 13 of the contested decision that, in the Commission's view, those exceptions concern only some of the documents referred to in the request. In particular, in point 13 of the contested decision, the Commission states that 'it is possible that a large proportion of the documents drawn up by the banks concerned or by third parties also contain information the disclosure of which could affect privacy and the integrity of the individual'.

g 90. It is therefore apparent from the contested decision that the exceptions relied on by the Commission do not necessarily apply to the whole of the Lombard Club file and that, even in the case of the documents to which they may apply, they may concern only certain passages in those documents.

h 91. Finally, the interveners rely on the exception in art 4(3) of Regulation 1049/2001. They maintain that the Lombard Club decision has been the subject matter of several actions for annulment and that it is therefore not yet a decision 'taken' within the meaning of art 4(3), which justifies a total refusal of access. However, since that exception was not relied on by the Commission in the contested decision, it is not for the court to assume the role of that institution and determine whether that exception is actually applicable to the documents referred to by the request.

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92. Consequently, the Commission was bound, in principle, to carry out a concrete, individual examination of each of the documents referred to in the request in order to determine whether any exceptions applied or whether partial access was possible. a

93. Nevertheless, since, in this case, the Commission did not carry out such an examination, it must be determined whether it is permissible for an institution to justify a total refusal of access by reason of the very large amount of work which, according to that institution, is entailed by such an examination. b

—Application of an exception related to the amount of work involved in carrying out a concrete, individual examination

94. Under art 6(3) of Regulation 1049/2001, '[i]n the event of an application relating to a very long document or to a very large number of documents, the institution concerned may confer with the applicant informally, with a view to finding a fair solution'. c

95. In this case, it is apparent from the file that the applicant and the Commission met on 24 July 2002, but that that meeting and the contacts which followed it did not lead to a solution. d

96. Regulation 1049/2001 does not contain any provision expressly permitting the institution, in the absence of a fair solution reached together with the applicant, to limit the scope of the examination which it is normally required to carry out in response to a request for access.

97. In the introductory part of the contested decision, the Commission nevertheless, in essence, justifies the failure to carry out a concrete, individual examination of the documents in question by application of the principle of proportionality. The Commission states *inter alia* that 'for reasons of proportionality, it does not appear either necessary or expedient to undertake an examination of the documents beyond the [above-mentioned] categories'. The Commission also relies on application of the principle of proportionality in points 10, 13 and 24 of the contested decision. e  
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98. It must therefore be examined whether it is in fact permissible, on the basis of the principle of proportionality, to refrain from applying the principle of a concrete, individual examination of the documents referred to in a request for access under Regulation 1049/2001.

99. According to consistent case law, the principle of proportionality requires measures adopted by Community institutions not to exceed the limits of what is appropriate and necessary in order to attain the objectives pursued; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued (see *R v Ministry of Agriculture, Fisheries and Food, ex p National Farmers' Union* Case C-157/96 [1998] ECR I-2211 (para 60) and *Tideland Signal Ltd v European Commission* Case T-211/02 [2002] ECR II-3781 (para 39)). The principle of proportionality also requires that derogations remain within the limits of what is appropriate and necessary for achieving the aim in view (see *Johnston v Chief Constable of the Royal Ulster Constabulary* Case 222/84 [1986] 3 All ER 135, [1986] ECR 1651 (para 38) and *Hautala's case*, cited in para 69, above (para 85)). g  
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100. Consequently, the refusal by an institution to examine concretely and individually the documents covered by a request for access constitutes, in principle, a manifest breach of the principle of proportionality. A concrete, individual examination of the documents in question enables the institution to

a achieve the aim pursued by the exceptions referred to in art 4(1) to (3) of Regulation 1049/2001 and results, moreover, in identification of the only documents covered, in whole or in part, by those exceptions. It therefore constitutes, for the purposes of the applicant's right of access, a measure less onerous than a complete refusal to examine the documents.

b 101. It should however be borne in mind that it is possible for an applicant to make a request for access, under Regulation 1049/2001, relating to a manifestly unreasonable number of documents, perhaps for trivial reasons, thus imposing a volume of work for processing of his request which could very substantially paralyse the proper working of the institution. It should also be noted that, where a request relates to a very large number of documents, the institution's right to seek a 'fair solution' together with the applicant, pursuant to art 6(3) of Regulation 1049/2001, reflects the possibility of account being taken, albeit in a particularly limited way, of the need, where appropriate, to reconcile the interests of the applicant with those of good administration.

c 102. An institution must therefore retain the right, in particular cases where concrete, individual examination of the documents would entail an unreasonable amount of administrative work, to balance the interest in public access to the documents against the burden of work so caused, in order to safeguard, in those particular cases, the interests of good administration (see, by analogy, *Hautala's* case, cited in para 69, above (para 86)).

d 103. However, that possibility remains applicable only in exceptional cases.

e 104. Firstly, concrete, individual examination of the documents referred to in a request for access under Regulation 1049/2001 is one of the elementary duties of an institution in response to such a request.

f 105. Secondly, public access to documents of the institutions is an approach to be adopted in principle, whereas the power to refuse access is the exception (see, by analogy with the principle laid down for application of the code of conduct, *Kuijjer II* (para 55)).

g 106. Thirdly, exceptions to the principle of access to documents must be interpreted strictly (see, by analogy with the code of conduct, *British American Tobacco International (Investments) v European Commission* Case T-111/00 [2001] ECR II-2997 (para 40)). That case law justifies a fortiori the need to construe particularly strictly any limitations placed on the diligence which must normally be displayed by an institution in deciding to apply an exception, since such limitations increase, from the time the request is received, the risk that the right of access may be compromised.

h 107. Fourthly, there are many circumstances in which for the Commission to have discretion not to carry out a concrete, individual examination when such an examination is necessary would run counter to the principle of good administration, which is one of the guarantees afforded by the Community legal order in administrative procedures and to which the duty of the competent institution to examine carefully and impartially all the relevant aspects in the individual case is linked (see *La Cinq SA v EC Commission* Case T-44/90 [1992] ECR II-1 (para 86) and *Métropole Télévision SA v European Commission* Joined cases T-528/93, T-542/93, T-543/93 and T-546/93 [1996] ECR II-649 (para 93)).

i 108. Fifthly, it is not, in principle, appropriate that account should be taken of the amount of work entailed by the exercise of the applicant's right of access and its interest in order to vary the scope of that right.

109. With regard to the applicant's interest, under art 6(1) of Regulation 1049/2001 he is not required to justify his request and therefore he does not normally have to demonstrate any interest. a

110. As regards the amount of work entailed in processing a request for access, Regulation 1049/2001 expressly envisages the possibility that a request for access may relate to a very large number of documents, since arts 7(3) and 8(2) provide that the time limits for processing initial requests and confirmatory requests may be extended in exceptional cases such as, for example, in the event of an application relating to a very long document or to a very large number of documents. b

111. Sixthly, the amount of work entailed in considering a request for access depends not only on the number of documents referred to in the request and their volume, but also on their nature. Consequently, the need to undertake a concrete, individual examination of very numerous documents does not, on its own, provide any indication of the amount of work entailed in processing a request for access, since that amount of work also depends on the required depth of that examination. c

112. Accordingly, it is only in exceptional cases and only where the administrative burden entailed by a concrete, individual examination of the documents proves to be particularly heavy, thereby exceeding the limits of what may reasonably be required, that a derogation from that obligation to examine the documents may be permissible (see, by analogy, *Kuiper II* (para 57)). d

113. In addition, in so far as the right of access to documents held by the institutions constitutes an approach to be adopted in principle, it is with the institution relying on an exception related to the unreasonableness of the task entailed by the request that the burden of proof of the scale of that task rests. e

114. Finally, where the institution has adduced proof of the unreasonableness of the administrative burden entailed by a concrete, individual examination of the documents referred to in the request, it is obliged to try to consult with the applicant in order, on the one hand, to ascertain or to ask him to specify his interest in obtaining the documents in question and, on the other, to consider specifically whether and how it may adopt a measure less onerous than a concrete, individual examination of the documents. Since the right of access to documents is the principle, the institution nevertheless remains obliged, against that background, to prefer the option which, whilst not itself constituting a task which exceeds the limits of what may reasonably be required, remains the most favourable to the applicant's right of access. f

115. It follows that the institution may avoid carrying out a concrete, individual examination only after it has genuinely investigated all other conceivable options and explained in detail in its decision the reasons for which those various options also involve an unreasonable amount of work. g

116. It must therefore be examined, in this case, whether the Commission was in a situation where concrete, individual examination of the documents referred to in the request for access imposed on it a burden exceeding the limits of what might reasonably be required, so that, taking into account the applicant's interest, it could specifically consider other options for processing the request, with a view, where appropriate, to adopting a measure less onerous in terms of its workload. h

117. With regard, first, to whether a concrete, individual examination of each of the documents referred to in the request was unreasonable, it should be i



*a* noted that the contested decision does not mention the precise number of documents in the Lombard Club file, but merely the number of pages which it contains. A mere reference to a number of pages is not sufficient, as such, for the purpose of assessing the amount of work entailed by a concrete, individual examination. Nevertheless, in the light, on the one hand, of the categories identified by the Commission in the contested decision and, on the other, of the nature of the file in question, it is clearly apparent from the papers in the case that the documents referred to are very numerous.

118. In addition, consultation of a file of more than 47,000 pages comprising many documents such as those belonging to the categories identified by the Commission is likely to be an extremely large task.

*c* 119. Firstly, it is clear that the documents in the Lombard Club file are filed in chronological order. In that regard, at the hearing, the Commission stated that, in view of the date of the contested decision, the documents referred to in the applicant's request had not yet been recorded in the register provided for by art 11 of Regulation 1049/2001, the coverage of which, according to art 8(1) of the Commission Decision of 5 December 2001 amending its rules of procedure, is to be extended gradually.

*d* 120. Secondly, in the light of the main categories identified by the Commission and of the reasons for the contested decision, it can be accepted that the documents referred to by the applicant's request contain a great deal of information which must be subjected to a concrete analysis in the light of the exceptions to the right of access and, in particular, information which could undermine the protection of the commercial interests of the banks involved in the Lombard Club file.

*e* 121. Thirdly, in the light of the main categories identified by the Commission, it can also be accepted that the Lombard Club file consists of a large number of documents originating from third parties. Consequently, the volume of work involved in examining concretely and individually the documents contained in that file could be increased by the need, where appropriate, to consult those third parties in accordance with art 4(4) of Regulation 1049/2001.

*f* 122. In this case, therefore, there are a number of factors which suggest that concrete, individual examination of all the documents in the Lombard Club file might represent a very large amount of work. Nevertheless, without there being any need to take a definitive view as to whether those factors demonstrate sufficiently in law that the amount of work involved exceeded the limits of what might reasonably be required of the Commission, it must be pointed out that the contested decision, which refuses altogether to grant the applicant any access, could in any event be lawful only if the Commission had previously explained specifically the reasons for which the alternatives to a concrete, individual examination of each of the documents referred to also represented an unreasonable amount of work.

*g* 123. In this case, the applicant informed the Commission, on 14 June 2002, that the purpose of its request was to enable it to produce certain evidence in proceedings brought against BAWAG before the Austrian courts.

*h* 124. It is also clear that, on 24 July 2002, at a meeting with the Commission's staff, the representatives of the VKI mentioned the possibility that the applicant could give an undertaking in writing to use the information obtained solely for the purpose of asserting consumers' claims.

*i* 125. In addition, in its confirmatory request of 26 September 2002, the applicant stated that it was not interested primarily in the Commission's

internal documents, which prompted the latter to exclude those documents from the scope of its analysis in the contested decision. a

126. Notwithstanding those considerations, it is not apparent from the reasons for the contested decision that the Commission considered specifically and exhaustively the various options available to it in order to take steps which would not impose an unreasonable amount of work on it but would, on the other hand, increase the chances that the applicant might receive, at least in respect of part of its request, access to the documents concerned. b

127. Thus, in the contested decision, the Commission stated 'as a subsidiary consideration' that publication of the Lombard Club decision was sufficient to 'safeguard' the interests of the applicant.

128. In addition, in point 24 of the contested decision, the Commission refused, in the following terms, to grant partial access to the documents included in the Lombard Club file: c

'We have undertaken in this case, for the purpose of deciding on your request, a categorisation of all the documents in the file and, in the case of some, a sub-categorisation. The alternative would be to examine each document, after consulting third parties where appropriate. In this specific instance, the file consists of more than 47 000 pages, not counting the internal documents. On the basis that an examination by reference to categories indicates that the documents in the file are—with the exception of a few documents already published—very largely subject to the exceptions provided for by the regulation, a separate examination of each document would impose on the Commission an inappropriate and disproportionate amount of work. That is particularly so because the other parts of the documents, or some of them, which could possibly be disclosed, would very probably serve neither the interests [of the] VKI in proving the unlawfulness of the conduct of the banks concerned in civil proceedings, nor other public interests.'

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129. It is therefore clear that the Commission took into account the applicant's interest as a very subsidiary consideration in comparing the likely effects of two types of practice, namely, in the first place, an individual examination of the documents included in the Lombard Club file and, in the second place, an examination limited to the categories established among those same documents on the basis of their nature. g

130. However, it is not apparent from the reasons for the contested decision that the Commission assessed, in a concrete, specific and detailed manner, on the one hand, the other conceivable options for limiting its workload and, on the other, the reasons which could allow it to avoid carrying out any examination rather than adopting, where appropriate, a measure less restrictive of the applicant's right of access. In particular, it is not apparent from the contested decision that, as regards the identification of documents contained in a file arranged in chronological order, the Commission specifically examined the option of asking the banks involved in the Lombard Club file to provide it with the dates of the documents submitted by them, which might possibly have enabled it to find some of them more easily in its file. In addition, although the Commission stated in its defence that drawing up a table of contents would have been a disproportionate task, the examination of that option is not mentioned at all in the contested decision and therefore cannot be considered to have been specifically examined. Finally, it is likewise not apparent from the contested decision that the Commission evaluated the h  
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*a* amount of work involved in identifying, then examining, individually and concretely, the few documents most likely to satisfy immediately and, where appropriate, partially in the first instance the applicant's interests.

131. The outright refusal by the Commission to grant the applicant access is therefore vitiated by an error of law. The first and fourth pleas must therefore be upheld. Consequently, without there being any need to rule on the other pleas put forward by the applicant, the contested decision must be annulled.

*b* THE REQUEST FOR PRODUCTION OF DOCUMENTS

132. It is for the Community judicature to decide, in the light of the circumstances of the case and in accordance with the provisions of the Rules of Procedure on measures of inquiry, whether it is necessary for a document to be produced (see *Siderurgica Aristrain Madrid SL v European Commission* Case C-196/99 P [2003] ECR I-11049 (para 67)).

*c* 133. Since the first and fourth pleas of the applicant must be upheld without there being any need to examine the documents in question, there is certainly no need in this case to order the production requested.

*d* COSTS

134. Under art 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has been unsuccessful, it must be ordered to pay the costs borne by the VKI, in accordance with the form of order sought by the latter.

*e* 135. Under the third subparagraph of art 87(4) of the Rules of Procedure, the court may order an intervener to bear its own costs. In this case, the interveners are to bear their own costs.

*f* On those grounds, the Court of First Instance (First Chamber, Extended Composition) hereby:

(1) Annuls Decision D (2002) 330472 (relating to a request for access to the administrative file in Case COMP/36.571/D-1, Austrian banks—'Lombard Club');

(2) Orders the Commission to pay the costs;

(3) Orders the interveners to bear their own costs.

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# easyCar (UK) Limited v Office of Fair Trading <sup>a</sup>

## (Case C-336/03)

COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES (FIRST CHAMBER) <sup>b</sup>

JUDGES JANN (PRESIDENT OF THE CHAMBER), LENAERTS, CUNHA RODRIGUES, SCHIEMANN AND ILEŠIĆ (RAPPORTEUR)

ADVOCATE GENERAL STIX-HACKL

29 SEPTEMBER, 11 NOVEMBER 2004, 10 MARCH 2005 <sup>c</sup>

*European Community – Consumer protection – Contracts negotiated away from business premises – Right of withdrawal and reimbursement for consumers – Exemptions – Contracts for provision of transport services – Car hire contracts – Whether car hire services amounting to transport services – European Parliament and Council Directive (EC) 97/7, arts 3(2), 6(1), (2).* <sup>d</sup>

A self-drive car hire undertaking offered cars for hire via the Internet, under terms and conditions which did not permit the customer to obtain a refund of sums paid on cancellation of the contract. In the main proceedings, whereas the undertaking sought a declaration from the national court that the rights of consumers in distance contracts to withdraw and to receive a refund of sums paid, as provided for under arts 6(1) and (2) of European Parliament and Council Directive (EC) 97/7 (on the protection of consumers in respect of distance contracts)—which were transposed into English law by regs 10 and 14 of the Consumer Protection (Distance Selling) Regulations 2000, SI 2000/2334—did not apply to its rental agreements, the Office of Fair Trading sought an injunction to restrain the undertaking from infringing the national regulations. The issues between the parties concerned whether contracts for car hire services were ‘contracts for the provision of... transport... services’ within the meaning of the exemption to art 6 of the directive, as provided for by art 3(2). Accordingly, the national court decided to stay the proceedings and refer under art 234 EC (formerly art 177 of the EC Treaty) a question in that regard to the Court of Justice of the European Communities. <sup>e</sup>

**Held** – Properly interpreted, ‘contracts for the provision of... transport... services’ in art 3(2) of the directive included contracts for the provision of car hire services. As a derogation from the Community rules for the protection of consumers, the scope of the concept of ‘transport services’ was to be interpreted strictly. Further, since it was not defined by the directive, it was to be interpreted by consideration of its usual meaning in everyday language, taking into account the context in which it had occurred and the purpose of the rules of which they were part. The legislature had used the term in a broad sense, intending to define the exemption, not according to the type of contract, but in such a way that all contracts for the provision of services in relevant sectors came within the scope of the exemption. Further, in everyday language, ‘transport’ referred not only to the action of moving persons or goods from one place to another, but also to the mode of transport and to the means used to move those persons and goods. Furthermore, the objectives pursued by the <sup>f</sup> <sup>g</sup> <sup>h</sup> <sup>i</sup>

- a* directive included protection for the interests of suppliers of certain services from the disproportionate consequences arising from the cancellation at no expense and with no explanation of services which had given rise to the booking. Car hire undertakings, which had to make arrangements for the performance, on the date fixed at the time of booking, of the agreed service, would suffer the same consequences in the event of cancellation as other undertakings operating in the transport sector (see judgment paras 21, 24, 26, 27, 28–31, below).

### Notes

For contracts negotiated at a distance, see Supp to 41 *Halsbury's Laws* (4th edn reissue) para 655A.

### Cases cited

- Aéroports de Paris v European Commission* Case C-82/01 P [2002] ECR I-9297, ECJ.  
*ARO Lease BV v Inspecteur van de Belastingdienst Grote Ondernemingen te Amsterdam* Case C-190/95 [1997] STC 1272, [1997] ECR I-4383, ECJ.
- d* *Deutsche Post AG v Sievers* Joined cases C-270/97 and C-271/97 [2000] ECR I-929, ECJ.  
*DIR International Film Srl v European Commission* Case C-164/98 P [2000] ECR I-447, ECJ.  
*European Commission v Spain* Case C-83/99 [2001] ECR I-445, ECJ.  
*Gregg v Customs and Excise Comrs* Case C-216/97 [1999] All ER (EC) 775, [1999] ECR I-4947, ECJ.
- e* *Hamann v Finanzamt Hamburg-Eimsbüttel* Case 51/88 [1991] STC 193, [1989] ECR 767, ECJ.  
*Hässle AB v Ratiopharm GmbH* Case C-127/00 [2003] ECR I-14781, ECJ.  
*Heininger v Bayerische Hypo- und Vereinsbank AG* Case C-481/99 [2004] All ER (EC) 1, [2001] ECR I-9945, ECJ.
- f* *Hönig v Stadt Stockach* Case C-128/94 [1995] ECR I-3389, ECJ.  
*Lease Plan Luxembourg SA v Belgium* Case C-390/96 [1998] STC 628, [1998] ECR I-2553, ECJ.  
*Philips Electronics NV v Remington Consumer Products Ltd* Case C-299/99 [2002] All ER (EC) 634, [2003] Ch 159, [2003] 2 WLR 294, [2002] ECR I-5475, ECJ.
- g* *Plato Plastik Robert Frank GmbH v Caropack Handelsgesellschaft mbH* Case C-341/01 (2003) Transcript (opinion), 11 September, (2004) Transcript (judgment), 29 April, ECJ.  
*R v Bouchereau* Case 30/77 [1981] 2 All ER 924n, [1978] QB 732, [1978] 2 WLR 251, [1977] ECR 1999, ECJ.
- h* *Rockfon A/S v Specialarbejderforbundet i Danmark* Case C-449/93 [1996] IRLR 168, [1996] ICR 673, [1995] ECR I-4291, ECJ.  
*Royscot Leasing Ltd v Customs and Excise Comrs* Case C-305/97 [1999] All ER (EC) 908, [1999] ECR I-6671, ECJ.  
*Veedfald v Århus Amtskommune* Case C-203/99 [2001] ECR I-3569, ECJ.

### i Reference

This reference for a preliminary ruling concerned the interpretation of art 3(2) of European Parliament and Council Directive (EC) 97/7 (on the protection of consumers in respect of distance contracts). The reference was made in the context of a dispute between the company easyCar (UK) Ltd (hereinafter easyCar) and the Office of Fair Trading (hereinafter the OFT) concerning the

terms and conditions of the car hire contracts offered and concluded by easyCar. Observations were submitted on behalf of: easyCar by D Anderson QC, K Bacon, Barrister, and D Burnside, Solicitor; the United Kingdom government, by C Jackson, acting as agent, and M Hoskins, Barrister; the Spanish government, by S Ortiz Vaamonde, acting as agent; the French government, by R Loosli-Surrans, acting as agent; the Commission of the European Communities, by N Yerrell and M-J Jonczy, acting as agents. The language of the case was English. The facts are set out in the opinion of the Advocate General. a  
b

11 November 2004. **The Advocate General (C Stix-Hackl)** delivered the following opinion<sup>1</sup>. c

## I—INTRODUCTION

1. This case concerns the interpretation of art 3(2) of European Parliament and Council Directive (EC) 97/7 (on the protection of consumers in respect of distance contracts)<sup>2</sup>. The Court of Justice of the European Communities is being asked to clarify how far car hire contracts can be regarded as 'contracts for the provision of ... transport ... services' within the meaning of that provision. d

2. Article 3(2) of the directive makes a derogation from the scope of the distance contracts directive in relation to arts 4, 5, 6 and 7(1) of the directive, and thereby also creates a derogation from the right to cancel which consumers are to enjoy under art 6. e

3. The case arises from a complaint by the Office of Fair Trading (OFT) and easyCar (UK) Ltd (easyCar), in which, on the one hand, the OFT claims that easyCar should cease refusing customers the right of withdrawal and refund, while easyCar is seeking a declaration from the national court that it is free from that obligation. f

## II—LEGAL BACKGROUND

### A—Community law

4. According to art 1 thereof, the object of the distance contracts directive is 'to approximate the laws, regulations and administrative provisions of the Member States concerning distance contracts between consumers and suppliers'. g

5. 'Distance contract' is defined by art 2(1) as—

'any contract concerning goods or services concluded between a supplier and a consumer under an organized distance sales or service-provision scheme run by the supplier, who, for the purpose of the contract, makes exclusive use of one or more means of distance communication up to and including the moment at which the contract is concluded.' h

6. One of the key provisions of the distance contracts directive is art 6(1), which provides that '[f]or any distance contract the consumer shall have a period of at least seven working days in which to withdraw from the contract without penalty and without giving any reason'. Article 6(2) defines the legal i

<sup>1</sup> Original language: German.

<sup>2</sup> OJ 1997 L144 p 19 (hereinafter the distance contracts directive).



a consequences of exercising the right to withdraw, while art 6(3) enumerates cases in which, unless the parties have agreed otherwise, the right to withdraw may not be exercised.

b 7. However, art 3(2) of the distance contracts directive provides, inter alia, that art 6 is not to apply to 'contracts for the provision of accommodation, transport, catering or leisure services, where the supplier undertakes, when the contract is concluded, to provide these services on a specific date or within a specific period'.

*B—National law*

c 8. The distance contracts directive was implemented into United Kingdom law by the Consumer Protection (Distance Selling) Regulations 2000, SI 2000/2334 (the regulations). The derogating provision in art 3(2) is implemented by reg 6(2), which provides:

'Regulations 7 to 19(1) shall not apply to ...

d (b) contracts for the provision of accommodation, transport, catering or leisure services, where the supplier undertakes, when the contract is concluded, to provide these services on a specific date or within a specific period.'

9. The basic 'right to cancel' is set out in reg 10(1):

e 'Subject to regulation 13, if within the cancellation period set out in regulations 11 and 12, the consumer gives a notice of cancellation to the supplier ... the notice of cancellation shall operate to cancel the contract.'

10. Regulation 12 transposes the time limits set out in art 6(1) of the directive, regarding contracts for the supply of services, and reg 13(1)(a) (on which easyCar relies in the alternative) transposes art 6(3).

f 11. Regulation 14 transposes the provisions of art 6(2), and provides inter alia that on the cancellation of a contract under reg 10, the supplier shall reimburse any sum paid by or on behalf of the consumer in relation to the contract, free of charge less certain permitted charges made for the cost of returning goods.

g *III—FACTS AND PROCEDURE*

h 12. easyCar is a car hire company, which makes contracts with customers only over the Internet. The rental cost of the cars is determined by supply and demand, so that, in principle, prices rise as fewer cars remain available. In that way, prices are lower the earlier one books and rise as the start of the rental period draws closer, according to the remaining availability. Customers are thereby enabled to get a vehicle, even shortly before the rental date, but at increased prices.

13. According to easyCar's terms of business, the customer has a right to cancel after a hire contract has been concluded, but without any right to refund save in the event of unforeseeable or otherwise exceptional circumstances, such as serious illness or natural disaster.

i 14. After several consumer complaints were raised against easyCar over the question whether the hire contracts complied with British law, and with the regulations in particular, easyCar applied to the referring court on 21 November 2002 for a declaration that its rental agreements 'are exempted from the cancellation requirements of Regulations 10 and 12 pursuant to Regulation 6(2)(b) and/or Regulation 13(1)(a)'.

15. easyCar argued that its car hire contracts fell within the exception in reg 6(2)(b) for 'contracts for the provision of ... transport services', which in turn corresponds to art 3(2) of the distance contracts directive. a

16. On 7 February 2003 the OFT, in turn, issued a claim seeking an injunction, arguing that easyCar was not complying with its obligations under regs 10 and 14, which represent the implementation of art 6(1) and (2) of the distance contracts directive. b

17. Though the parties differ as to what is denoted by 'transport' within the meaning of the regulations, they agree that the car hire contracts at issue constitute 'distance contracts' and the 'provision of services' within the meaning of the regulations and thus of the distance contracts directive.

18. Since the regulations, breach of which the OFT alleges before the national court, are to be interpreted as the transposition of the distance contracts directive, the High Court of Justice (England and Wales), Chancery Division, referred the following question to the Court of Justice by order of 21 July 2003: c

'Does the term "contracts for the provision of ... transport ... services", in Article 3(2) of [the distance contracts directive] include contracts for the provision of car hire services?' d

#### IV—THE QUESTION REFERRED

##### *A—Arguments of the parties*

19. easyCar argues that car hire contracts are 'contracts for the provision of ... transport ... services', submitting that 'transport' includes not only the actual carrying out of transport by one's own staff but also simply the placing of means of transport at the customer's disposal. The legislature deliberately drew no distinction. The provision in art 3(2) therefore refers to all contracts concluded in the area of 'transport', an interpretation supported by the German wording 'in den Bereichen ... Beförderung' and the Italian wording 'relativi ... ai trasporti', which both exclude a narrow interpretation. e

20. Further, it maintains, it is clear from the other services referred to in art 3(2) that the cases to be removed from the scope of the distance contracts directive are precisely those in which cancellation is out of the question because the service provider would be exposed to severe consequences. That is particularly so where reservation is necessary on account of limited capacities. A car hire firm is also exposed to that risk. There is no distinction in that respect from contracts in the areas of accommodation, catering or leisure services. f

21. The travaux préparatoires to the directive, it argues, also support that interpretation, in that, for example, art 3 of the Commission of the European Communities' proposal for a directive of 21 May 1992<sup>3</sup> expressly includes services which require reservation. g

22. easyCar also relies on the interpretation of the word 'transport'. It argues that, as the court has stated in relation to the Sixth Council Directive (EEC) 77/388 (on the harmonisation of the laws of the member states relating to turnover taxes—common system of value added tax: uniform basis of assessment)<sup>4</sup>, that expression covers everything that is used to go from one place to another, so that means of transport are also included. Council h

<sup>3</sup> OJ 1992 C156 pp 14, 16.

<sup>4</sup> OJ 1977 L145 p 1 (hereinafter the Sixth VAT Directive).

a Directive (EEC) 83/182 (on tax exemptions within the Community for certain means of transport temporarily imported into one member state from another)<sup>5</sup> also supports the view that the provision of vehicles constitutes a supply of transport services.

b 23. Not to include car hire would, moreover, not be in accordance with the Community law principle of equal treatment, as car hire would be disadvantaged vis-à-vis traditional transport services such as bus services, with which it is in competition, if the exception were not to apply to it.

c 24. The United Kingdom government, by contrast, argues that car hire contracts are not covered by the exception in art 3(2), firstly because the exception should be narrowly construed and secondly because 'transport' means the provision of transport services and is not limited to the provision of means of transport.

d 25. A difference in treatment from that accorded to passenger transport undertakings is, the government submits, justified. Unlike such undertakings, which require a special licence to transport persons, car hire is subject to no such requirement. In addition, passenger transport services depend on fixed route networks. Moreover, the position of a passenger as regards the possession of a driving licence and the conclusion of an insurance contract is not comparable with that of the driver of a hired car.

e 26. The United Kingdom government further doubts whether car hire services are in a competitive relationship with passenger transport services at all.

f 27. In any event, the government argues that the customer in a distance contract for the provision of car hire services is just as deserving of protection as in other cases covered by the directive.

g 28. The Spanish government argues that the content of a car hire contract is not transport per se. Although the expressions 'suministro/fourniture/provision' in the Spanish, French and English language versions<sup>6</sup> of art 3(2) of the directive might give the misleading impression that they cover the supply of moveable goods, the directive makes a derogation only for the carrying out of transport itself, not the supply of means. That, it argues, is apparent primarily from a comparison of the two indents in art 3(2) and the use which is there made of the term 'supply'.

h 29. The Commission agrees that art 3(2) does not cover car hire contracts. That, it argues, is obvious from the natural interpretation of the word 'transport'. 'Transport', it submits, means the movement of persons or things from one place to another. It thus includes an active element, which is absent in the case of the mere provision of hire cars.

i 30. The Commission further argues that, whilst all derogations concern services for which reservations are made, the aim of the legislature was also to remove from its scope services in respect of which cancellation close to the time of performance would lead to severe consequences for the undertaking providing the service. That risk, it submits, is not present in the case of car hire, since there the vehicle returns to the 'pool' of available vehicles, and thus remains at the disposal of the undertaking.

5 OJ 1983 L105 p 59.

6 In those language versions, these expressions are unclear, in that they can mean either the provision of a service or the supply of goods. Since the German version refers to 'Erbringung' (provision), its wording does not support such a view.



*B—Legal assessment*

31. The question referred concerns the interpretation of the second indent of art 3(2) of the distance contracts directive, and in particular the clarification of the expression 'for the provision of ... transport ... services'.

32. The second indent of art 3(2) excludes contracts for the provision of accommodation, transport, catering or leisure services from the scope of certain provisions of the directive, where the supplier undertakes, when the contract is concluded, to provide these services on a specific date or within a specific period.

33. It thus represents a derogation from the scope of the application of a provision of secondary law, which, according to the consistent case law of the court, is to be interpreted narrowly<sup>7</sup>. That applies in particular in the area of consumer protection<sup>8</sup>, since here in particular it is especially necessary to take account of the protective purpose of the measure in question when interpreting it.

34. With regard to car hire, the uncertainty surrounding the derogation in question arises from the fact that the contracts concerned might be capable of being regarded as contracts for the provision of transport services in that their purpose is the provision of a means of transport. From the wording of that derogation, the question which essentially arises is whether the provision of a means of transport is to be regarded as the provision of transport services. In this context, the purpose of the derogation merits particular attention.

*1. The concept of 'transport' in art 3(2) of the distance contracts directive*

35. The directive itself does not explain the term 'transport', so that, in principle, the term must be interpreted in its context within the directive in accordance with its ordinary meaning<sup>9</sup>.

36. In the common understanding, the characteristic factor in transport is that persons or goods are carried to a place other than the place of departure. It is not sufficient, however, that the carriage is effected by the recipient of the service himself, as in the case of car hire; rather, it is precisely the carriage to another place that naturally belongs to the characteristic duties of the provider of the service. The French government rightly pointed to that circumstance in its oral submissions.

37. In the context of the distance contracts directive, however, a divergent interpretation might arise simply from the fact that some language versions of the derogating provision refer not to 'transport' as such, but generally to a provision of services 'in the area' of transport. Thus the German and Italian versions concern all services 'in den Bereichen ... Beförderung' or 'relativi ai trasporti', whereas the French, Spanish or English versions refer to a provision 'of transport'<sup>10</sup>. It is, however, not excluded, as the Spanish government points out, that the wording of various language versions also allows a broader interpretation.

38. As the Community judicature has consistently held, the different language versions of a Community text must be given a uniform interpretation

<sup>7</sup> See, inter alia, *European Commission v Spain* Case C-83/99 [2001] ECR I-445 (para 19), *Gregg v Customs and Excise Comrs* Case C-216/97 [1999] All ER (EC) 775, [1999] ECR I-4947 (para 12).

<sup>8</sup> See, inter alia, *Heininger v Bayerische Hypo- und Vereinsbank AG* Case C-481/99 [2004] All ER (EC) 1, [2001] ECR I-9945 (para 31), *Veedfald v Århus Amtskommune* Case C-203/99 [2001] ECR I-3569 (para 15).

<sup>9</sup> See *Commission v Spain* (cited in footnote 7, above) (paras 16, 20).

<sup>10</sup> See footnote 6, above.

*a* and hence in the case of divergence between the versions the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms part<sup>11</sup>.

*b* 39. The directive is designed on the one hand to ensure comprehensive protection for consumers, to be accorded in principle in all areas where, on account of the use of distance selling methods, there is an increased need for information. Certain areas, on the other hand, which the legislature assumed would be particularly severely affected by the strict requirements of the distance contracts directive, remain exceptions.

*c* 40. If, for the purposes of interpretation, one considers, for example, the travaux préparatoires to the distance contracts directive and its wording to the effect that the services are to be provided at a certain time or within a certain period, it becomes clear that the essential feature of all the areas excluded by the second indent of art 3(2) is that they concern provisions of services for which reservations are made. The justification lies in the need to protect the provider of services, in particular, from cancellation at short notice of a service that has already been booked<sup>12</sup>.

*d* 41. That is because the dependence of an undertaking on reservations causes it to enter into various commitments, which would expose it to heavy burdens if the counterpart were lacking. In particular, the provider of services undertakes at the time the contract is made to keep a certain capacity free for a certain period. If the recipient does not use that service, the provider must rely at short notice on finding a new recipient, who wishes to receive the same service for exactly the same period. That can prove problematic from the point of view of complying with particular customer wishes in the absence of corresponding flexibility—unlike in the case of the renewed offering for sale of goods or services in respect of which reservation plays no part.

*e* 42. With that objective in mind—namely taking account of the needs of the service provider—the issue is not so much whether the carrying out of the activity in question constitutes transport as such as whether that activity falls within the area of transport and is therefore subject to the same risks as envisaged in the second indent of art 3(2).

*f* 43. Since the decisive factor for the exception is not, therefore, the actual carrying out of transport, one cannot exclude the possibility that the placing of means of transport at the customer's disposal is to be regarded as a service within the area of 'transport' and can therefore fall within the exception in the distance contracts directive.

*g* 2. *The placing of means of transport at the customer's disposal as a service within the area of transport*

*h* 44. easyCar essentially argues that the renting out of vehicles constitutes the placing of means of transport at the customer's disposal, which as a provision of services falls within art 3(2) of the distance contracts directive in just the

*i* 11 See *Plato Plastik Robert Frank GmbH v Caropack Handelsgesellschaft mbH* Case C-341/01 (2004) Transcript (judgment), 29 April (para 64), *Hässle AB v Ratiopharm GmbH* Case C-127/00 [2003] ECR I-14781 (para 70), *Rockfon A/S v Specialarbejderforbundet i Danmark* Case C-449/93 [1996] IRLR 168, [1995] ECR I-4291 (para 28) and *R v Bouchereau* Case 30/77 [1981] 2 All ER 924n, [1977] ECR 1999 (para 14).

12 See the Proposal for a Council Directive on the protection of consumers in respect of contracts negotiated at a distance (distance selling), COM/92/11 final (OJ 1992 C156 p 14). See also the Common Position (EC) 19/95 adopted by the Council on 29 June 1995 with a view to adopting Directive 95/ /EC of the European Parliament and of the Council of ... on the protection of consumers in respect of distance contracts (OJ 1995 C288 p 1).

same way as the provision of actual transport. easyCar refers in that respect to various judgments of the court clarifying the concept of means of transport. a

45. Whether and to what extent those judgments are relevant here, however, is questionable.

The relevance of the existing case law

46. In *Hamann v Finanzamt Hamburg-Eimsbüttel*<sup>13</sup> the court included sailing yachts within the term 'forms of transport' under art 9(2)(d) of the Sixth VAT Directive<sup>14</sup>. b

47. Concerning the place where a taxable provision of services is made, art 9(2) of the Sixth VAT Directive contains, for practical reasons, special determining criteria. The criterion for the hiring out of movable tangible property—the place of use—did not appear practicable in relation to the hiring out of forms of transport, since forms of transport may easily cross frontiers making it difficult, if not impossible, to determine the place where they are used<sup>15</sup>. Accordingly, that determining criterion does not apply to forms of transport. Against that background, the court justified the designation of sailing yachts as 'forms of transport' by reference to the difficulty in determining the place where the yacht was used and need to avoid a situation in which VAT was not payable at all. In making its decision, it relied on factors that can have no relevance for the interpretation of art 3(2) of the distance contracts directive. c  
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48. I come to the same conclusion in relation to the judgments in *ARO Lease BV v Inspecteur van de Belastingdienst Grote Ondernemingen te Amsterdam*<sup>16</sup> and *Lease Plan Luxembourg SA v Belgium*<sup>17</sup>, in which the court—again against the background of the Sixth VAT Directive and for the purpose of determining the place of supply of a service—equated the hiring out of motor vehicles to a hiring out of forms of transport. The same applies to the judgment in *Commission v Spain*<sup>18</sup>, in which the court held, concerning the application of a reduced rate of value added tax, that '[t]he making available of road infrastructure to users on payment of a toll does not consist in the provision of a means of transport but in permitting users who have a vehicle to make a journey in better conditions'. e  
f

49. In conclusion, therefore, solutions worked out by the court in interpreting the Sixth VAT Directive can be used in other contexts only to a very limited extent. Moreover, the question here is not whether car hire can be classified as the placing of a form of transport at the customer's disposal, but rather whether it constitutes a service in the area of transport within the meaning of the distance contracts directive. g

50. Nor can Directive 83/182 and the case law based thereon give any information, since, here also, legislative material with an assessment in tax law is concerned with an area other than consumer protection. h

13 Case 51/88 [1991] STC 193, [1989] ECR 767 (para 15 et seq).

14 Concerning the concept of a motor vehicle in the Sixth VAT Directive: see also, for example, *Royscot Leasing Ltd v Customs and Excise Comrs* Case C-305/97 [1999] All ER (EC) 908, [1999] ECR I-6671 (para 20). i

15 See the judgment cited in footnote 13, above (para 17).

16 Case C-190/95 [1997] STC 1272, [1997] ECR I-4383 (paras 11–14).

17 Case C-390/96 [1998] STC 628, [1998] ECR I-2553 (paras 22, 23).

18 Cited in footnote 7, above (para 21).



a 51. Nor can the expression ‘service in the area of transport’ be derived from general legal rules of First Council Directive (EEC) 80/1263 (on the introduction of a Community driving licence)<sup>19</sup> or the subsequent Council Directive (EEC) 91/439 (on driving licences)<sup>20</sup>, since neither of those directives concern transport; their primary aim is rather the categorisation of individual classes of driving licence.

b 52. It can, it is true, also be deduced from the case law of the court that not all services in the transport sector constitute transport services. When one considers, however, that the issue in *Aéroports de Paris v European Commission*<sup>21</sup> was the classification of services in connection with the running of an airport, that become immediately obvious.

c Conclusions in relation to the interpretation of the distance contracts directive

53. If, therefore, no conclusions can be drawn from the existing case law regarding the interpretation of the distance contracts directive, the concept of transport in art 3(2) of the distance contracts directive requires an independent interpretation, apart from the above-mentioned directives and areas of law.

d That interpretation must accord with the context of the directive and the protective purpose of its provisions.

54. With regard to the derogation, as already emphasised<sup>22</sup>, the most important point to note is that, in accordance with consistent case law, such a provision is to be interpreted narrowly. Due attention must therefore also be paid to the affinity of a form of transport with transport within the meaning of the second indent of art 3(2).

e 55. A rented vehicle is, in principle, suitable for carrying objects and further persons in addition to the driver. A further factor supporting the argument that car rental constitutes a provision of services in the area of transport—at least in the broadest sense—is the purpose in using the rented vehicle as a form of transport. It is true that, in the case of car hire, the hirer has no way of knowing how the vehicles will be used. As easyCar argues with some justification, however, the result of renting a vehicle as an alternative to the use of public transport is that use as a form of transport stands in the foreground.

f 56. Therefore, even if the subject matter of a car hire contract is the placing of means of transport at the customer’s disposal, there is to that extent nevertheless a service in the area of transport. Whether, however—as required here—it constitutes a transport service within the meaning of art 3(2) of the distance contracts directive, essentially depends on the purpose of the relevant derogation from that directive.

g 3. *The purpose of the derogation under art 3(2) of the distance contracts directive*

h 57. It needs to be determined here whether, in accordance with its sense and purpose and taking due account of the consumer protection goals of the directive, the second indent of art 3(2) allows the placing of a form of transport at the customer’s disposal to be regarded as a transport service.

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<sup>19</sup> OJ 1980 L375 p 1.

<sup>20</sup> OJ 1991 L237 p 1.

<sup>21</sup> Case C-82/01 P [2002] ECR I-9297 (para 27).

<sup>22</sup> See para 33, above.

### The sense and purpose of the derogation

58. Even if car hire has the placing of a form of transport at the customer's disposal as its subject matter, the sense of the derogation might nevertheless require that not every such placing is to fall within the exception. That in turn depends upon whether, in the event of the distance contracts directive being applied, the undertaking in question would be exposed to the same particular financial or factual consequences as the other providers of services referred to in the second indent of art 3(2). Only if the undertaking were, through application of the provisions of the distance contracts directive, to be exposed to such consequences can a reduction in consumer protection, corresponding to the compromise apparent in the derogation between consumer protection and the legitimate concerns of undertakings<sup>23</sup>, be justified.

59. As established above<sup>24</sup>, the derogation seeks to protect particular services which have reservation as a precondition and would be affected by the requirements of the distance contracts directive to an unreasonable extent. That occurs where a reservation leads to a setting aside of capacities that can no longer be used in another place and can therefore lead to high opportunity costs on the part of the provider.

### Whether car hire undertakings can be disproportionately burdened

60. A car hire undertaking that concludes all its contracts over the Internet is in principle dependent on a reservation of its services, because only in that way is it capable of making economic use of the vehicles. Even in the case of 'traditional' car hire undertakings, reservation allows a more economic use of the vehicle fleet. That economic consideration does not, however, appear on its own to be decisive, when one considers that, even in the case of hire vehicles which become available at short notice, a profitable bargain can still be made, through so-called last-minute offers, for example. In that case, the provider has a plan at his disposal to combat insufficient utilisation at the last minute. Application of the right to cancel under the distance contracts directive is therefore not in itself sufficient to constitute a disproportionate burdening of the undertakings concerned from the economic standpoint.

61. The essential feature of a disproportionate burden, however, would be an increased organisational effort on the basis of an existing reservation. That will as a rule not be the case with the mere placing of hire cars at customers' disposal, at least not if, for example, the preparation of the vehicle (cleaning, tanking, etc) is in any case carried out on the basis of an additional agreement, as appears to be the case with easyCar.

62. Nor, in principle, is a car hire contract affected by a cancellation in the same way as transport undertakings in general which undeniably fall within the derogation. Although, in the case of car hire also, contracts cancelled at short notice can lead to capacities remaining unused during the reserved period, a transport undertaking, unlike a car hire firm, also has in principle to solve the problem of a suitable redeployment of any staff who are not needed. Independently thereof, a transport undertaking also has to carry increased

<sup>23</sup> This in turn means that a proper interpretation of the derogation in question is not necessarily the 'most consumer-friendly' since the very existence of such an exceptional provision indicates in itself that an appropriate compromise between consumer protection and the legitimate concerns of undertakings is necessary in interpreting this derogation. In striking that compromise, it should be noted that, in the final analysis, innovative services or distribution channels are to be interpreted in favour of consumers.

<sup>24</sup> See paras 40 et seq, above.

a liability risks vis-à-vis transported goods or persons, which cause increased costs. Moreover, the loss of opportunity to use a vehicle from a fleet, as in the case of a car hire contract, is likely to involve less in the way of costs than the carrying out of a transport service with a high proportion of empty capacity.

b 63. Nor does any different result arise from the possibility of there being a relationship of competition between a car hire undertaking and passenger transport undertakings which fall within the derogation of art 3(2) of the distance contracts directive. Whether such a relationship of competition actually exists is immaterial, since, even if it did, account would have to be taken of the fact that non-application of the distance contracts directive to such transport undertakings is justified primarily by the particular demands on the business and its staff, such as special licences, dependence on networks and, in part, a practical obligation to contract, which do not apply to the same extent in the case of car hire.

c 64. It is apparent from all of the above that the service plan of a car hire firm is not unduly affected merely because of the existence of a right to cancel in favour of the consumer.

d 65. A car hire firm could become deserving of protection in principle only if it is itself dependent on an overall plan going beyond the individual undertaking. The proceedings in which this question has arisen concern the car hire firm of easyCar, which forms part of a business plan with many branches (easyJet, easyBus etc). A car hire firm that is bound into an overall business plan, which includes areas falling within the derogation under the distance contracts directive, to such an extent that serious consequences, on account, for example, of essential staff or business identity or on account of mixed offers (flight + hire car), actually feed through to the car hire business could fall within the derogation. Otherwise, the car hire firm would, on account of those consequences, be placed in a worse position than its competitors. In such circumstances, moreover, sufficient consumer protection might be afforded by means of Council Directive (EEC) 90/314 (on package travel, package holidays and package tours)<sup>25</sup>.

f 66. However, the facts underlying this reference do not suggest any such dependence.

g 67. In principle, therefore, none of the above justifies removing or restricting consumer protection in relation to the conclusion of a pure car hire contract through the non-application of provisions of the distance contracts directive, since consumers should above all be supplied with sufficient information in order to be clear in their own minds as to the contents of the contract. Particularly, however, in the case of an undertaking—such as the car hire firm of easyCar concerned by this reference—which makes cost savings on the basis of a high degree of splitting up of component services, an increased duty to provide information is necessary, for example as to which services are included and which are to be booked in addition.

h 68. I would therefore hold that a placing of forms of transport at customers' disposal by a car hire firm on the basis of hire contracts can be excluded from the scope of the directive only if, in the event of the rights contained in the provisions referred to in art 3(2) of the distance contracts directive coming into operation, the hire undertaking would suffer just as severe particular

25 OJ 1990 L158 p 59.



consequences as an undertaking carrying out transport itself. In the case of a 'normal' car hire firm, however, that is in principle not the case. a

#### V—CONCLUSION

69. In the light of the above, I propose that the Court of Justice should reply to the question referred as follows: b

A pure car hire contract does not constitute a 'contract for the provision of ... transport ... services' within the meaning of art 3(2) of European Parliament and Council Directive (EC) 97/7 (on the protection of consumers in respect of distance contracts).

10 March 2005. **THE COURT OF JUSTICE (First Chamber)** delivered the following judgment. c

1. The reference for a preliminary ruling concerns the interpretation of art 3(2) of European Parliament and Council Directive (EC) 97/7 (on the protection of consumers in respect of distance contracts) (OJ 1997 L144 p 19) (hereinafter the directive).

2. The reference was made in the context of a dispute between the company easyCar (UK) Ltd (hereinafter easyCar) and the Office of Fair Trading (hereinafter the OFT) concerning the terms and conditions of the car hire contracts offered and concluded by easyCar. d

#### LAW e

##### *Community legislation*

3. The object of the directive, as stated in art 1, is to harmonise the provisions applicable in the member states to distance contracts between consumers and suppliers.

4. Under art 3(2) of the directive, arts 4, 5, 6 and 7(1) of the directive do not apply— f

'... to contracts for the provision of accommodation, transport, catering or leisure services, where the supplier undertakes, when the contract is concluded, to provide these services on a specific date or within a specific period ...'

5. Article 6(1) of the directive provides, in respect of distance contracts, for a right of withdrawal for the consumer. Under art 6(2), where the right of withdrawal has been exercised, the supplier must reimburse the sums paid by the consumer free of charge, except for the cost of returning the goods. g

##### *National legislation h*

6. The directive was transposed into United Kingdom law by the Consumer Protection (Distance Selling) Regulations 2000, SI 2000/2334 (the national regulations).

7. The exemption referred to in art 3(2) of the directive was transposed into national law by reg 6(2).

8. The right of withdrawal provided for in art 6(1) of the directive was transposed into national law by reg 10, and the obligation under art 6(2) to reimburse by reg 14. i

9. Regulation 27 of the national regulations authorises the OFT to apply for an injunction against any person who appears to it to be responsible for a breach.

a THE MAIN PROCEEDINGS AND THE QUESTION REFERRED FOR A PRELIMINARY RULING

10. easyCar is a self-drive car hire undertaking. It operates in the United Kingdom and in several other member states. The company's customers can book cars offered for hire only via the Internet. Under the terms and conditions of the car hire contract offered and concluded by easyCar, a customer cannot

b obtain a refund of sums paid if that contract is cancelled, except in 'unusual and unforeseeable events beyond [his] control including ... serious illness of the driver which results in the driver being unfit to drive; natural disaster ... acts or restraints of governments or public authorities; war, riot, civil commotion or acts of terrorism' or 'at the discretion of our Customer Service Manager in other extreme circumstances'.

c 11. In the view of the OFT, which received a number of complaints from consumers relating to hire contracts which they had concluded with easyCar, the terms and conditions of those contracts infringe regs 10 and 14, which provide, for the purpose of implementing the directive, for a right of withdrawal, together with full reimbursement of sums paid by the consumer, within a specific period after the conclusion of the contract.

d 12. easyCar submits that the hire contracts which it offers are covered by the exemption laid down for 'contracts for the provision of ... transport ... services' within the meaning of reg 6(2) of the national regulations and art 3(2) of the directive, and that it is therefore not subject to the requirements of regs 10 and 14. The OFT, on the other hand, contends that car hire cannot be

e characterised as a 'transport service'.

13. Both easyCar and the OFT brought proceedings before the High Court of Justice of England and Wales, Chancery Division. easyCar sought a declaration that its rental agreements are exempted from the right of withdrawal provided for by the national regulations, whereas the OFT sought an injunction to restrain easyCar from infringing the national regulations by refusing to offer its

f customers the right to withdraw and to receive a refund of sums paid.

14. It was in those circumstances that the High Court of Justice of England and Wales, Chancery Division, decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

g 'Does the term "contracts for the provision of ... transport ... services", in Article 3(2) of [the directive], include contracts for the provision of car hire services?'

THE APPLICATION FOR REOPENING OF THE ORAL PROCEDURE

h 15. By application lodged at the Registry of the Court of Justice on 13 December 2004, easyCar sought the reopening of the oral procedure.

16. In that regard, it should be recalled that the court may order that the oral procedure be reopened, in accordance with art 61 of its Rules of Procedure, if it considers that it lacks sufficient information, or that the case must be dealt with on the basis of an argument which has not been debated between the parties (see *Deutsche Post AG v Sievers* Joined cases C-270/97 and C-271/97 [2000] ECR I-929 (para 30) and *Philips Electronics NV v Remington Consumer Products Ltd* Case C-299/99 [2002] All ER (EC) 634, [2002] ECR I-5475 (para 20)).

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17. The court considers that there is no need in this case to order the reopening of the oral procedure. Consequently, the application for a reopening must be rejected.

## THE QUESTION REFERRED FOR A PRELIMINARY RULING

18. The order for reference indicates that it is common ground between the parties that the contracts concluded between easyCar and its customers are distance contracts within the meaning of the national regulations and of the directive, and that they constitute contracts for the provision of services. By its question, the national court seeks, in essence, to ascertain whether car hire services are transport services for the purposes of art 3(2) of the directive. a

19. easyCar submits that this question should be answered in the affirmative. The Spanish, French and United Kingdom governments and the Commission of the European Communities maintain the opposite view. b

20. In that regard, it must be stated from the outset that neither the directive nor the documents relevant for its interpretation, such as the travaux préparatoires, provide clarification of the exact scope of the concept of 'transport services' mentioned in art 3(2) of the directive. Similarly, the general scheme of the directive shows only that its objective is to entitle consumers to extensive protection by conferring on them certain rights, including the right of withdrawal, and that art 3(2) provides for an exemption from those rights in four closely-related sectors of economic activity, including that of transport services. c

21. It is settled case law that the meaning and scope of terms for which Community law provides no definition must be determined by considering their usual meaning in everyday language, while also taking into account the context in which they occur and the purposes of the rules of which they are part (see *Hönig v Stadt Stockach* Case C-128/94 [1995] ECR I-3389 (para 9) and *DIR International Film Srl v European Commission* Case C-164/98 P [2000] ECR I-447 (para 26)). When those terms appear, as in the main proceedings, in a provision which constitutes a derogation from a principle or, more specifically, from Community rules for the protection of consumers, they must, in addition, be interpreted strictly (see *European Commission v Spain* Case C-83/99 [2001] ECR I-445 (para 19) and *Heininger v Bayerische Hypo- und Vereinsbank AG* Case C-481/99 [2004] All ER (EC) 1, [2001] ECR I-9945 (para 31)). d

22. So far as the term 'transport services' is concerned, it must be held that it represents, like each of the other categories of services listed, a sectoral exemption and that it therefore relates generally to services in the transport sector. e

23. When the provisions on the exemption at issue in the main proceedings were drafted the legislature did not opt for the term 'contracts of carriage' commonly used in the legal systems of the member states, which relates only to carriage of passengers and goods performed by the carrier, but for the distinctly broader term 'contracts for the provision of ... transport ... services', which can cover all contracts governing services in the field of transport, including those involving an activity which does not include, as such, the carriage of the customer or his goods, but which is aimed at enabling the customer to perform that carriage. f

24. The wording of art 3(2) of the directive thus demonstrates that the legislature intended to define the exemption laid down in that provision, not according to the type of contract, but in such a way that all contracts for the provision of services in the accommodation, transport, catering and leisure sectors come within the scope of that exemption, with the exception of those the performance of which is not due on a specific date or within a specific period. g

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- a 25. That interpretation is expressly supported by several language versions of art 3(2) of the directive, namely the German, Italian and Swedish versions, which mention, respectively, 'Dienstleistungen in den Bereichen ... Beförderung' ('services in the transport sector'), 'servizi relativi ... ai trasporti' ('services relating to transport') and 'tjänster som avser ... transport' ('services which concern transport').
- b 26. In everyday language, 'transport' refers not only to the action of moving persons or goods from one place to another, but also to the mode of transport and to the means used to move those persons and goods. Making a means of transport available to the consumer is thus one of the services involved in the transport sector.
- c 27. Consequently, without exceeding the strict scope of the sectoral exemption relating to 'transport services', provided for in art 3(2) of the directive, it must be held that that exemption covers car hire services, the essential nature of which is precisely the making available to the consumer of a means of transport.
- d 28. In addition, so far as concerns the context in which the concept of 'transport services' is used and the objectives pursued by the directive, it is established, as Advocate General Stix-Hackl noted in paras 39–41 of her opinion, that the intention of the legislature was to institute protection for the interests of consumers who use means of distance communication, but also protection for the interests of suppliers of certain services, in order that the latter should not suffer the disproportionate consequences arising from the cancellation at no expense and with no explanation of services which have given rise to a booking. In that regard, easyCar rightly maintains, without, moreover, being contradicted on this point either by the governments which submitted observations to the court or by the Commission, that art 3(2) of the directive is aimed at exempting suppliers of services in certain sectors on the ground that the requirements of the directive could affect those suppliers disproportionately, in particular where a service has given rise to a booking and that booking is cancelled by the consumer at short notice before the date specified for the provision of that service.
- e 29. Clearly, car hire undertakings carry on an activity which the legislature intended to protect against such consequences by means of the exemption laid down in art 3(2) of the directive. Those undertakings must make arrangements for the performance, on the date fixed at the time of booking, of the agreed service and therefore, for that reason, suffer the same consequences in the event of cancellation as other undertakings operating in the transport sector or in the other sectors listed in art 3(2).
- f 30. It follows from the foregoing considerations that the interpretation to the effect that car hire services are transport services for the purposes of art 3(2) of the directive is the only one which ensures that the exemption laid down in that provision has the character of a sectoral exemption and which enables the objective pursued by that provision to be achieved.
- g 31. The answer to the question referred must therefore be that art 3(2) of the directive is to be interpreted as meaning that 'contracts for the provision of transport services' includes contracts for the provision of car hire services.
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#### COSTS

32. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is

a matter for that court. Costs incurred in submitting observations to the court, other than the costs of those parties, are not recoverable. a

On those grounds, the Court of Justice (First Chamber) hereby rules:

Article 3(2) of European Parliament and Council Directive (EC) 97/7 (on the protection of consumers in respect of distance contracts) is to be interpreted as meaning that 'contracts for the provision of transport services' includes contracts for the provision of car hire services. b

*a* **Ferriere Nord SpA v European Commission**

(Case T-176/01)

*b* COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES (FOURTH CHAMBER, EXTENDED COMPOSITION)

JUDGES LEGAL (PRESIDENT), TIILI, MEIJ, VILARAS AND FORWOOD

15 JANUARY, 18 NOVEMBER 2004

*c* *European Community – State aids – Aid for environmental protection – Member state notifying Commission of proposed measure to assist undertaking's investment in technologically innovative manufacturing plant – New plant reducing polluting and noise emissions – Commission declaring proposed measure incompatible with common market – Commission concluding that proposed investment for economic and industrial purposes, and that environmental benefits inherent in process – Whether undertaking pursuing environmental objectives.*

*d*

The Italian competent authorities notified the Commission of the European Communities of its intention to grant the applicant undertaking, which was situated in Italy and which operated in the steel, mechanical and metallurgical sector, a financial contribution for investment in continuous flow plant and in new rolling line, which was technologically innovative and which would reduce polluting and noise emissions. However, in respect of that proposed aid measure, the Commission adopted Commission Decision (EC, ECSC) 2001/829 (on the state aid which Italy is planning to grant to Ferriere Nord SpA), by which it declared the financial assistance to be incompatible with the common market and not to be implemented. The Commission held, so far as relevant: (i) that the undertaking's investment in the plant had not been based on environmental objectives, but economic and industrial purposes, which precluded the grant of aid for environmental protection; and (ii) that environmental protection advantages were inherent in the process and could not be isolated from the total cost of the investment, as was required by the Community guidelines on state aid for environmental protection (OJ 2001 C 37 p 3). Maintaining, inter alia, that its investment had pursued an environmental objective which rendered it eligible on that basis for aid for environmental protection, the applicant sought annulment of the decision. In particular, it was submitted that the Commission had failed to take into account the environmental purpose of the project and had considered, arbitrarily, that the purpose of the investment was predominantly economic, whereas the objective of the new process had specifically been to make the production system ecological—while it was logical that the new plant should be more economically efficient than the old plant, the former rolling line had remained satisfactory in functional and technological terms and it had been replaced by innovative equipment in order to eliminate the disadvantages which the old process had represented for the environment.

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**Held** – Where a project pursued a partially environmental objective, in order for assisted investment to be justified as state aid for environmental protection, it had to be demonstrable that the same economic performance might be



obtained using less costly, but more economically harmful equipment. Having regard to the scheme of the guidelines, it was clear that only an additional investment cost linked with environmental protection was eligible for state aid. Such eligibility assumed that economic considerations were not in themselves sufficient to justify the investment in the form chosen. Although a project might have an objective of improving economic productivity whilst at the same time an objective of environmental protection, the existence of the second objective was not to be inferred from the mere finding that the new equipment had a less negative impact on the environment than the old equipment, which might be merely a collateral effect of a change in technology for economic purposes or of the renewal of used equipment. It followed that the instant case did not depend on whether the investment brought environmental improvements or whether it went beyond existing standards, but, primarily on whether the investment was being carried out in order to bring about such improvements. In that regard, it was apparent that the applicant had equipment which it wished to replace by a plant using a technologically innovative process incorporating the performance for environmental protection of any modern equipment. The inevitable conclusion was, therefore, that the investment had followed on from a decision of the undertaking to modernise its production equipment and that it would in any event have been in that form. Accordingly, the Commission had not made an error of assessment by taking the view that it had not been established that the investment had a genuinely environmental purpose. In any event, the decision had stated that the cost of the investment intended to protect the environment could not be isolated from the total cost of the operation, which finding was not superfluous, since, if the project chosen entailed an additional cost by comparison with a different, hypothetical, project offering the same economic performance in less environmentally favourable conditions, it might be inferred that the investment had an environmental object. Accordingly, the Commission had lawfully declared the aid incompatible with the common market and there was no reason to annul the decision (see judgment paras 147, 151, 152, 155–157, 163, 164, below).

## Notes

For competition and state aids generally, see 47 *Halsbury's Laws* (4th edn) (2001 reissue) para 439.

## Cases cited

- Associação dos Refinadores de Açúcar Portugueses (ARAP) v European Commission* Case C-321/99 P [2002] ECR I-4287, ECJ.
- Belgium v EC Commission* Case 234/84 [1986] ECR 263, ECJ.
- ESF Elbe-Stahlwerke Feralpi GmbH v European Commission* Case T-6/99 [2001] ECR II-1523, CFI.
- Förde-Reederei GmbH v EU Council* Case T-170/00 [2002] ECR II-515, CFI.
- France v European Commission* Case C-17/99 [2001] ECR I-2481, ECJ.
- Germany v EC Commission* Case 84/82 [1984] ECR I-1451, ECJ.
- GruSa Fleisch GmbH & Co KG, Import-Export (Firma) v Hauptzollamt Hamburg-Jonas* Case C-34/92 [1993] ECR I-4147, ECJ.
- Italy v European Commission* Case C-400/99 [2001] ECR I-7303, ECJ.
- Italy v European Commission* Case C-47/91 [1994] ECR I-4635, ECJ.
- Keller SpA v European Commission* Case T-35/99 [2002] ECR II-261, CFI.

- a* *Koinopraxia Enoseon Georgikon Synetairismon Diacheiriseos Enchorion Proionton Syn PE v European Commission* Case C-146/91 [1994] ECR I-4199, ECJ.  
*Licata v Economic and Social Committee* Case 270/84 [1986] ECR 2305, ECJ.  
*Lorenz (Gebr) GmbH v Germany* Case 120/73 [1973] ECR 1471, ECJ.  
*Oleifici Mediterranei (SA) v European Economic Community* Case 26/81 [1982] ECR 3057, ECJ.
- b* *Regione Siciliana v European Commission* Case T-190/00 (2003) Transcript (judgment), 27 November, CFI.  
*Saldanha v Hiross Holding AG* Case C-122/96 [1998] All ER (EC) 238, [1997] ECR I-5325, ECJ.  
*Scan Office Design SA v European Commission* Case T-40/01 [2002] ECR II-5043, CFI.
- c* *Société française de Biscuits Delacre v EC Commission* Case C-350/88 [1990] ECR I-395, ECJ.  
*Spain v EC Commission* Joined cases C-278–280/92 [1994] ECR I-4103, ECJ.  
*Spain v European Commission* Case C-113/00 [2002] ECR I-7601, ECJ.  
*Spain v European Commission* Case C-114/00 [2002] ECR I-7657, ECJ.
- d* *Spain v European Commission* Case C-351/98 [2002] ECR I-8031, ECJ.  
*Thai Bicycle Industry & Co Ltd v EU Council* Case T-118/96 [1998] ECR II-2991, CFI.  
*Westdeutsche Landesbank Girozentrale v European Commission* Joined cases T-228/99 and T-233/99 [2003] ECR II-435, CFI.

### *e* Application

- By application lodged on 13 July 2001 at the Registry of the Court of First Instance of the European Communities, Ferriere Nord SpA (Ferriere), an undertaking in the steel, mechanical and metallurgical industrial sector established in Osoppo, Italy, brought the present action on the basis of the fourth paragraph of art 230 EC (formerly art 173 of the EC Treaty), art 235 EC (formerly art 178 of the EC Treaty) and the second paragraph of art 288 EC (formerly art 215 of the EC Treaty) for, first, annulment of Commission Decision (EC, ECSC) 2001/829 (on the state aid which Italy is planning to grant to Ferriere Nord SpA) and, second, compensation for the harm allegedly sustained by the applicant following the adoption of that decision. Ferriere was represented by W Viscardini Donà and G Donà, lawyers. Ferriere was supported by the Italian Republic, represented initially by U Leanza, acting as agent, and subsequently by I Braguglia and M Fiorilli, Avvocati dello Stato, with an address for service in Luxembourg. The Commission of the European Communities was represented by V Kreuschitz and V Di Bucci, acting as agents, with an address for service in Luxembourg. The language of the case was Italian. The facts are set out in the judgment of the court.

18 November 2004. **THE COURT OF FIRST INSTANCE (Fourth Chamber, Extended Composition)** delivered the following judgment.

### LEGAL FRAMEWORK

- i* 1. Article 87 EC (formerly art 92 of the EC Treaty) provides that, save as otherwise provided, state aid is incompatible with the common market in so far as it affects trade between member states and is anti-competitive in that it favours certain undertakings or the production of certain goods.
2. Article 88 EC (formerly art 93 of the EC Treaty) governs co-operation between the Commission of the European Communities and the member

states as regards examination of existing aid systems and new aid systems. It authorises the Council of the European Communities to act in the event of aid which is incompatible with the common market and determines the powers of the Council.

3. Article 174 EC (formerly art 130r of the EC Treaty) provides that Community policy on the environment is to have as its objectives, *inter alia*, the protection and improvement of the quality of the environment and the protection of human health.

4. Article 7(6) of Council Regulation (EC) 659/1999 (laying down detailed rules for the application of art [88 EC]) (OJ 1999 L83 p 1), on the decisions taken by the Commission to close the formal examination procedure, provides:

‘... The Commission shall as far as possible endeavour to adopt a decision within a period of 18 months from the opening of the procedure. This time limit may be extended by common agreement between the Commission and the Member State concerned.’

5. Article 6 of Commission Decision (ECSC) 2496/96 (establishing Community rules for state aid to the steel industry) (OJ 1996 L338 p 42), which was applicable until 22 July 2002, provided, in respect of the procedure:

‘1. The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid of the types referred to in Article 2 to 5. It shall likewise be informed of plans to grant aid to the steel industry under schemes on which it has already taken a decision under the EC Treaty ...

2. The Commission shall be informed, in sufficient time for it to submit its comments, and by 31 December 2001 at the latest, of any plans for transfers of State resources by Member States, regional or local authorities or other bodies to steel undertakings in the form of acquisition of shareholdings, provisions of capital, loan guarantees, indemnities or similar financing ...

5. If the Commission considers that a certain financial measure may represent State aid within the meaning of Article 1 or doubts whether a certain aid is compatible with the provisions of this Decision, it shall inform the Member State concerned and give notice to the interested parties and other Member States to submit their comments. If, after having received the comments and after having given the Member State concerned the opportunity to respond, the Commission finds that the measure in question is an aid incompatible with the provisions of this Decision, it shall take a decision not later than three months after receiving the information needed to assess the proposed measure. Article 88 of the [ECSC] Treaty shall apply in the event of a Member State’s failing to comply with that decision.

6. If the Commission fails to initiate the procedure provided for in paragraph 5 or otherwise to make its position known within two months of receiving full notification of a proposal, the planned measures may be put into effect provided that the Member State first informs the Commission of its intention to do so ...’

6. The Community guidelines on state aid for environmental protection (OJ 1994 C72 p 3; the 1994 guidelines), the period of validity of which expired on 31 December 1999 and was twice extended, until 30 June 2000 (OJ 2000 C14 p 8) and then until 31 December 2000 (OJ 2000 C184 p 25), were applicable in



a all the sectors governed by the EC Treaty, including those subject to specific Community rules on state aid (point 2). Those guidelines (at point 3) stated the conditions for the application of the rules on state aid, in particular for investment aid:

b '3.2.1. Aid for investment in land (when strictly necessary to meet environmental objectives), buildings, plant and equipment intended to reduce or eliminate pollution and nuisances or to adapt production methods in order to protect the environment may be authorised within the limits laid down in these guidelines. The eligible costs must be strictly confined to the extra investment costs necessary to meet environmental objectives. General investment costs not attributable to environmental protection must be excluded. Thus, in the case of new or replacement plant, the cost of the basic investment involved merely to create or replace production capacity without improving environmental performance is not eligible ... In any case aid ostensibly intended for environmental protection measures but which is in fact for general investment is not covered by these guidelines.'

d 7. Point 3 of the 1994 guidelines also defined the special conditions for authorisation of aid to help firms to adapt to new mandatory standards or to improve on mandatory environmental standards and also the conditions for the grant of aid in the absence of mandatory standards.

e 8. The Community guidelines on state aid for environmental protection (OJ 2001 C37 p 3; the 2001 guidelines), which replaced the 1994 guidelines, provide at point 7 that they apply to aid to protect the environment in all sectors governed by the EC Treaty, including those subject to specific Community rules on state aid.

f 9. As regards the reference to environmental standards, points 20 and 21 of the 2001 guidelines state that if environmental requirements are to be taken into account in the long term, prices must accurately reflect costs and environmental protection costs must be fully internalised; accordingly, the Commission takes the view that the grant of aid is no longer justified in the case of investment designed merely to hold firms to comply with existing or new Community technical standards, except in favour of small and medium-sized enterprises (SMEs) in order to enable them to adapt to new Community standards, and that it may prove a useful incentive for firms to achieve levels of protection higher than those required by Community standards.

g 10. As regards the investments taken into consideration, point 36 (first sentence) of the 2001 guidelines states:

h 'The investments concerned are investments in land which are strictly necessary in order to meet environmental objectives, investments in buildings, plant and equipment intended to reduce or eliminate pollution and nuisances, and investments to adapt production methods with a view to protecting the environment.'

i 11. As regards the eligible costs, point 37 provides, in the first three paragraphs:

'Eligible costs must be confined strictly to the extra investment costs necessary to meet the environmental objectives.'

This has the following consequences: where the cost of investment in environmental protection cannot be easily identified in the total cost, the

Commission will take account of objective and transparent methods of calculation, e.g. the cost of a technically comparable investment that does not though provide the same degree of environmental protection.

In all cases, eligible costs must be calculated net of the benefits accruing from any increase in capacity, cost savings engendered during the first five years of the life of the investment and additional ancillary production during that five-year period.'

12. The 2001 guidelines state that they are to become applicable when they are published in the Official Journal of the European Communities (point 81), which they were on 3 February 2001. Furthermore, point 82 of those guidelines states:

'The Commission will apply these guidelines to all aid projects notified in respect of which it is called upon to take a decision after the guidelines are published in the Official Journal, even where the projects were notified prior to their publication ...'

#### BACKGROUND TO THE DISPUTE

13. In 1978 the Italian Autonomous Region of Friuli-Venezia Giulia adopted a number of measures designed to encourage the initiatives of industrial undertakings for environmental protection. The scheme in question, which results from art 15(1) of Regional Law No 47 of 3 June 1978, was amended by art 7 of Regional Law No 23 of 8 April 1982 and then by art 34 of Regional Law No 2 of 20 January 1992. It was approved by the Commission (letter SG (92) D/18803 of 22 December 1992) and definitively adopted by Regional Law No 3 of 3 February 1993. Article 15(1) of Regional Law No 47 of 3 June 1978, as amended most recently by Regional Law No 3 of 3 February 1993, provides:

'The regional administration is authorised to grant to industrial undertakings which have been in operation for at least two years and which propose to introduce or alter processes and production plant in order to reduce the quantity or danger of discharges, waste and emissions produced or noise nuisance or to improve the quality of working conditions, in accordance with the new standards fixed by the legislation applicable to the sector, financial assistance up to a maximum of 20% in equivalent gross subsidy of the costs considered eligible.'

14. In 1998, the Italian Autonomous Region of Friuli-Venezia Giulia voted for new credits to finance the aid scheme approved by the Commission in 1992. Article 27(c)(16) of Regional Law No 3 of 12 February 1998 on the refinancing of Regional Law No 2 of 20 January 1992 provided budget credits of ITL 4,500m per annum for the period 1998–2000. That refinancing measure was approved by Commission Decision SG (98) D/7785 of 18 September 1998.

15. Ferriere Nord SpA (Ferriere) is an undertaking in the steel, mechanical and metallurgical industrial sector, situated in Osoppo, in the Autonomous Region of Friuli-Venezia Giulia. It makes steel products, some of which come under the ECSC Treaty while others come under the EC Treaty. The undertaking, which is one of the main European producers of electro-welded mesh, had a turnover of €210,800,000 in 1999; of this, 84% was in Italy, 11% in the rest of the European Union and 5% in the rest of the world.

16. By letter of 26 March 1997, Ferriere requested the Autonomous Region of Friuli-Venezia Giulia to make a financial contribution, under art 15 of

a Regional Law No 47 of 3 June 1978, as amended, in order to ... a new plant for the production of electrowelded mesh, which was technologically innovative and of such a kind as to reduce polluting and noise emissions and to improve working conditions. The total investment came to ITL 20,000m.

b 17. By Regional Decree of 8 October 1998, the Autonomous Region of Friuli-Venezia Giulia decided to grant Ferriere a contribution equal to 15% of the admissible cost, namely ITL 1,650,000,000 (€852,154).

c 18. By letter dated 18 February 1999, received by the Commission's Directorate-General 'Competition' on 25 February, the Italian authorities notified the Commission, in the context of the procedure for systematic notification of projects involving the transfer of public resources for the benefit of steel industries provided for in art 6(1) and (2) of Decision 2496/96, of their intention to grant the steel undertaking Ferriere state aid for environmental protection, in application of Regional Law No 47 of 3 June 1978, as amended.

d 19. The notification related to state aid for investment in continuous flow plant and in a new rolling line for welded steel mesh. Payment of the aid in respect of the second investment was suspended by the Italian authorities in order to prevent the problems which might arise if it had to be reimbursed pursuant to a Community decision finding it incompatible with the common market.

e 20. By letter of 3 June 1999, the Commission informed the Italian Republic that it had decided to initiate the procedure provided for in art 6(5) of Decision 2496/96 concerning aid C 35/99—Italy—Ferriere Nord (OJ 1999 C288 p 39).

f 21. The Italian authorities informed the Commission, by letter of 3 August 1999 from the Autonomous Region of Friuli-Venezia Giulia to the Permanent Representation of Italy to the European Union, that the investment in respect of the rolling line fell within the scope of the EC Treaty, since the welded steel mesh manufactured with that equipment is not an ECSC product; that it satisfied objectives aimed at protecting health and the environment; and that the measure came within the framework of point 3.2.1 of the 1994 guidelines.

g 22. Ferriere and the European Independent Steelworks Association (EISA), by letters of 5 and 4 November 1999 respectively, also claimed that the relevant legal framework for the purposes of examining the aid measure was the EC Treaty.

h 23. By letter of 25 July 2000, the Italian authorities informed the Commission that, at Ferriere's request, they were withdrawing the part of the notification relating to the ECSC investment in respect of the continuous flow plant and confirmed the part of the notification relating to the investment in respect of the rolling line, which concerned non-ECSC steel products; and they requested the Commission to make a determination under art 88(3) EC concerning the compatibility of the project with the common market.

i 24. By letter of 14 August 2000, the Commission informed the Italian Republic that it had decided to initiate the procedure provided for in art 88(2) EC concerning aid C 45/00—Italy—Ferriere Nord SpA, towards investments in a new rolling line for welded steel mesh (OJ 2000 C315 p 4). The Commission stated, *inter alia*, in that decision that as Ferriere was an undertaking which did not keep separate accounts for its activities according to whether they came under the ECSC Treaty or the EC Treaty, it had to ensure that the aid did not benefit the ECSC activities.

25. Ferriere submitted its comments in a letter of 13 November 2000, in which it emphasised the separation between its ECSC activities and its EC activities and stressed the importance of the environmental objective of



its investment, stating that the aid came within the scheme approved in 1992 and that it was consistent with point 3.2.1 of the 1994 guidelines. a

26. By letter to the Commission of 4 December 2000, the United Kingdom Iron and Steel Association stated that the aid should be examined from the aspect of the ECSC provisions and that the proposed investment had a manifestly economic purpose.

27. In a letter dated 15 January 2001, the Italian Republic confirmed that the aid should be assessed in the light of the EC Treaty. b

28. On 28 March 2001, the Commission adopted Decision (EC, ECSC) 2001/829 (on the state aid which Italy [was] planning to grant to Ferriere Nord SpA) (OJ 2001 L310 p 22; the contested decision).

29. The Commission states in the contested decision that the welded mesh, which will be manufactured in a separate unit of the undertaking using the new rolling line, is not an ECSC product and that the aid must therefore be assessed in the light of the EC Treaty. It states that the proposed financial assistance constitutes state aid. c

30. The Commission considers that the investment, which is intended to improve the undertaking's competitiveness and to replace old equipment, is essentially based on economic reasons, that it would have been made in any event and that it does not justify the grant of aid for environmental protection. Its positive effects, from the point of view of environmental protection and working conditions, would be inherent in a new plant. The Commission observes that, in the absence of mandatory ecological standards requiring the construction of the new rolling line, the aid cannot be regarded as an individual application of a scheme which has already been approved. Last, it states that, on the assumption that the environmental purpose was predominant, it would not be possible to distinguish, within the total cost of the investment, the part attaching to environmental protection, as required by the 2001 guidelines. d

31. Consequently, the Commission declares that the aid is incompatible with the common market and cannot be implemented. It orders the Italian Republic to comply with that decision. It terminates the procedure initiated in respect of aid C 35/99—Italy—Ferriere Nord (see para 20, above). e

#### PROCEDURE

32. By application lodged at the Registry of the Court of First Instance on 13 July 2001, Ferriere brought the present action on the basis of the fourth paragraph of art 230 EC (formerly art 173 of the EC Treaty), art 235 EC (formerly art 178 of the EC Treaty) and the second paragraph of art 288 EC (formerly art 215 of the EC Treaty). g

33. On 22 November 2001, the Italian Republic sought leave to intervene in support of the form of order sought by the applicant. By order of 14 January 2002, the President of the First Chamber, Extended Composition, granted that application. h

34. By decision of the Court of First Instance of 2 July 2003 (OJ 2003 C184 p 32), the Judge-Rapporteur was assigned, for the period 1 October 2003–31 August 2004, to the Fourth Chamber, Extended Composition, to which the case was consequently reallocated. i

35. By a measure of organisation of procedure notified to the parties on 28 October 2003, the court requested the Commission and the Italian Republic to produce certain legislative and administrative documents concerning the aid scheme approved in 1992 and to state whether it had subsequently been

a amended. The applicant was also requested to indicate the factors which in its view made it possible to isolate the investment cost associated with environmental protection.

36. By letters of 26 November 2003, the parties answered the court's requests.

b 37. The parties presented oral argument and their answers to the questions put by the court at the hearing on 15 January 2004.

#### FORMS OF ORDER SOUGHT BY THE PARTIES

38. Ferriere claims that the court should:

—annul the contested decision;

c —order the Commission to make good the harm caused to the applicant by that decision, together with interest at the statutory rate applicable in Italy and a sum taking account of monetary revaluation, both to be calculated on the amount of the aid as from 26 April 1999;

—order the Commission to pay the costs.

d 39. The Italian Republic claims that the court should annul the contested decision.

40. The Commission contends that the court should:

—dismiss the action;

—order the applicant to pay the costs.

#### THE LAWFULNESS OF THE CONTESTED DECISION

e 41. In support of its action, Ferriere puts forward both procedural pleas and substantive pleas.

##### *Procedure*

f 42. The applicant develops six procedural pleas, alleging that the Commission was not lawfully entitled to initiate the formal aid examination procedure, that it did not observe the procedural time limits and that it breached the rights of the defence, the principle of protection of legitimate expectations, the principle of sound administration and its obligation to state the reasons for its decision.

g *First plea: the Commission was not lawfully entitled to initiate the formal aid examination procedure*

—Arguments of the parties

h 43. Ferriere maintains that the Commission unlawfully initiated the formal procedure, first on 3 June 1999 and then a second time on 14 August 2000, as the aid constitutes a measure for the application of the authorised scheme. The Commission should have closed the file, notified in error, after declaring that it was compatible with the approved scheme. The initiation of the formal procedure in the circumstances of the present case thus constitutes a breach of the principles of protection of legitimate expectations and legal certainty.

i 44. The Italian Republic, which alleges misuse of powers, claims that the Commission should have merely taken note of the notification and not examined it as an individual aid.

45. The Commission contends that it was justified in initiating the formal examination procedure. First, it states that the Italian authorities notified the aid at the request of the Autonomous Region of Friuli-Venezia Giulia, since the aid was not considered to be covered by the approved scheme; that, in the second notification, of 25 July 2000, the Italian government asked it to adopt a

position on a plan to grant new aid within the meaning of art 88(3) EC; and that, since it was not maintained that the aid was covered by the approved scheme, it had no reason to carry out further investigations. Second, when notifying the aid, the Italian authorities stated that there were no mandatory standards, contrary to the requirements of the approved scheme. The Commission further contends that, after finding, following verification, that the planned aid was not covered by an existing scheme, it then examined it in the light of the legislation in force.

—Findings of the court

46. It is not in dispute that two decisions to initiate the formal procedure were notified to the Italian authorities, on 3 June 1999 and 14 August 2000.

47. It follows from the Commission's letter of 22 December 1992, referred to at para 13, above, approving the aid scheme in favour of environmental protection proposed by the Autonomous Region of Friuli-Venezia Giulia, that the Commission determined the matter within the framework of the provisions of the EC Treaty, under which the scheme in question had been notified to it by the Italian authorities on 23 January 1992, and not within the framework of the ECSC Treaty.

48. Also, in accordance with the requirements of art 6(1) of Decision 2496/96, which provides that the Commission is to be informed of plans to grant aid in respect of which it has already taken a decision under the EC Treaty, the Italian authorities on 18 February 1999 notified the planned aid in favour of environmental protection which they intended to grant to the applicant. The information given in that notification, to the effect that the aid was granted pursuant to Regional Law No 47 of 3 June 1978, as amended by Regional Law No 2 of 2 January 1992, 'notified at the time to the European Community with a favourable outcome', is immaterial, since approval had been given in the context of the EC Treaty and in such circumstances the above-mentioned provisions of Decision 2496/96 required the member state to notify planned aid covered by the ECSC Treaty.

49. Upon being notified of such planned aid, the Commission, when it had doubts as to its compatibility with the provisions of Decision 2496/96 on aid to the steel industry, could lawfully, pursuant to art 6(5) of that decision, cited at para 5, above, initiate the formal procedure, as it did on 3 June 1999.

50. Ferriere cannot therefore maintain that the Commission initially acted unlawfully in initiating the formal procedure.

51. As regards the second initiation of the formal procedure, it should be borne in mind that, when the Commission has before it a specific grant of aid alleged to have been made in pursuance of a previously authorised scheme, it cannot at the outset examine it directly in relation to the Treaty. Prior to the initiation of any procedure, it must first examine whether the aid is covered by the general scheme and satisfies the conditions laid down in the decision approving it. If it did not do so, the Commission could, whenever it examined an individual aid measure, go back on its decision approving the aid scheme, which had already involved an examination in the light of art 87 EC. This would jeopardise the principles of the protection of legitimate expectations and legal certainty. Aid which constitutes the strict and foreseeable application of the conditions laid down in the decision approving the general aid scheme is thus considered to be existing aid, which does not need to be notified to the Commission or examined in the light of art 87 EC (see *Associação dos*



*a* *Refinadores de Açúcar Portugueses (ARAP) v European Commission* Case C-321/99 P [2002] ECR I-4287 (para 83) and the case law cited).

*b* 52. In the present case, when the Italian authorities withdrew part of the first notification and confirmed the notification in respect of the aid relating to the rolling line, on 25 July 2000, as stated at para 23, above, they expressly requested the Commission to adopt a position on the compatibility of the planned aid with the common market pursuant to art 88(3) EC, which concerns new aid, and not in the context of the permanent co-operation between the Commission and the member states established by art 88(1) EC, which is concerned with existing aid.

*c* 53. Furthermore, while the letter from the Autonomous Region of Friuli-Venezia Giulia of 18 February 1999 attached to the notification of 18 February 1999, which remained valid for the part of the notification which was maintained, contained a reference to the approved scheme, the Italian authorities did not maintain that the aid in respect of Ferriere's investment constituted a measure for the application of that scheme. Furthermore, and for the sake of completeness, although the approved *d* scheme, cited at para 13, above, concerns investments which bring improvements from the aspect of environmental protection or working conditions 'in accordance with the new norms fixed by the legislation in the sector', the above-mentioned letter stated that Ferriere was not subject to mandatory norms or to other legal obligations, which on the face of it gave rise to doubt as to whether the notified project corresponded to the approved *e* scheme.

54. In those circumstances, in the light of the ambiguity of the letter of 15 February 1999 and of the fact that the Italian authorities did not maintain at the time of their second notification that the aid measure granted to Ferriere constituted a measure for the application of the approved scheme even though they twice took the initiative to notify the impugned aid project to the *f* Commission, notifying it for the second time on the basis of art 88(3) EC, as new aid the compatibility of which they expressly requested the Commission, in their letter of 25 July 2000, to determine, it does not appear that the Commission acted unlawfully in initiating the formal procedure for a second time.

*g* 55. The reference which Ferriere and the Italian Republic make to the *Italgrani* and *Tirrenia* cases previously examined by the Court of Justice (see *Italy v European Commission* Case C-47/91 [1994] ECR I-4635 (the *Italgrani* case) and *Italy v European Commission* Case C-400/99 [2001] ECR I-7303 (the *Tirrenia* case)) is irrelevant. In those cases, the Commission had initiated the formal procedure following complaints and the Italian government contended that the *h* aid granted to the undertakings concerned fell, in the *Italgrani* case, within an approved scheme and, in the *Tirrenia* case, within a public service contract, so that it constituted existing aid (see the *Italgrani* case (paras 6, 12), and the *Tirrenia* case (paras 8, 24, 25)). The Court of Justice stated in the *Italgrani* case that for the Commission to call in question 'aid in strict conformity with the decision approving the aid scheme' would jeopardise the principles of *i* protection of legitimate expectations and legal certainty (see the *Italgrani* case (para 24)).

56. The reasoning of the Court of Justice does not appear to be capable of being transposed to the present case, which concerns individual aid notified to the Commission as new aid pursuant to art 88(3) EC.

57. It follows from the foregoing that Ferriere cannot argue that the formal procedure was initiated unlawfully or that there has been a breach of the principles of protection of legitimate expectations and legal certainty. The first plea must therefore be rejected. a

*Second plea: the Commission failed to observe the procedural time limits* b

—Arguments of the parties

58. Ferriere claims that the Commission exceeded the procedural time limits laid down in respect of state aid, from two aspects. First, the Commission initiated the formal procedure on 3 June 1999, more than three months after notification of the aid, when, according to the texts and the case law, it ought to have adopted a decision within two months following notification of aid. Second, the Commission did not observe the period of 18 months prescribed by art 7(6) of Regulation 659/99 within which it must take a decision after initiating a formal procedure, as 20 months elapsed before the contested decision was adopted. Ferriere further submits that while the 18-month period is not mandatory, it can be extended only by common consent between the Commission and the member state concerned. c  
d

59. The Italian Republic maintains that the delay in adopting the contested decision constitutes a breach of art 7(6) of Regulation 659/1999 and that it did not agree to an extension of the period for closing the formal procedure. The intervener further contends that the Commission failed to observe the principle of loyal co-operation by declaring, in art 3 of the contested decision, that the procedure initiated under the ECSC Treaty following the notification of 18 February 1999 was closed. e

60. The Commission contends that the plea alleging that the procedure was unduly long is unfounded. As regards the initiation of the formal procedure, it observes that the initial notification was effected on the basis of rules which proved to be irrelevant, so that it could not be compelled to react within the two-month period normally applicable, and that the Italian authorities had not informed it of their intention to implement the aid. As regards the duration of the formal examination procedure, the Commission claims that the period of 18 months in art 7(6) of Regulation 695/1999 is not mandatory. Furthermore, as the contested decision, dated 28 March 2001, was based on the second decision to initiate the formal procedure, dated 14 August 2000, the real duration of the procedure was seven-and-a-half months. f  
g

—Findings of the court

61. As regards the first decision to initiate the formal procedure, the relevant provisions, concerning a notification made under the ECSC Treaty, are those set out in art 6(6) of Decision 2496/96 and not, as the parties wrongly state, those of art 4(5) of Regulation 659/1999, which apply to the second notification. h

62. Article 6(6) of Decision 2496/96 mentions a period of two months beyond which, if a formal procedure has not been initiated, the planned aid measures may be put into effect provided that the member state has first informed the Commission of its intention. That provision does not impose on the Commission a period on pain of nullity but, in accordance with the principle of proper administration, invites it to act diligently and allows the member state concerned to put the aid measures into effect once a period of two months has elapsed, subject to having previously informed the i

- a Commission that it intends to do so (see *Lorenz (Gebr) GmbH v Germany* Case 120/73 [1973] ECR 1471 (para 6) and *Germany v EC Commission* Case 84/82 [1984] ECR I-1451 (para 11)).

b 63. It is common ground that the Italian authorities did not inform the Commission of their intention to pay the aid. The intervener cannot claim that it did not grant an 'extension' of the period to the Commission, since such a mechanism is not provided for by art 6(6) of Decision 2496/96. Likewise, although the Commission, which had received notification on 25 February 1999, did not initiate the formal procedure until 3 June 1999, or three months and nine days later, that period, during which the Italian authorities did not contact the Commission according to the procedures laid down in the above-mentioned provision, does not in the circumstances of the case appear excessive. In any event, it does not follow from the wording of art 6(6) of Decision 2496/96 that a formal procedure initiated more than two months after notification would for that reason be vitiated by nullity.

c 64. Ferriere cannot therefore validly maintain that the contested decision is unlawful owing to the belated initiation of the formal procedure.

d 65. As regards the time which the Commission took to adopt the contested decision, art 7(6) of Regulation 659/1999, cited at para 4, above, which is applicable to the aid measure in question, provides that the Commission is as far as possible to endeavour to adopt a decision within 18 months from the opening of the procedure and that that period may be extended by common agreement between the Commission and the member state concerned.

e 66. In the present case, that period applies to the procedure which followed the second notification, made under the EC Treaty, and not, as the applicant contends, to the procedure which followed the first notification, made under the ECSC Treaty.

f 67. Admittedly, the contested decision refers to both treaties, mentions the first notification, effected on 25 February 1999 under the ECSC Treaty and, in art 3, declares that the procedure initiated following that notification is closed. However, that first notification was withdrawn, as regards the planned ECSC aid which it mentions, on 25 July 2000, by the second notification. That second notification, which replaced the preceding notification, confirmed that the Commission was being requested to examine the impugned planned aid, this time by reference to the EC Treaty. On that point, the Italian authorities explained at the hearing the problems of characterisation which arise in the case of intervention in favour of steel undertakings such as the applicant, which operate within the sphere of both treaties. Furthermore, the assessment of the time which elapsed with effect from the first decision initiating the formal procedure, taken on 3 June 1999, should be made in the light of Decision 2496/96, which, however, does not specify a period within which a decision must be adopted following the opening of a formal procedure.

g 68. Consequently, it is with effect from the decision to open the formal procedure adopted on 14 August 2000, which followed the second notification of the planned aid, based on the EC Treaty, that the duration of that procedure must be assessed, in the light of the requirements of Regulation 659/1999.

i 69. As the Commission adopted the contested decision on 28 March 2001, or seven months and 14 days after initiating the formal procedure, the period of 18 months referred to at para 65, above, which is indicative and can be extended, was complied with. The applicant is therefore not justified in maintaining that the Commission exceeded the periods laid down for adopting the contested decision. In any event, even on the assumption that the date



initiating the formal procedure, namely 3 June 1999, were to be taken into consideration, the duration of the procedure would be a little under 22 months, which would not mean that the indicative period of 18 months mentioned above was unreasonably exceeded (see *Regione Siciliana v European Commission* Case T-190/00 (2003) Transcript (judgment), 27 November (para 139)).

70. Nor does it appear that the Commission failed to fulfil its duty of loyal co-operation with the Italian Republic, in the circumstances of the present case, characterised by the fact that the undertaking engaged in two categories of activities and maintained a single set of accounts, that two successive notifications were submitted, under the ECSC Treaty and then under the EC Treaty, and that the Commission was required to ascertain the exact nature—ECSC or EC—of the activity benefiting from the aid. Article 3 of the contested decision, which declares that the procedure initiated following the notification made under the ECSC Treaty is closed, is limited, in that context, to drawing the necessary formal conclusion from the procedure initiated on 3 June 1999.

71. It follows from the foregoing that Ferriere cannot validly maintain that the Commission failed to observe the procedural time limits. The second plea must therefore be rejected.

### *Third plea: failure to observe the rights of the defence*

#### *—Arguments of the parties*

72. Ferriere maintains that the Commission failed to observe the rights of the defence in applying the successive guidelines on state aid for environmental protection. After initiating the formal procedure in accordance with the 1994 guidelines, it adopted the contested decision on the basis of the 2001 guidelines, without inviting the Italian Republic and interested parties to submit their comments in respect of the new guidelines.

73. The Commission claims that, in the procedure involving the examination of state aid, the only party with rights of defence is the member state, to which the decisions are addressed. The defendant further states that the applicant was informed of the opening of the formal examination procedures, that it twice submitted comments which were taken into account and that it could have submitted new comments following publication of the 2001 guidelines. Furthermore, the criteria for assessment remained substantially unaltered when the new guidelines were published.

#### *—Findings of the court*

74. It should first of all be noted that Ferriere's plea must be examined not from the point of view of the rights of the defence, which only the states enjoy in state aid matters, but in consideration of the right which, pursuant to art 88(2) EC, the 'parties concerned' have to submit comments during the review stage referred to in that provision (see *Westdeutsche Landesbank Girozentrale v European Commission* Joined cases T-228/99 and T-233/99 [2003] ECR II-435 (paras 122–125)).

75. It is common ground that, when the 2001 guidelines were published, the parties concerned had already produced their comments, in consideration of the 1994 guidelines. It follows from the 2001 guidelines, and in particular from the introduction thereto, that they are intended to follow on from the 1994 guidelines and define the Commission's new approach in the light of both

- a* national and international developments in the concepts, regulations and policies relating to environmental protection. On the assumption that the Commission, as it considered it was entitled to do, could lawfully apply the new guidelines when it adopted the contested decision—a question which will be examined at paras 134–140, below—it would not have been able, without disregarding the procedural rights of the parties concerned, to have
- b* based its decision on new principles introduced by the 2001 guidelines without inviting the parties concerned to submit their comments in that regard.

76. It follows from the contested decision that the Commission declared the aid incompatible with the common market on two types of grounds, namely that the main reason for the investment was economic (see recital (31)), the advantages in environmental terms being marginal consequences of that investment (see recital (33)), and that the extra investment cost incurred in order to meet environmental objectives could not be isolated (see recital (32)).

- c*
- d* 77. The principles laid down by the two sets of guidelines are, in the light of those grounds, substantially identical, as the Commission stated at recital (31) (footnote (3)) to the contested decision. Like the 1994 guidelines, the 2001 guidelines provide that investment aimed at protecting the environment is eligible (see point 3.2.1 of the 1994 guidelines and point 36 of the 2001 guidelines, cited at paras 6, 10, above respectively), the 1994 guidelines expressly precluding the grant of aid ostensibly intended for environmental protection measures but in fact for general investment. Both sets of guidelines also contain the same method of calculating the cost eligible for aid (see point
- e* 3.2.1 of the 1994 guidelines and point 37, cited at para 11, above, of the 2001 guidelines).

78. The applicant claimed at the hearing that the deletion of certain details in the 2001 guidelines is not inconsequential, particularly as regards the new plant for which, it contends, the 1994 guidelines permitted aid to be granted provided that the plant had a positive impact on the environment. On that

*f* point, Ferriere maintains in its written submissions that, since the 1994 guidelines, at point 3.2.1, excluded, in the case of new or replacement investment, the cost of basic investment intended to create or replace production capacity without improving environmental performance, that meant, a contrario, that aid could be granted for new plant having a positive impact for environmental protection.

- g* 79. In reality, however, the applicant's observations concern the determination, envisaged at point 3.2.1 of the 1994 guidelines, of the 'eligible costs' qualifying for an aid measure, which must be 'strictly confined to the extra investment costs necessary to meet environmental objectives'. The guidelines, cited at para 6, above stated that '[t]hus, in the case of new or
- h* replacement plant, the cost of the basic investment involved merely to create or replace production capacity without improving environmental performance is not eligible'. The terms of the 2001 guidelines cannot therefore be regarded as containing an amendment to the previous provisions. In effect, whether the investment concerns new plant or old plant, only the extra cost associated with environmental protection can benefit from an aid measure; and although the
- i* 2001 guidelines do not contain the same stipulation as the 1994 guidelines, that same condition of eligibility for aid remains applicable.

80. It therefore appears that the Commission did not derive from the new guidelines any principles or criteria for assessment which would have altered its analysis of the notified aid. In those circumstances, it was not required to consult the parties concerned again. The applicant was able to submit its

comments, which are summarised in recitals (13) to (16) of the contested decision, on the principles and assessment criteria, substantially identical in both sets of guidelines, which led the Commission to declare the aid incompatible with the common market. a

81. The Commission did not therefore base its decision on grounds on which the applicant was unable to make known its comments and, accordingly, did not infringe art 88(2) EC. b

82. Ferriere cannot therefore validly maintain that there was a breach of the rights of the defence, understood here as the procedural rights which art 88(2) EC recognises to the 'parties concerned'. Consequently, the third plea must be rejected. c

*Fourth plea: breach of the principle of protection of legitimate expectations*

—Arguments of the parties

83. Ferriere maintains that the Commission failed to provide the protection which ought to be given to a legitimate expectation of a procedural nature. Since the Commission never asked the Italian authorities or the applicant to produce documents establishing the environmental objective of the investment, it could not lawfully state in its decision that no documents had been provided to it in that regard. d

84. The Italian Republic submits that the Commission's criticism in the decision that proof of the environmental purpose of the investment was not provided fails to observe the rules on the burden of proof, since in a procedure involving a review of compatibility with the Treaty and not a procedure for the approval of aid, the burden of proof was borne by the Commission. e

85. The Commission contends that it did not breach the principle of protection of legitimate expectations and that the Italian government and the undertaking were clearly invited by the decisions initiating the formal procedure to adduce evidence of the environmental objective of the investment. f

—Findings of the court

86. This plea consists of two parts, concerning, first, the elements which the Commission should have requested from the parties concerned and, second, the rules on proof. g

87. First, Ferriere criticises the Commission for not having asked it or the Italian Republic to provide documentation relating to the environmental purpose of the investment, then for having stated in its decision that no evidence on that point had been provided (see recital (30)).

88. The principle of protection of legitimate expectations on which the applicant relies means that in carrying out the procedure involving review of state aid, the Commission must take account of the legitimate expectations which the parties concerned may entertain as a result of what was said in the decision opening the procedure (see *ESF Elbe-Stahlwerke Feralpi GmbH v European Commission* Case T-6/99 [2001] ECR II-1523 (para 126)) and, subsequently, that it does not base its final decision on the absence of elements which, in the light of those indications, the parties concerned were unable to consider that they must provide to it. h

89. It is apparent from the decision of 3 June 1999 initiating the formal procedure, referred to at para 20, above, that the Commission stated in that decision that it had doubts that the principal objective of the investment was i



- a environmental protection, that it considered at that stage that its effect in that regard would be very limited and that the alleged advantages for environmental protection seemed to it to be more connected with the protection of the workers, which did not come under either the code on aid to the steel industry or the 1994 guidelines. The Commission also pointed out that the decision to make the necessary investments for economic reasons
- b owing to the age of the plant was not eligible for aid.

90. In the decision of 14 August 2000 initiating the formal procedure, referred to at para 24, above, the Commission gave an indication of its initial assessment of the investment from the point of view of environmental protection. It stated that the Italian authorities had not proved that the acquisition of the rolling line had as its main objective to improve environmental protection or

c the working conditions of the workforce and that it appeared to the Commission, on the contrary, that Ferriere had essentially sought to replace or increase its production capacity by acquiring very productive equipment. The Commission concluded that at that stage of its review the effects of the investment on working conditions and the environment appeared to constitute

d only very marginal consequences of the investment.

91. Such reiterated information was sufficiently clear and precise for the Italian authorities and the applicant to consider that they were being invited to provide all the relevant evidence capable of showing that the investment had a principally environmental objective. Ferriere's complaint alleging breach of a legitimate expectation of a procedural nature cannot therefore be upheld.

e 92. Second, Ferriere claims that the Commission based its decision on presumptions without carrying out the specific checks which it was required to do. The Italian Republic further claims that proof of the non-environmental objective of the investment had to be adduced by the Commission and that the decision reverses the burden of proof.

f 93. When the Commission decides to initiate the formal procedure, it is for the member state and the potential recipient of the aid to put forward the arguments whereby they seek to show that the planned aid corresponds to the exceptions provided for in application of the Treaty, since the object of the formal procedure is specifically to ensure that the Commission is fully informed of all the facts of the case (see, to that effect, *Germany v Commission*, cited above (para 13)).

g 94. Although the Commission is required to express its doubts clearly as to the compatibility of the aid with the common market when it opens a formal procedure in order to allow the member state and other parties concerned to respond as fully as possible, the fact remains that it is for the applicant for the aid to dispel those doubts and to establish that its investment satisfies

h the condition on which it may be granted (see, to that effect, *France v European Commission* Case C-17/99 [2001] ECR I-2481 (paras 41, 45–49)). It was therefore for the Italian Republic and Ferriere to establish that the investment in question was eligible for aid for environmental protection and, in particular, that it had the environmental objective required by the two sets of guidelines applicable in turn (see, to that effect, *Spain v EC Commission* Joined cases C-278–280/92 [1994] ECR I-4103 (para 49) and *Spain v European Commission* Case C-113/00 [2002] ECR I-7601 (para 70)).

i 95. It is apparent from the case file and, in particular, from the contested decision that the Commission, which had expressed its doubts as to the compatibility of the aid with the common market and received the comments of the interested third parties and the Italian Republic on the project in

question, carried out a precise and properly reasoned analysis of the evidence submitted to it, at recitals (23) to (36) to the decision, as it was required to do. a

96. It follows from the foregoing that Ferriere cannot validly maintain that the Commission failed to observe the principle of protection of legitimate expectations during the administrative procedure. The fourth plea must therefore be rejected. b

*Fifth plea: breach of the principle of sound administration*

—Arguments of the parties

97. Ferriere maintains that the Commission failed to respect the principle of sound administration, by erring in its quest for the relevant legal basis—the ECSC Treaty and then the EC Treaty—and by embarking on a formal procedure in respect of a measure applying an authorised scheme. c

98. The Commission claims that it did not fail to respect the principle of sound administration. As two notifications were submitted to it, on the basis of the ECSC Treaty and then on the basis of the EC Treaty, it was required, in a case involving a steel undertaking which did not keep separate accounts, to examine the aid from the aspect of both Treaties. d

—Findings of the court

99. It is apparent from the case file that Ferriere is a steel undertaking manufacturing products which in some cases come under the ECSC Treaty and in others the EC Treaty; that the Italian authorities first notified the aid in question under the ECSC Treaty; that during the administrative procedure the Italian Republic and Ferriere then stated that welded steel mesh (to be manufactured in the rolling line for which the investment was planned) was not an ECSC product but an EC product; and that a new notification was made under the EC Treaty. In that regard, the intervener explained at the hearing that it was difficult to determine the relevant legal framework in the case of undertakings whose activities are covered by both Treaties. e f

100. Furthermore, in the case of a steel undertaking which, like Ferriere, does not keep separate accounts, the Commission was correct to ascertain that the aid in question would not be diverted to the ECSC activities (see the *Feralpi* case, cited above (paras 74, 125)).

101. In those circumstances, the Commission cannot be imputed with alleged procedural errors, when it was not immediately certain whether the investment related to the ECSC Treaty or the EC Treaty; when the planned aid was notified to it successively under each of the two Treaties; and when in any event it was required to ascertain that the aid was not likely to benefit activities other than those in respect of which it would be granted. The Commission's need to ascertain the legal basis on which to found its decision clearly cannot constitute a breach of the principle of sound administration. g h

102. Furthermore, from a strictly procedural point of view, the fact of embarking upon two formal procedures does not in this case disclose a failure to observe the principle of sound administration when, as stated in response to the first plea (paras 50, 54, 57, above), both of those procedures were lawfully opened following the notifications submitted by the Italian authorities. As regards Ferriere's argument concerning breach of the principle of sound administration owing to the opening of a formal procedure when the case involved a measure for the application of an approved scheme, that goes to the substantive question, which is whether, as the applicant maintains, the aid i

a measure in question constituted such a measure, and it will be examined together with the first substantive plea (see paras 116–128, below).

103. It follows from the foregoing that Ferriere cannot validly maintain that the Commission failed to observe the principle of sound administration. The fifth plea must therefore be rejected.

b *Sixth plea: breach of the obligation to state reasons*

—Arguments of the parties

104. Ferriere maintains that the Commission did not sufficiently state the reasons for its decision by merely stating, at recital (30) (footnote (1)), that no specific legal limits existed for the type of plant concerned.

c 105. The Commission states that it could not rely on any grounds other than that it had found that no standards existed.

—Findings of the court

d 106. It is settled case law that the obligation to provide a statement of reasons laid down in art 253 EC (formerly art 190 of the EC Treaty) is an essential procedural requirement, as distinct from the question whether the reasons given are correct, which goes to the substantive legality of the contested measure. The statement of reasons must be appropriate to the act at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent court to exercise its power of review. The question whether the statement of reasons meets the requirements of art 253 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (see *Société française de Biscuits Delacre v EC Commission* Case C-350/88 [1990] ECR I-395 (paras 15, 16) and *Spain v European Commission* Case C-114/00 [2002] ECR I-7657 (paras 62, 63)).

f 107. In the light of that case law, it does not appear that the Commission failed in the present case to fulfil its obligation to provide a sufficient statement of the reasons for the contested decision.

g 108. The contested decision cites, at recital (1) (footnote (3)), art 15(1) of Regional Law No 47 of 3 June 1978, as amended (cited at para 13, above), which provides that aid may be granted to investments made by industrial undertakings which adapt their processes or plant to new standards fixed by the legislation applicable to the sector. The contested decision refers at recital (14) to the applicant's observations concerning the existence of mandatory limit values with which its plant complies and states in that regard, at recital (30) (footnote (1)), that, contrary to the company's contentions, no specific legal limits are prescribed for this kind of plant. The reason based on the absence of binding norms applicable to Ferriere's plant is clearly stated in a legal and factual context which enabled the applicant to grasp its meaning.

h 109. Ferriere cannot therefore validly maintain that the contested decision is vitiated by a failure to state reasons. Consequently, the sixth plea must be rejected.

i 110. It follows from the foregoing that the six pleas relating to the procedure must be rejected in their entirety.

*Substance*

111. In support of its action, Ferriere develops substantive pleas of three types, alleging, first, that its investment constitutes a measure implementing an



approved scheme and not new aid; second, that the contested decision should have been adopted on the basis of the 1994 guidelines and not the 2001 guidelines; and, third, that its investment pursues an environmental objective which renders it eligible on that basis for aid for environmental protection.

*First plea: Ferriere's investment constitutes a measure implementing an approved scheme and not new aid*

—Arguments of the parties

112. Ferriere maintains that its investment came under the regional scheme approved by the Commission in 1992 and was merely an implementing measure, so that by the contested decision the Commission failed to take account of its own decision authorising the aid.

113. It submits that the Commission misinterpreted the aid scheme approved in 1992, as adaptation to 'standards established by the legislation' does not refer to adaptation to 'mandatory environmental standards' but may be understood as adaptation to purely indicative and therefore non-binding standards. That interpretation corresponds to the philosophy of the 1994 and 2001 guidelines, which include that nature of the aid as an incentive. Furthermore, the 2001 guidelines provide that aid may be authorised for investments carried out in the absence of mandatory standards. In addition, environmental standards concerning polluting emissions or sound nuisance and standards aimed at improving working conditions exist under national or Community provisions and were taken into account in the completion of the applicant's new plant.

114. The Italian Republic maintains that the aid comes under the scheme approved in 1992. In 1998, moreover, the Commission authorised the refinancing of that scheme in terms which show, as is also apparent from the 1994 and 2001 guidelines, that the grant of aid is not subject to the existence of mandatory standards. The Commission therefore misinterpreted the approved scheme.

115. The Commission claims that the aid in question is not compatible with the scheme approved in 1992. That scheme lays down as a condition of eligibility for aid that the investment concerned is aimed at adaptation to new standards in the sector. In the Commission's submission, Ferriere's previous plant satisfied the existing standards and the new plant has no connection with the entering into force of new standards. The standards to which the applicant refers are neither new nor binding, or indeed are relied on for the first time in the present proceedings. The Commission further states that the improvement of working conditions and hygiene or security measures taken inside the factories are not environmental protection measures.

—Findings of the court

116. The question whether the impugned aid constitutes a measure for the implementation of the scheme approved in 1992 or new aid depends on the interpretation of the provision establishing that scheme, cited at para 13, above, according to which investments intended to introduce improvements from the point of view of the environment or working conditions 'in accordance with the new standards determined by the legislation in the sector' are eligible for aid.

117. It follows from the actual wording of that provision that standards must be applied in the sector in which the candidate for the aid is active, that they must have been recently introduced and that in order to be eligible the investment must bring the plant into conformity with those standards.

a 118. That interpretation is corroborated by the circumstances in which, during the examination of the planned aid scheme, the condition relating to adaptation to new standards was introduced. It follows from two letters from the Commission to the permanent representation of Italy that in the first letter, dated 21 May 1992, the Commission had asked whether, according to  
b the planned scheme, the grant of the aid was conditional upon conformity with new normative standards and that in the second, dated 9 September 1992, it stated unequivocally that 'the aid [must] have as its objective to facilitate the adaptation of undertakings to new obligations imposed by the public authorities relating to the elimination of pollution'.

c 119. No amendment was made to that scheme, particularly in the case of the condition concerning adaptation to new standards, when the Commission, by letter of 18 September 1998, gave its approval to the refinancing of the scheme approved in 1992. The summary of the authorised scheme in that letter cannot be interpreted as an amendment of the scheme. Incidentally, the Italian Republic and the Commission stated in their answers to the questions put by the court, referred to at para 36, above, that the procedure initiated in 1998 was  
d aimed merely at the refinancing of the existing scheme and did not affect the content or the scope of that scheme.

120. Ferriere's request, dated 26 March 1997, to the Autonomous Region of Friuli-Venezia Giulia for aid did not mention any standard with which the plant sought to comply. Furthermore, the letter from the Region dated 15 February 1999 attached to the notification submitted by the Italian authorities on  
e 18 February 1999, referred to at paras 53, 54, above, expressly states that there are no mandatory standards or other legal obligations to which the undertaking would be subjected and further states that the investment, made in order to improve the results from the environmental aspect, goes further than the Community standards. As stated at paras 53, 54, above, moreover, the Italian authorities did not maintain, at the time of the second notification, that  
f the aid granted to Ferriere constituted a measure implementing the approved scheme.

121. Admittedly, during the administrative procedure, Ferriere, in its letter of 13 November 2000, referred to at para 25, above, made reference, without indicating the legal basis, to 'limit values' prescribed by the legislation in force, explaining that those values also complied with the guidelines in Council  
g Directive (EC) 96/61 (concerning integrated pollution prevention and control) (OJ 1996 L257 p 26), which was transposed into domestic law by Legislative Decree No 372 of 4 August 1999, ie at a date later than its application for aid and the notification of February 1999. However, those documents, which do not themselves contain any value in figures, merely make recommendations  
h for the issue of authorisation in connection with industrial plant which bears no relation to the aid case in issue here.

122. In its application, Ferriere also referred to Council Directive (EEC) 86/188 (on the protection of workers from the risks related to exposure to noise at work) (OJ 1986 L137 p 28), implemented in Italy by Legislative Decree No 277 of 15 August 1991, and referred in a footnote to various  
i measures of Community or national law laying down limit values with which its investment complies. The applicant refers, in Community law, to Council Directive (EEC) 91/689 (on hazardous waste) (OJ 1991 L377 p 20), amended by Council Directive (EC) 94/31 of 27 June 1994 (OJ 1994 L168 p 28) and implemented in Italy by Legislative Decree No 22 of 5 February 1997. The applicant also mentions a number of measures of domestic law, namely Decree

No 203 of the President of the Republic of 24 May 1988 on smoke and dust emissions in the atmosphere, Law No 447 of 26 October 1995 on emissions of noise nuisance outside industrial plant and one of its implementing regulations, Implementing Decree No 675900 of the President of the Council of Ministers of 14 November 1997.

123. However, irrespective of the fact that on the date of the application for aid, 26 March 1997, those requirements were for the most part not new, Ferriere has not identified, either during the administrative procedure or during these proceedings, the standards which, in its submission, were provided for by those provisions and to which its investment was intended to adapt the industrial plant. As that information was not produced and thus could not be taken into consideration in drafting the contested decision, it cannot be relied on to challenge the legality of that decision (see *Belgium v EC Commission* Case 234/84 [1986] ECR 263 (paras 11, 16)). As regards, moreover, the provisions of Community law on which the applicant relies, first, it is apparent that Directive 86/188 was concerned with the provision of information to and the protection and medical supervision of workers exposed to certain noise levels at their place of work, but does not deal with standards to be complied with by undertakings. Second, there is no indication in the file that Ferriere produces hazardous waste such as that referred to in Directive 91/689 and is therefore affected by the provisions of that directive.

124. Thus, it must be held that Ferriere was not in a position to indicate, either during the administrative procedure or during the present proceedings, the precise new standards, applicable in the sector in which it is active, with which its investment was intended to comply. The arguments based on provisions of Community law or national law, which are not new or which have no connection with the grant of the aid in issue, are inadmissible in part, since they are raised for the first time before the court, and unfounded in part, since they have no connection with the investment in question. The inevitable conclusion is that Ferriere has failed to establish the relationship between its investment and any new standards concerning its sector.

125. Accordingly, there is no need to determine whether the standards referred to by the approved aid scheme are to be understood as mandatory or indicative standards or to ascertain whether any standard introduced after the commissioning in the 1970s of the plant to be replaced should be characterised as aid, as Ferriere maintains, as the applicant has failed to identify any standards whatsoever to which it wished to adapt its plant. Likewise, the argument that the 1994 and 2001 guidelines would allow aid to be granted, by way of incentive, in the absence of mandatory standards or in circumstances where the investment goes beyond the standards to be complied with is of no relevance here, since the provision establishing the approved scheme requires that, in order to be eligible for aid, the investment must be aimed at the adaptation of the plant to new standards which apply to the sector.

126. It follows from the foregoing that the Commission was correct to consider that the impugned aid could not be regarded as a measure implementing the approved scheme but was a new measure.

127. It follows, moreover, that Ferriere's argument, referred to at para 102, above, that the Commission infringed the principle of sound administration by initiating a formal procedure in respect of a measure implementing an approved scheme cannot be upheld either.

128. The first substantive plea must therefore be rejected.



*a* Second substantive plea: the contested decision should have been adopted in the light of the 1994 guidelines and not the 2001 guidelines

—Arguments of the parties

*b* 129. Ferriere claims that its investment should have been examined in the light of the 1994 guidelines. It submits that the contested decision has an incorrect legal basis. The aid should have been evaluated on the basis of the criteria set out in the 1994 guidelines and not by reference to those in the 2001 guidelines. The Commission also failed to observe the principle of protection of legitimate expectations on that point.

*c* 130. The applicant submits that, as interpreted by the Commission, point 82 of the 2001 guidelines (cited at para 12, above) is illegal. The new guidelines could be applied to aid which had already been notified only in so far as a formal procedure had not yet been initiated in respect of that aid.

131. The Italian Republic claims that the aid should have been evaluated in the light of the 1994 guidelines, which were in force when it was granted, on 8 October 1998, and not according to the law in force at the time of adoption of the contested decision.

*d* 132. The Commission contends that the planned aid was incompatible with the common market in the light of the 2001 guidelines and that it could not have been authorised under the 1994 guidelines either.

*e* 133. It further claims that the objection of illegality in respect of point 82 of the 2001 guidelines was not raised in the application that it is therefore inadmissible under art 48(2) of the Rules of Procedure of the Court of First Instance. In any event, point 82 merely provides for the immediate application of the new system in accordance with the general principles of the application of the law *ratione temporis*, which does not breach the principle of protection of legitimate expectations.

*f* —Findings of the court

*g* 134. The compatibility with the common market of planned aid aimed at environmental protection is assessed in accordance with the combined provisions of art 6 EC (formerly art 3c of the EC Treaty) and art 87 EC and by reference to the Community guidelines which the Commission has previously adopted for the purposes of such an examination. The Commission is bound by the guidelines and notices that it issues in the area of supervision of state aid where they do not depart from the rules in the Treaty and are accepted by the member states (see *Spain v European Commission* Case C-351/98 [2002] ECR I-8031 (para 53)). The parties concerned are therefore entitled to rely on those guidelines and the court will ascertain whether the Commission complied with the rules it has itself laid down when it adopted the contested decision (see *Keller SpA v European Commission* Case T-35/99 [2002] ECR II-261 (paras 74, 77)).

*h* 135. In the present case, it must first of all be determined what Community guidelines on state aid in relation to environmental protection the Commission was required to apply when adopting its decision.

*i* 136. The objection of illegality expressly raised in the reply is admissible, contrary to the Commission's contention, since it constitutes the expansion, in paras 12–18 of the reply, of a plea raised by implication in para 54 of the application (see, to that effect, *Thai Bicycle Industry & Co Ltd v EU Council* Case T-118/96 [1998] ECR II-2991 (para 142)).

137. It follows from points 81 and 82 of the 2001 guidelines (see para 12, above) that those guidelines entered into force on the date on which they were

published, on 3 February 2001, and that the Commission was then required to apply them to all notified aid projects, even where they were notified prior to the publication of the guidelines. Contrary to the applicant's interpretation, the immediate application of the new guidelines is not subject to any reservation, and therefore does not preclude a case, such as this, in which a formal procedure has been initiated.

138. First, what is stated at points 81 and 82, which are inspired by art 254(2) EC (formerly art 191(2) of the EC Treaty) on the entry into force of regulations and directives of the Council and of the Commission, proceeds from the principle that, subject to derogations, acts of the institutions are immediately applicable (see *Licata v Economic and Social Committee* Case 270/84 [1986] ECR 2305 (para 31) and *Saldanha v Hiross Holding AG* Case C-122/96 [1998] All ER (EC) 238, [1997] ECR I-5325 (paras 12–14)).

139. Second, the principle of protection of legitimate expectations cannot be usefully invoked here, since, like the principle of legal certainty, it concerns situations existing before the entry into force of new provisions (see *Firma GruSa Fleisch GmbH & Co KG, Import-Export v Hauptzollamt Hamburg-Jonas* Case C-34/92 [1993] ECR I-4147 (para 22)). Ferriere is not in such a situation, but in the temporary situation in which a member state has notified a new aid project to the Commission and requested that it examine the compatibility of the aid with the Community rules, the grant of the aid being dependent on the outcome of that examination. Furthermore, and in any event, since the two successive sets of guidelines were essentially identical, as previously stated (see para 77, above), the applicant's legitimate expectation cannot have been affected.

140. Consequently, the contested decision was adopted legally in application of the 2001 guidelines, which entered into force on 3 February 2001.

*Third plea: Ferriere's investment pursued an environmental objective which rendered it eligible on that basis for aid for environmental protection*

#### —Arguments of the parties

141. Ferriere maintains that its investment was eligible for aid for environmental protection. It meets the objectives of the Community policy on the environment set out in art 174 EC and satisfies the requirements of the Community directives and recommendations. The investment entails, in particular, improvements from the point of view of atmospheric pollution, the elimination of hazardous waste, noise nuisance and working conditions, the last two of which are expressly mentioned in the provision establishing the approved scheme.

142. The applicant also claims that it was possible to isolate from the total cost the cost corresponding to environmental protection, which the region evaluated at ITL 11,000m out of a total investment of ITL 20,000m.

143. The Commission failed to take account of the environmental purpose of the project and considered, arbitrarily, that the purpose of the investment was predominantly economic, whereas the objective of the new process was specifically to make the production system ecological. While it is logical that a new plant should be more economically efficient than an old one, the former rolling line was still perfectly satisfactory in functional and technological terms and was replaced by innovative equipment in order to eliminate the disadvantages which the old process represented for the environment.

a 144. The Italian Republic claims that the investment in question was determined principally on grounds linked with environmental protection.

b 145. The Commission contends that the aid was not justified in the present case, since the investment would have been made in any event for reasons unconnected with environmental protection; the reduction in nuisance and pollution was the necessary and intrinsic consequence of a predominant and inescapable economic and technological choice. Nor is it possible to isolate the additional costs associated with the environmental aspect. In addition, the documents produced for the first time at the stage of the reply, on the assumption that they are admissible, cannot have an impact on the legality of the contested decision, which was adopted in the light of the matters which came to its knowledge during the administrative procedure.

c —Findings of the court

d 146. The Commission declared the aid incompatible for the reasons stated at para 30, above, namely that the investment, which was intended to replace old equipment by an innovative plant, was not based on environmental objectives but was being done for economic and industrial purposes, which precluded the grant of aid for environmental protection. It further considered that the advantages for environmental protection were inherent in the process, which did not make it possible to isolate from the total cost of the investment the part corresponding to environmental protection (see recitals (29) and (31) to (33) to the decision).

e 147. The benefit of the Community provisions on state aid for environmental protection depends on the purpose of the investment in respect of which aid is sought. Thus the 2001 guidelines (points 36 and 37, cited at paras 10, 11, above), which are identical in that regard to the 1994 guidelines (point 3.2.1, cited at para 6, above), mention investments intended to reduce or eliminate pollution or nuisances, or to adapt production methods, and state that only the additional investment cost linked with environmental protection is eligible for aid. The eligibility for aid for environmental protection of an investment which meets, *inter alia*, economic considerations assumes that those considerations are not in themselves sufficient to justify the investment in the form chosen.

g 148. It follows from the scheme of the 2001 guidelines, which is identical in that regard to the scheme of the 1994 guidelines, that any investment which adapts plant to standards, whether mandatory or not, national or Community, which exceeds such standards or which is carried out in the absence of any standards is not eligible for aid, but only investment whose very object is that environmental performance.

h 149. The Commission was therefore entitled to declare the project incompatible with the common market in so far as it did not satisfy that requirement.

i 150. It is therefore irrelevant that the applicant maintains that its investment brings improvements from the point of view of environmental protection, as is the fact that the contested decision recognises the advantages of the investment from the point of view of environmental protection or of the health and safety of workers.

151. Admittedly, it is possible that a project should have an objective of improving economic productivity and at the same time an objective of environmental protection, but the existence of the second objective cannot be inferred from the mere finding that the new equipment has a less negative



impact on the environment than the old equipment, which may be merely a collateral effect of a change in technology for economic purposes or of the renewal of used equipment. In order that a partially environmental object of the assisted investment may be accepted in such a case, it is necessary to establish that the same economic performance could have been obtained by using less costly, but more environmentally harmful, equipment. a

152. The outcome of the dispute therefore does not depend on whether the investment brings environmental improvements or whether it goes beyond existing environmental standards, but, primarily, on whether it was carried out in order to bring such improvements. b

153. On this point, the applicant maintains that the objective of the new process was to render the production system ecological, as explained in detail in annexes B and C to its request for aid dated 26 March 1997. Those documents confirm the technological advance represented by the new, fully-automated process for the production of welded steel mesh, which has the consequences of reducing noise from the plant and eliminating dust emissions. They therefore confirm the interest of such a plant from an economic and industrial point of view, an interest which suffices to justify the decision to make the investment. c

154. Ferriere also claims that its previous plant was still operating perfectly satisfactorily when it decided to replace it in order to acquire an innovative technique eliminating the environmental disadvantages of the old process. In that regard, the documents produced for the first time with the reply, which were therefore not communicated to the Commission during the administrative procedure, can have no impact on the lawfulness of the contested decision (see *Belgium v Commission* (para 16)). Incidentally, those documents show at the most that as early as 1993–1994 the undertaking was planning to acquire a new innovative plant. Furthermore, the fact, which seems to be accepted by the Commission at recital (29) to the contested decision, that the new rolling line did not entail an increase in production capacity does not establish the environmental objective of the investment. d

155. It is apparent, in short, that Ferriere had equipment more than 25 years old which it wished to replace by a new plant using a technologically innovative process incorporating the performance for environmental protection of any modern equipment. The inevitable conclusion is that the investment follows on from a decision of the undertaking to modernise its production equipment and that it would in any event have been made in that form. e

156. Consequently, the Commission did not make an error of assessment in taking the view that it was not established that the investment had a genuinely environmental purpose. The Commission was entitled to consider that the advantages of the investment for environmental protection were inherent in that innovative plant. Furthermore, the analysis of the advantages of the investment from the point of view of working conditions is not in contradiction with the grounds of which the applicant complains, since according to point 6 of the 2001 guidelines actions aimed at safety and hygiene are not covered by those guidelines. g

157. Second, apart from finding that the investment had no environmental purpose, the contested decision states that the cost of the investment intended to protect the environment could not be isolated from the total cost of the operation. That ground of the contested decision is not superfluous, since if the project chosen entailed an additional cost by comparison with a different, h

a hypothetical, project offering the same economic performance in less environmentally favourable conditions, it might be inferred that the investment had an environmental object (see para 151, above).

b 158. On that point, Ferriere claims that the environmental part of its investment corresponds to the part of the total costs of the investment which was recognised by the Autonomous Region of Friuli-Venezia Giulia as eligible for aid, namely ITL 11,000m (€5.68m).

c 159. When invited in a written question put by the court, referred to at para 35, above, to specify the evidence on the basis of which the additional investment cost of environmental protection could be evaluated at ITL 11,000m of the ITL 20,000m representing the total cost of the investment, Ferriere merely referred to the assessment made by the region. At the hearing, the applicant acknowledged that it was difficult to draw distinctions in the case of a process which in itself improves environmental protection and it indicated that the region had excluded general expenditure.

d 160. The letters from Ferriere to the region, dated 26 May and 26 June 1998, which are on the file and which present the detailed budget of the investment broken down into its various components, do not answer the question. The court has been given no further explanation which would enable it to understand the method followed and to conclude that the ITL 11,000m correspond to the environmental cost of the investment. While it is possible to understand the difficulty in isolating the cost in a case such as this where the advantages for the environment are inherent in the process, the principles laid e down in the 2001 guidelines, which are similar to those in the 1994 guidelines, preclude the total cost of an investment from being eligible for aid and require that the additional costs involved in attaining the objective of protecting the environment be identified.

f 161. However, neither the applicant nor the Italian Republic has provided any explanation on that point. In particular, they have not indicated the procedure followed by the Autonomous Region of Friuli-Venezia Giulia in arriving at a determination of the amount of the investment eligible for aid.

162. Consequently, the Commission could lawfully consider in the contested decision that it was not possible to isolate in the investment the expenditure specifically intended for environmental protection.

g 163. Accordingly, the Commission was entitled to consider that Ferriere's investment was not eligible for aid for environmental protection.

h 164. It follows from all of the foregoing that the Commission could lawfully declare the aid incompatible with the common market. Ferriere and the Italian Republic are therefore not entitled to request annulment of the contested decision. The submissions seeking annulment of that decision must therefore be rejected.

#### THE APPLICATION FOR COMPENSATION FOR THE ALLEGED HARM

##### *Arguments of the parties*

i 165. Ferriere maintains that it suffered harm owing to the illegality of the contested decision, which impairs freedom of economic initiative and the right of property, to the initiation of the formal procedure and to the time taken to close it. As it was unable to have the aid which the region was prepared to grant it, it was required to borrow in order to finance the investment and was deprived of the possibility of using the amount advanced for other purposes.

166. The applicant claims compensation for the period during which it was unable to have the aid. The compensation should correspond to an amount allowing it to pay the statutory interest and compensation for monetary devaluation and should be calculated as from 26 April 1999, which corresponds to the end of the two-month period following receipt of the notification, on 25 February 1999, and is the date on which the Commission should have recognised that the aid was compatible with the common market.

167. The Commission contends that the conditions for engaging liability are not met. Among the fundamental rights, only those which protect legal certainty and legitimate expectations are in theory capable of being included in the category of rules whose breach may render the institutions liable. Furthermore, the serious and manifest nature of the breach is in any event absent in the present case. Last, the applicant does not show the alleged interference with freedom of economic initiative and the right to property.

168. The Commission further contends that the alleged harm is neither certain nor determinable, as undertakings do not have a right to receive state aid, still less at a fixed date. Even on the assumption that the aid did come under an authorised scheme, the delay in paying it would not be imputable to the Commission but to the Italian authorities, who chose to notify the aid and then to suspend payment thereof. The claim for default interest is unfounded as regards reparation of harm. Last, as regards monetary depreciation, actual damage is not made out.

#### *Findings of the court*

169. Ferriere's claim for compensation, submitted on the basis of arts 235 and 288 EC, seeks to establish the non-contractual liability of the Community owing to the harm allegedly caused to it as a result of the unlawfulness of the contested decision.

170. According to established case law, in order for the Community to incur non-contractual liability, the applicant must prove the unlawfulness of the alleged conduct of the institution concerned, actual damage and the existence of a causal link between that conduct and the damage pleaded (see *Oleifici Mediterranei (SA) v European Economic Community* Case 26/81 [1982] ECR 3057 (para 16) and *Scan Office Design SA v European Commission* Case T-40/01 [2002] ECR II-5043 (para 18)). If any one of those conditions is not satisfied, the action must be dismissed in its entirety and it is unnecessary to consider the other conditions for non-contractual liability (see *Koinopraxia Enoseon Georgikon Synetairismon Diacheiriseos Enchorion Proionton Syn PE v European Commission* Case C-146/91 [1994] ECR I-4199 (paras 19, 81) and *Förde-Reederei GmbH v EU Council* Case T-170/00 [2002] ECR II-515 (para 37)).

171. As the first condition of the which Community's non-contractual liability within the meaning of the second paragraph of art 288 EC, relating to the unlawfulness of the contested measure, is not fulfilled, the claim for compensation must be rejected in its entirety and there is no need to examine the other conditions of that liability, namely actual damage and the existence of a causal link between the Commission's conduct and the damage pleaded.

172. It follows from all the foregoing that the application must be dismissed in its entirety.

#### **COSTS**

173. Under art 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if these have been applied for in the successful



*a* party's pleadings. Furthermore, art 87(4) of the Rules of Procedure provides that the member states are to bear their own costs when they have intervened in the proceedings.

174. Since the applicant has been unsuccessful, it must be ordered to bear its own costs and to pay those incurred by the Commission.

*b* 175. In accordance with art 87(4) of the Rules of Procedure, the Italian Republic must be ordered to bear its own costs.

On those grounds, the Court of First Instance (Fourth Chamber, Extended Composition) hereby:

- (1) Dismisses the action;
- c* (2) Orders the applicant to bear its own costs and to pay those incurred by the Commission;
- (3) Orders the Italian Republic to bear its own costs.

# Valmont Nederland BV v European Commission<sup>a</sup>

(Case T-274/01)

COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES (FOURTH CHAMBER, EXTENDED COMPOSITION)<sup>b</sup>

JUDGES LEGAL (PRESIDENT), TIILI, MEIJ, VILARAS AND FORWOOD

19 FEBRUARY, 16 SEPTEMBER 2004

*European Community – Commission – Decision – Annulment – Evidential basis for decision – Sale of land by public body to private undertaking – Member state providing Commission with expert report concerning commercial value of land at material time – Further information arising from report requested by Commission but not provided by member state – Member state subsequently providing Commission with second expert report together with explanation of discrepancies between reports – Commission adopting decision declaring land transaction as state aid – Decision based on first report – Whether decision having proper evidential basis – Commission Decision (EC) 2002/142 – Article 87(1) EC (formerly EC Treaty, art 92(1)).*<sup>c</sup>

The applicant was successor in title to a company with whom a municipality in the Netherlands had agreed to sell an area of undeveloped land. As a result, articles in the national press claimed that that company had been the recipient of an improper subsidy granted by selling the land at less than commercial value. Before the Commission of the European Communities had opened a formal investigation into the matter, the Netherlands authorities had supplied it with a report produced by an independent expert (the first report), which estimated the commercial value of the land at the material time. Further information arising from that report was requested by the Commission, but none was provided. Once the formal investigation was opened, the Netherlands authorities provided the Commission with: (i) a report from a different independent expert (the second report), which provided a different estimate of the commercial value of the land at the material time; (ii) information from the second expert explaining the discrepancies between the two reports; and (iii) information explaining that, although a car park which had been constructed on part of the land had been financed by the municipality, other undertakings were permitted to use that car park in various ways, free of charge. In due course, Commission Decision (EC) 2002/142 (on the state aid implemented by the Netherlands in favour of Valmont Nederland BV) was adopted, which declared that the land transaction and the construction of the car park contained elements of state aid that were incompatible with the common market within the meaning of art 87(1) EC<sup>d</sup> (formerly art 92(1) of the EC Treaty), and which ordered recovery of that aid from the applicant. In adopting that decision, the Commission had relied upon the report of the first and not the second expert, and it had attributed half of the benefit of the financing of the car park to the applicant. Subsequently, the applicant brought an action before the Court of First Instance of the European Communities seeking annulment of the<sup>e</sup>

<sup>a</sup> Article 87(1) EC, so far as material, is set out at judgment para 1, below

- a decision. It contended: (i) that the Commission had erroneously based itself on the first report (which had been inconsistent and which had arrived at a market price for the land without any rational explanation) and had adopted its conclusion without having conducted a serious examination of it; and (ii) that the Commission had arbitrarily concluded that half of the financing granted by the municipality for the construction of the car park was to be deemed a benefit.

**Held** – (1) Where the Commission considered that aid had been granted, which had not been notified to it and which was therefore unlawful, it had the power to require the member state concerned to provide it with all the information necessary for its examination. It was only where the member state concerned had failed to provide the information so required that the Commission was empowered to make its decision based on the information available to it. However, in the instant case, the Commission, considering that the information in its possession was insufficient, had requested the information from the Netherlands authorities, but it had not required (by decision, and according to the applicable provisions of Community law) that that information be provided. Therefore, it could not rely on the incomplete nature of the information in its possession to justify the decision. Further, none of the arguments advanced to justify the evidential value of the first report was persuasive. Accordingly, the Commission had misapplied art 87(1) EC inasmuch as it had considered, on the basis of an expert's report devoid of evidential value in that respect, that the sale of the land contained an element of state aid (see judgment paras 55, 59, 60, 70, 89–91, below).

(2) Where a state measure amounted to compensation for services provided by a recipient undertaking in order to discharge public service obligations, such that the undertaking concerned did not enjoy a real financial benefit and was not placed in a more favourable competitive position than undertakings competing with it, the state measure concerned might fall outside of the scope of art 87(1) EC where a number of conditions were satisfied. In the instant case, it had followed from the Commission's own assessments that the applicant bore a burden in allowing others to use its car park in various ways regularly and free of charge, under an agreement concluded in the public interest with a national territory. It was also apparent that a portion of the financing granted by the national authority for the construction of the car park had benefited the applicant. However, the Commission could not, as it had done, automatically consider that that portion of the financing necessarily benefited the applicant without having first examined whether or not that portion of the financing might amount to compensation for the burden borne by the applicant. In so far as the Commission maintained that the requisite conditions had not been satisfied, it was not for the Community judicature to replace the Commission by carrying out an examination in its stead and substituting the conclusions to which the court arrived. It followed that the Commission had failed to establish to the requisite legal standard that half of the financing granted for the construction of the car park was to be classified as state aid. Accordingly, the decision would be annulled in its entirety (see judgment paras 129, 130, 132–134, 136–139, below).

### Notes

For grounds for annulment generally, see 51 *Halsbury's Laws* (4th edn) paras 2.45–2.49.



**Cases cited**

- Altmark Trans GmbH v Nahverkehrsgesellschaft Altmark GmbH* (Oberbundesanwalt beim Bundesverwaltungsgericht, third party) Case C-280/00 [2005] All ER (EC) 610, [2003] ECR I-7747, ECJ.
- Astilleros Zamacona SA v European Commission* Case T-72/98 [2000] ECR II-1683, CFI.
- Belgium v EC Commission* Case 234/84 [1986] ECR 2263, ECJ.
- Belgium v European Commission* Case C-197/99 P [2003] ECR I-8461, ECJ.
- Belgium v European Commission* Case C-56/93 [1996] ECR I-723, ECJ.
- De Gezamenlijke Steenkolenmijnen in Limburg v ECSC High Authority* Case 30/59 [1961] ECR 1, ECJ.
- Département du Loiret v European Commission* Case T-369/00 [2003] ECR II-1795, CFI.
- Diputación Foral de Álava v European Commission* Joined cases T-127/99, T-129/99 and T-148/99 [2002] ECR II-1275, CFI.
- Enirisorse SpA v Ministero delle Finanze* Joined cases C-34–38/01 [2003] ECR I-14243, ECJ.
- Fédération Française des Sociétés d'Assurance (FFSA) v European Commission* Case T-106/95 [1997] ECR II-229, CFI.
- Fédération Nationale du Commerce Extérieur des Produits Alimentaires v France* Case C-354/90 [1991] ECR I-5505, ECJ.
- France v EC Commission* Case C-301/87 [1990] ECR I-307, ECJ.
- France v European Commission* Case C-17/99 [2001] ECR I-2481, ECJ.
- France v Ladbroke Racing Ltd* Case C-83/98 P [2000] ECR I-3271, ECJ.
- Germany v EC Commission* Joined cases C-324/90 and C-342/90 [1994] ECR I-1173, ECJ.
- Italy and SIM 2 Multimedia SpA v European Commission* Joined cases C-328/99 and C-399/00 [2003] ECR I-4035, ECJ.
- Kneissl Dachstein Sportartikel AG v European Commission* Case T-110/97 [1999] ECR II-2881, CFI.
- Kwekerij Gebroeders Van der Kooy BV v EC Commission* Joined cases 67/85, 68/85 and 70/85 [1988] ECR 219, ECJ.
- Linde AG v European Commission* Case T-98/00 [2002] ECR II-3961, CFI.
- Ministère de l'Economie, des Finances et de l'Industrie v GEMO SA* Case C-126/01 [2003] ECR I-13769, ECJ.
- Namur-Les Assurances du Crédit SA v Office National du Ducroire* Case C-44/93 [1994] ECR I-3829, ECJ.
- Salomon SA v European Commission* Case T-123/97 [1999] ECR II-2925, CFI.
- Steinike und Weinlig (Firma) v Germany* Case 78/76 [1977] ECR I-595, ECJ.
- Thyssen Stahl AG v European Commission* Case T-141/94 [1999] ECR II-347, CFI; *affd* Case C-194/99 P [2003] ECR I-10821, ECJ.

**Application**

By application lodged on 22 October 2001 at the Registry of the Court of First Instance of the European Communities, Valmont Nederland BV (Valmont), a company incorporated under Netherlands law and established in Maarheeze, North Brabant, Netherlands, brought the present action for the annulment of Commission Decision (EC) 2002/142 (on the state aid implemented by the Netherlands in favour of Valmont Nederland BV). Valmont was represented by A Van Landuyt, A Prompers and G Van de Wal, lawyers. The Commission of the European Communities was represented initially by G Rozet and

a H Speyart, and subsequently by G Rozet and H Van Vliet, acting as agents, with an address for service in Luxembourg. The language of the case was Dutch. The facts are set out in the judgment of the court.

16 September 2004. **The COURT OF FIRST INSTANCE (Fourth Chamber, Extended Composition)** delivered the following judgment.

b  
LEGAL FRAMEWORK

1. Article 87(1) EC (formerly art 92(1) of the EC Treaty) provides that, save as otherwise provided in the Treaty, any aid granted by a member state or through state resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods are, in so far as it affects trade between member states, incompatible with the common market.

c 2. Commission Communication 97/C 209/03 on state aid elements in sales of land and buildings by public authorities was published in the Official Journal of the European Communities on 10 July 1997 (OJ 1997 C209 p 3)  
d (hereinafter the communication on land sales).

3. In point I, that communication states its purpose to be, among other things, to clarify the practice of the Commission of the European Communities regarding the examination of sales of publicly owned land, to reduce the number of transactions to be examined in the light of arts 87 and 88 EC (formerly arts 92 and 93 of the EC Treaty) and, to that end, to provide  
e guidance on procedure to the member states.

4. In point II.1, entitled 'Sale through an unconditional bidding procedure', the communication states, in particular, that '[a] sale of land ... following a sufficiently well-publicised, open and unconditional bidding procedure, comparable to an auction, accepting the best or only bid is by definition at market value and consequently does not contain State aid'.  
f

5. In point II.2, entitled 'Sale without an unconditional bidding procedure', it states, in particular, as follows:

'If public authorities intend not to use the procedure described under 1, an independent valuation should be carried out by one or more independent asset valuers prior to the sale negotiations in order to establish the market value on the basis of generally accepted market indicators and valuation standards. The market price thus established is the minimum purchase price that can be agreed without granting State aid.'

g 6. In point II.3, entitled 'Notification', the communication on land sales indicates, essentially, that, in order to allow the Commission to establish whether state aid exists, the member states should, without prejudice to the de minimis rule, notify to it any sale that was not concluded on the basis of either  
h of the procedures described at points II.1 or II.2.

BACKGROUND TO THE DISPUTE

i 7. Valmont Nederland BV (Valmont) is a company incorporated under Netherlands law established in Maarheeze, Netherlands, in Noord-Brabant (North Brabant). It is the successor to Nolte Mastenfabriek BV, which was bought in 1991 by its parent company, Valmont Industries Inc.

8. On 1 July 1993, the municipality of Maarheeze (hereinafter Maarheeze) and Nolte Mastenfabriek BV signed an agreement for the sale by the former and the purchase by the second of some three hectares of undeveloped land

intended for industrial purposes. That agreement fixed a sale price excluding VAT of 900,000 Netherlands guilders (NLG), or approximately €408,402. a

9. The transaction was finalised by an authentic deed of sale signed on 8 February 1994. The sale price, excluding VAT, was fixed in accordance with the sale agreement of 1 July 1993, on the basis of NLG 30/m<sup>2</sup> (approximately €13·61/m<sup>2</sup>). b

10. In the spring of 1998, articles in the Netherlands press claimed that certain municipalities in Noord-Brabant had made improper use of subsidies granted by the provincial authorities in order to attract businesses into their region. It was claimed that Maarheeze had been the recipient of one such subsidy and used it in such a way as to enable it to sell land below its commercial value. c

11. By letter of 1 April 1998, the Commission invited the Netherlands authorities to provide it with information on the matter.

12. By letter of 2 July 1998, the Netherlands authorities informed the Commission of their intention to send it an expert's report determining the price of some of the land concerned at the time when it was sold.

13. By letter of 19 January 1999, the Netherlands authorities sent the Commission a copy of a report of 4 December 1998, drawn up for them by an independent expert, Mr Laureijssen, a member of the firm of experts Laureijssen & Brocken (the Laureijssen report). That report, which dealt with two plots of land sold by different municipalities to different undertakings, concluded, with regard to the land sold to Valmont, that the price per square metre should be estimated at NLG 42·50 (approximately €19·29) in 1993. d

14. By letter of 7 November 2000, the Commission notified the Netherlands authorities of its decision to open a formal investigation procedure under art 88(2) EC. It indicated in that decision that the sale of the land, on the one hand, and the subsequent construction of a car park on part of that land, financed by Maarheeze for up to NLG 250,000 (approximately €113,445), on the other, appeared to amount to state aid. Furthermore, it doubted whether it fulfilled the requisite conditions to enable it to be declared compatible with the common market. e

15. By letter of 12 December 2000, the Netherlands authorities transmitted their comments to the Commission, together with the following documents:

—a report of 4 October 1994, drawn up on behalf of Valmont by an independent expert, Mr Schekkerman, a member of the firm of experts Troostwijk (the Troostwijk report), which concluded that the sale price of the land should be estimated at NLG 1,050,000 (approximately €476,000) in 1994; g

—a letter of 28 November 2000 from the same person entirely devoted to the discrepancy between the estimates arrived at in the Laureijssen and Troostwijk reports (the Troostwijk letter); h

—three letters of 6 and 7 October 2000 from undertakings other than Valmont declaring that they used the latter's car park in various ways, free of charge.

16. By Commission Communication 2001/C 37/08 (invitation to submit comments pursuant to art 88(2) EC, concerning aid C 57/2000 (ex NN 157/99) in favour of Valmont Nederland BV (ex Nolte), the Netherlands) (OJ 2001 C37 p 44), the letter of 7 November 2000 notifying the Netherlands authorities of the decision to open a formal investigation procedure was brought to the attention of interested parties. i

17. By letters of 20 February and 5 March 2001, Valmont counsel submitted its comments to the Commission.



**a** 18. On 18 July 2001, the Commission adopted Decision (EC) 2002/142 (on the state aid implemented by the Netherlands in favour of Valmont Nederland BV) (OJ 2002 L48 p 20; the decision).

19. Article 1 thereof provides that the land transaction and the construction of the car park contain elements of state aid in favour of Valmont amounting to NLG 375,000 (approximately €170,168) and NLG 125,000 (approximately €56,723) respectively.

**b** 20. It also finds that those state aid elements are incompatible with the common market (see art 2) and requires the Netherlands, first, to take all necessary measures to recover it from the recipient (see art 3) and, secondly, to inform the Commission of the above-mentioned measures (see art 4).

**c** PROCEDURE AND FORMS OF ORDER SOUGHT BY THE PARTIES

21. By application lodged at the Registry of the Court of First Instance of the European Communities on 22 October 2001, Valmont brought the present action.

**d** 22. The case was initially allocated to the First Chamber, Extended Composition, and subsequently, upon the Judge-Rapporteur being assigned to the Fourth Chamber as a result of the changes to the composition of the chambers of the Court of First Instance from 1 October 2003, to the Fourth Chamber, Extended Composition.

**e** 23. On hearing the report of the Judge-Rapporteur, the Court (Fourth Chamber, Extended Composition) decided to open the oral procedure. It also asked the parties, pursuant to art 64 of its Rules of Procedure, to answer a number of written questions and produce a number of documents. The parties complied with the request within the specified period.

24. The parties made their submissions to the court and gave their oral replies to the court's questions at the hearing on 19 February 2004.

**f** 25. Valmont claims that the court should:

- annul the decision;
- order the Commission to pay the costs.

26. The Commission contends that the court should:

- dismiss the application;
- order Valmont to pay the costs.

**g** LAW

27. In support of its claims, Valmont puts forward six pleas in law.

**h** 28. The first plea in law alleges infringement of art 87(1) EC inasmuch as the sale of the land carries no benefit. The second plea in law alleges infringement of art 87(1) EC inasmuch as the sale of the land and the construction of the car park do not affect trade and do not distort competition. The third plea in law alleges, in essence, that the administrative procedure was conducted irregularly and that Valmont's procedural rights were not observed. The fourth plea in law alleges, in essence, infringement of art 87(1) EC inasmuch as the Commission concluded that the sale of the land contained a benefit by basing itself on an expert's report which is of no evidential value. The fifth plea in law alleges, in essence, infringement of art 87(1) EC inasmuch as the construction of the car park contains no benefit. The sixth plea in law alleges, in essence, infringement of the rules regarding recovery of state aid and procedural time limits.

**i** 29. Valmont's first and fourth pleas in law constitute, in essence, a single plea in law, alleging infringement of art 87(1) EC inasmuch as the sale of the land does not contain a benefit, which must be examined first. Next to be examined

will be Valmont's fifth plea in law alleging infringement of art 87(1) EC inasmuch as the construction of the car park does not contain a benefit. a

*The plea in law, alleging infringement of art 87(1) EC inasmuch as the sale of the land does not contain a benefit*

30. According to Valmont, the Commission misapplied the communication on land sales, made erroneous use of the Laureijssen report and made a manifest error of assessment of the sale. b

31. The argument concerning the use made by the Commission of the Laureijssen report must be examined first of all.

*Arguments of the parties*

32. First, Valmont argues that the Commission based itself on the Laureijssen report, drawn up at the request of the Netherlands authorities towards the end of the preliminary investigation stage, in 1998, despite the fact that it was inconsistent. In particular, Valmont claims that, with regard to the land at issue, that report arrives, without any rational explanation, at a market price of NLG 42.50/m<sup>2</sup> and that the Commission adopted that conclusion without seriously examining it. c  
d

33. Secondly, the Commission disregarded the Troostwijk report, commissioned by Valmont in order to obtain bank financing, in 1994, despite the fact that it was relevant. Furthermore, it peremptorily disregarded the Troostwijk letter.

34. The Commission replies that Valmont's arguments overlook the fact that, when investigating land sales by a public body pursuant to art 87(1) EC, the Commission, which is not itself qualified to estimate the price of such an asset, bases itself on the objective criteria set down in the communication on land sales. In particular, in the context of the procedure described in point II.2 of that communication, it is for an expert to take into account the whole of the relevant economic circumstances. Provided that, first, such an expert is qualified and independent within the meaning of that provision and that, secondly, no serious methodological error is apparent in his report, the Commission is obliged to adopt the conclusions to which it arrives. e  
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35. In the present case, on the one hand, the Commission could base itself on the Laureijssen report, which was drawn up after the sale but still for the purposes of the administrative procedure. First, the expert was possessed of the knowledge and independence required by the second to fourth paragraphs of point II.2(a) of the communication on land sales. Next, the task entrusted to him to estimate the price of the land at the time of the sale was carried out in accordance with the fifth paragraph of point II.2(a) of that communication. Furthermore, his working methods were appropriate since, in particular, he had visited the site. Finally, careful examination of the Laureijssen report shows that the expert dedicated the requisite attention to all the relevant factors and that, finally, the calculation of the price per square metre of the land properly included those factors. g  
h

36. On the other hand, the Commission could disregard the Troostwijk report and the Troostwijk letter since the estimate in those documents concerned the developed land which Valmont could sell rather than the undeveloped land which it had acquired. i

*Findings of the court*

37. In view of the fact that aid is a legal concept which must be interpreted on the basis of objective factors, the Community courts must in principle,

- a having regard both to the specific features of the case before them and to the technical or complex nature of the Commission's assessments, carry out a comprehensive review as to whether a measure falls within the scope of art 87(1) EC (see *France v Ladbroke Racing Ltd* Case C-83/98 P [2000] ECR I-3271 (para 25) and *Linde AG v European Commission* Case T-98/00 [2002] ECR II-3961 (para 40)). The exception to that principle is where a complex economic appraisal is involved, in which case review by the court is restricted (see, to that effect, *Belgium v European Commission* Case C-56/93 [1996] ECR I-723 (para 11) and *Italy and SIM 2 Multimedia SpA v European Commission* Joined cases C-328/99 and C-399/00 [2003] ECR I-4035 (para 39)).

- c 38. Furthermore, the legality of a Commission decision concerning state aid must be assessed in the light of the information available to the Commission when the decision was adopted (see *Belgium v EC Commission* Case 234/84 [1986] ECR 2263 (para 16) and *Belgium v European Commission* Case C-197/99 P [2003] ECR I-8461 (para 86)).

- d 39. In the present case, art 1 of the decision states that the sale of the land contains an element of state aid amounting to NLG 375,000 (approximately €170,168) and it is clear from recitals (15) to (18) of the decision that the difference between the sale price of the land and the market price of the land determined by the Commission is thus described as state aid.

- e 40. In order to arrive at such a conclusion, the Commission first pointed out that it followed from point II.2 of the communication on land sales that a member state which wished to sell a piece of land could have its value estimated beforehand by an expert, such an estimate then constituting the market price which, where adhered to, rules out the existence of state aid. It found, in the present case, that the experts' reports which it had available were subsequent to the transaction (see recital (16) of the decision).

- f 41. Next, it considered that the Troostwijk report had no evidential value while the Laureijssen report was evidential (see recital (17) of the decision).

42. Finally, it adopted the market price of NLG 42.50/m<sup>2</sup> (approximately €19.29/m<sup>2</sup>) estimated in the Laureijssen report, compared the sale price of NLG 30/m<sup>2</sup> (approximately €13.61/m<sup>2</sup>) with it and concluded from that comparison that there existed state aid (see recital (18) of the decision).

- g 43. It must therefore be considered whether the Commission based itself exclusively on a report devoid of any evidential value in order to conclude that there was state aid in the land's sale price. Since that question does not involve, in the present case, any complex economic appraisal it must, as such, be fully reviewed.

- h 44. Measures which, in various forms, mitigate the burdens which are normally included in the budget of an undertaking and which are thereby similar to subsidies constitute benefits for the purposes of art 87(1) EC (see, to that effect, *De Gezamenlijke Steenkolenmijnen in Limburg v ECSC High Authority* Case 30/59 [1961] ECR I at 39 and the *Italy and SIM 2 Multimedia* case, cited at para 37, above (para 35), such as, among others, the supply of goods or services on favourable terms (see, to that effect, *Kwekerij Gebroeders Van der Kooy BV v EC Commission* Joined cases 67/85, 68/85 and 70/85 [1988] ECR 219 (paras 28, 29) and *Ministère de l'Economie, des Finances et de l'Industrie v GEMO SA* Case C-126/01 [2003] ECR I-13769 (para 29)).

- i 45. When applied to the sale of land to an undertaking by a public authority, the consequence of that principle is that it must be determined whether, in particular, the sale price could not have been obtained by the purchaser under normal market conditions (see, to that effect, *Diputación Foral de Álava v*



*European Commission* Joined Cases T-127/99, T-129/99 and T-148/99 [2002] ECR II-1275 (para 73), a paragraph which was not subject to appeal). Where the Commission carries out an examination for that purpose of the experts' reports drawn up after the transaction in question, it is bound to compare the sale price actually paid to the price suggested in those various reports and to determine whether it deviates sufficiently to justify a finding that there is a benefit (see, to that effect, the *Diputación Foral de Álava* case, cited above (para 85), a paragraph which was not subject to appeal). That method makes it possible to take into account the uncertainty of such a determination, which is by nature retrospective, of such market prices. a

46. In the present case, contrary to what is stated in recital (18) of the decision, the conclusion of the Laureijssen report that the sale price excluding VAT should be estimated at NLG 42.50/m<sup>2</sup> in 1993 does not rely on any calculation or on a comparison with the prices paid for other land sold by the municipality concerned and sales of land by other proprietors. c

47. First, that figure does not rely on any explicit and verifiable figures. Indeed, after stating, in the ninth and tenth paragraphs of point 3.4, as follows:

'[T]he municipality of Cranendonck, formerly Maarheeze, also based itself on the cost price. No plot of approximately [three hectares] which was directly sellable was available. The plot sold to Valmont International BV belonged to the municipality and consisted of woods worth approximately NLG 2/m<sup>2</sup>.

The cost of construction had been estimated by the municipality at NLG 30/m<sup>2</sup> excluding VAT (which is also the figure found for "Den Engelsman"). The development plan was drawn up after the sale to Valmont, namely on 24 August 1994 ...' e

The Laureijssen report immediately concludes (at point 4):

'[O]n the basis of the foregoing evaluations and of the comparison with assets sold and rented, the immovable asset in question must be estimated on the basis of:

- (a) the 1993 price index;
- (b) its being unburdened by a lease;
- (c) there being no third-party rights ...
- (d) its being unburdened by any mortgage or charge;
- (e) there being no drawbacks at the environmental level, such as pollution of the ground or the air, processed or harmful materials, which might negatively influence, in the long or short term, the value of the asset being estimated;

(f) taking nevertheless into account justified cost reductions for each asset, such as declared by the municipality,

as being:

value for private freehold sale ...  
NLG 42.50/m<sup>2</sup> excluding VAT.'

48. On the one hand, it is clear from the passage cited above that, in order to fix the sale price, Maarheeze based itself on a cost price of NLG 32/m<sup>2</sup> obtained by adding the value of the ground in its original wooded state (NLG 2/m<sup>2</sup>) and the costs of providing services (NLG 30/m<sup>2</sup>). That cost price therefore consists of the explicit and verifiable sum of objective figures. Moreover, it is apparent that the cost of providing services of NLG 30/m<sup>2</sup>, which constitutes the essential constituent of that cost price, corresponds to i

a that found for the whole of the Den Engelsman area, in which is situated the land sold to Valmont, and may therefore be considered as having been estimated at its fair value. Finally, it is apparent that that cost price justifies a sale price of NLG 30/m<sup>2</sup>, as the expert states in the first to third paragraphs of point 3.4 of his report:

b 'During the visits we made to the municipalities of Helmond and Cranendonck [formerly Maarheeze], we received information concerning the fixing of the sale price charged in the transactions in question involving E. P. M. and Valmont Nederland BV.

The municipalities have explained the reduction in the land prices.

c For the sake of completeness of our report, we do not wish to deprive you of that reply. We believe that the explanations given are such as to justify the sale prices.'

49. On the other hand, it is clear that it is impossible to verify objectively the elements then set forth in the Laureijssen report or the market price of NLG 42.50/m<sup>2</sup> supposedly resulting from their combination.

d 50. In the first place, the elements appearing in point 4(b), (c), (d) and (e) of that report had already been taken into account by the sale agreement of 1 July 1993 and by the authentic deed of sale of 8 February 1994. The former document indicates, at para 1, that '[t]he municipality has investigated whether there is any pollution of the ground of the land sold' and that 'the investigation shows that the state of the ground is deemed fit for development and for its use for the purpose intended for the plot'. The second document reiterates that conclusion at point C.6, and reiterates, at points C.2.1, C.2.3 and C.5, that the plot is freehold and unburdened by third party rights, charges or mortgages. In the absence of any explanation in the Laureijssen report, it is arbitrary to consider that the latter document evaluates the effect of those elements on the sale price more accurately than was done at the time of the sale.

f 51. Next, as regards the reference in point 4(f) of the Laureijssen report to 'justified cost reductions for each asset' being taken into account, it is worth noting that, although that report actually describes a justified cost reduction so far as concerns the second plot, sold by a municipality other than Maarheeze, to an undertaking other than Valmont, which it aimed to estimate (see para 13, above), it does not, on the contrary, mention any such element with regard to the plot sold by Maarheeze to Valmont.

g 52. At the hearing, the Commission stated that it had requested further details in that respect from the Netherlands authorities during the administrative procedure, that they had failed to provide them and that the passage in question referred no doubt to declarations made to the expert by h Maarheeze municipal officials but which were not set down in the Laureijssen report.

i 53. According to the case law cited in para 38, above, the legality of a decision on state aid adopted by the Commission may only be assessed on the basis of information available to the Commission at the time of its adoption. In the present case, it follows that, although the Commission did not obtain the additional information it requested, it did indeed however have at its disposal the Laureijssen report containing the reference in question and was not exonerated from assessing the evidential value thereof. The court may thus review the legality of the decision in that respect. However, it is not disputed by the parties that the Laureijssen report does not explain what the 'justified cost reduction' relating to the land bought by Valmont might be and the court

considers that an unsubstantiated reference cannot reasonably be considered conclusive and relevant for the purpose of explaining the discrepancy of NLG 10.50/m<sup>2</sup> noted between the cost price of NLG 32/m<sup>2</sup> on which Maarheeze based itself and the sale price of NLG 42.50/m<sup>2</sup> estimated in the Laureijssen report. The argument that that reference could be considered to refer to statements made to the expert by Maarheeze municipal officials which were not set down in the Laureijssen report is too speculative to affect that assessment.

54. However, in so far as it may be inferred from the Commission's arguments that the error committed by it in that respect is connected with the incomplete nature of the information available to it, it remains to be examined whether the Commission may avail itself of that fact.

55. According to the case law, where it considers that aid has been granted without it having been notified to it and is, therefore, unlawful, the Commission has the power to require the member state concerned to provide it with all the information necessary for its examination; it is only where the member state concerned fails to provide the information requested that the Commission is empowered to make its decision on the basis of the information available to it (see, to that effect, *France v EC Commission* Case C-301/87 [1990] ECR I-307 (paras 19, 22) and *Germany v EC Commission* Joined cases C-324/90 and C-342/90 [1994] ECR I-1173 (para 26)).

56. The power conferred on the Commission to require the member state concerned to provide it with information is at present provided for by Council Regulation (EC) 659/1999 (laying down detailed rules for the application of art [88 EC]) (OJ 1999 L83 p 1). That regulation entered into force on 16 April 1999. To the extent that it provides procedural rules, it applies to any administrative procedure pending before the Commission when it entered into force, save for those provisions which contain a specific body of rules in that regard (see, to that effect, *Département du Loiret v European Commission* Case T-369/00 [2003] ECR II-1795 (paras 50, 51)). Since the preliminary investigation stage was set in motion by the letter of 1 April 1998 and the formal investigation procedure was opened by decision of the Commission notified to the Netherlands authorities by letter of 7 November 2000 (see paras 11, 14, above), that regulation applies in the present case.

57. According to the wording of art 10 of Regulation 659/1999 itself, the power conferred on the Commission to address to the member state concerned, successively, a request for information (see art 10(2) and, by reference, art 5(1) thereof), followed, if necessary, by a reminder (see art 10(2) and, by reference, art 5(2) thereof) and, finally, an instruction to provide information (see art 10(3) of that regulation) depends initially merely on a choice by the Commission. Furthermore, art 10(3) of Regulation 659/1999 provides, inter alia, that, where a decision requiring information to be provided is adopted, it must 'specify what information is required'.

58. It follows that the Commission may adopt a final decision where it considers to have available all the necessary information and that it is only where it considers that that is not the case that it requires the member state concerned to provide it (see, to that effect, *Germany v Commission*, cited in para 55, above (para 26) and *France v European Commission* Case C-17/99 [2001] ECR I-2481 (para 28)), as described in the preceding paragraph.

59. However, in the present case, the Commission has stated that it had requested the Netherlands authorities to provide it with an explanation regarding the reference in the Laureijssen report to a 'justified cost reduction'



- a relating to the land bought by Valmont. In other words, the Commission considered that the information in its possession was not sufficient. None the less, it did not obtain additional information and finally based the decision solely on the information it then had in its possession. Moreover, the fact that the Commission stated in the decision that 'on the basis of the information available, [it could] rely [on the Laureijssen] report' (see recital (18) of the decision) attests to that.

b 60. Nevertheless, it is not clear from the decision or the file, nor does the Commission claim, moreover, that the Netherlands authorities were ever required, by decision requiring that information be provided, adopted under art 10(3) of Regulation 659/1999, to provide the information in question. Since the Commission has not made use of the powers enabling it to enjoin the member state concerned to provide it with it, it cannot rely on the incomplete nature of the information in its possession in order to justify the decision (see, to that effect, *Germany v Commission*, cited at para 55, above (paras 28, 29)).

c 61. Finally, the reference, in point 4(a) of the Laureijssen report, to the 1993 price index does not demonstrate that the sale price ought to have been fixed at NLG 42.50/m<sup>2</sup> but only that it could, in theory and in different circumstances, have been fixed at NLG 50/m<sup>2</sup>. That latter figure must be understood, as the Commission explained at the hearing, only as a 'rather artificial price'.

d 62. Perusal of the table entitled 'Land sale price, excluding VAT, per square metre', in point 3.2 of the Laureijssen report, shows that a price of NLG 50/m<sup>2</sup> was the theoretical sale price applicable in 1993 in Maarheeze. The evaluations which precede that table state that the sale prices actually agreed case by case are 'strongly influenced and/or decided' by that theoretical sale price, and the '[r]emarks' which follow it show that, in the expert's view, that price is applicable irrespective of the actual size of the land concerned, since '[Maarheeze] does not distinguish between large and small plots'.

e 63. However, point 3.2 of the Laureijssen report also reads that, in 1993, 'the economy was clearly in recession ... in central and eastern [Noord-]Brabant', that, indeed, 'land prices have not generally been downwardly revised', but also that, '[i]n the circumstances, there is clearly a devaluation'. The expert continues, in unambiguous terms:

f 'Charging a lower price in unfavourable economic circumstances, particularly when selling large volumes of industrial land, is entirely understandable. Indeed, obtaining a quicker return on investment and preventing loss of future interest are sufficient reasons from an economic point of view. Moreover, in the circumstances described, that could have a knock-on effect on the price where one is dealing with market operators who are acting logically.'

g 64. Perusal of the Laureijssen report thus makes it clear, first, that a sale price which is lower than the theoretical price of NLG 50/m<sup>2</sup> was 'entirely' understandable, 'particularly when selling large volumes', or even logical in the economic context of 1993 with regard to a transaction such as that in issue in the present case; secondly, that the cost price of NLG 32/m<sup>2</sup> was based on objective and ascertainable criteria and could constitute a market price; thirdly, that the alleged market price of NLG 42.50/m<sup>2</sup> arrived at in that report is not based on the sum of verifiable elements.

h 65. In the second place, that figure of NLG 42.50/m<sup>2</sup> is not based on a comparison with prices paid in other land sales by the municipality concerned or on land sales by other proprietors.

66. On the other hand, perusal of the Laureijssen report shows that the expert inquired into the existence of similar, contemporaneous transactions with which to compare the sale, as emerges from the second and third paragraphs of point 3.1 of the report, and that he reviewed the transactions carried out by Maarheeze between 1991 and 1995 and examined the transactions carried out by other proprietors, both private and public, but that he then took the view that it was impossible to carry out such a comparison. a

67. Perusal of the table entitled 'Total land sales per year', in point 3.2 of the Laureijssen report, leads to the observation that, apart from the plot of three hectares sold to Valmont, sale of land by Maarheeze for industrial development and noted by the expert involved a total of 0.18 hectares of land in 1991, 0.56 hectares in 1993, 0.04 hectares in 1994 and 3.52 hectares in 1995, without it being, moreover, possible to determine whether the latter figure corresponds to a single transaction or to several transactions, since it is an annual total. b  
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68. Likewise, in the second to sixth paragraphs and the sixteenth to nineteenth paragraphs of point 3.2 and again in the first and third paragraphs of point 3.3 of the Laureijssen report, the expert found that there were no comparable transactions carried out by other proprietors in either the public or private sectors. First, the municipalities of Noord-Brabant had a monopoly with regard to sales of land made suitable for industrial development. Second, those municipalities charged different sales prices for plots of comparable sizes as shown in the table entitled 'Land sale prices excluding VAT per m<sup>2</sup>', which appears in point 3.2 of the above-mentioned report, and in the remarks which follow it. d  
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69. Consequently, as stated in the ninth paragraph of point 3.2 of the Laureijssen report, the expert carried out 'an estimate ... largely [based] on hypothetical arguments', without, moreover, his report making clear the elements on which that estimate had been based, since it states first that '[a]ccount has been taken of sales transactions, to a certain party, of a plot of a minimum size of [four hectares]' (fourth paragraph of point 3.1 of the Laureijssen report), then that '[t]here were no comparable land sales of [four hectares] in the municipality of [Maarheeze] during the period from 1991 to 1995 to a specific tenderer' (first paragraph of point 3.3 of the Laureijssen report) and finally that the synopsis of the figures in the table entitled 'Land sales excluding VAT per m<sup>2</sup>' 'covers an average for plots of approximately 90 000 m<sup>2</sup>', that is to say nine hectares (point 3.2 of the Laureijssen report). f  
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70. When asked to speak to the evidential value of the Laureijssen report, the Commission put forward various arguments seeking to justify the market price of NLG 42.50/m<sup>2</sup> concluded in that document and to put to one side the market price of NLG 32/m<sup>2</sup> which it mentions. However, none of those arguments is persuasive. h

71. First, the Commission indicated in its answers to the court's written questions that it was normal for an expert report to provide, as here, a general estimate. It is nevertheless true that an expert report can be deemed of any evidential value, either by the Commission or by the court, only as regards its objective content and that a mere unsubstantiated statement in such a document does not make it possible to conclude that state aid exists. Besides, it is the line of argument adopted by the Commission during the hearing with regard to the Troostwijk report. It argued that, if the method for determining the price of the land adopted in the Troostwijk report, which subtracts the costs of construction from the value of the developed land (see recital (17) of i

a the decision) were deemed to be acceptable, it is still the case that 'no accurate calculation' of those costs was carried out in the present case and the figure of NLG 35/m<sup>2</sup> at which the report arrives is therefore inadequate in any event.

b 72. Secondly, the Commission stated in its replies to the court's written questions and later at the hearing that, although imprecise, the list of factors determining the market price in point 4 of the Laureijssen report is adequate provided it is produced, as in the present case, by an independent qualified expert. However, although the Commission may commission outside consultants, without albeit being bound thereto (see, to that effect, *Fédération Française des Sociétés d'Assurance (FFSA) v European Commission* Case T-106/95 [1997] ECR II-229 (para 102) and *Astilleros Zamacona SA v European Commission* Case T-72/98 [2000] ECR II-1683 (para 55)), it is not thereby exempted from assessing their work. Subject to judicial review, ensuring that art 87 EC is observed and art 88 EC is implemented is the central and exclusive responsibility of the Commission (see, to that effect, the judgments of the Court of Justice of the European Communities in *Firma Steinike und Weinlig v Germany* Case 78/76 [1977] ECR I-595 (para 9), *Fédération Nationale du Commerce Extérieur des Produits Alimentaires v France* Case C-354/90 [1991] ECR I-5505 (para 14) and *Namur-Les Assurances du Crédit SA v Office National du Ducroire* Case C-44/93 [1994] ECR I-3829 (para 17)) and not of the aforementioned experts.

c 73. Thirdly, the Commission states in its replies to the written questions of the court that the Laureijssen report also mentions factors which help to explain the conclusion at which it arrives. The Commission took those factors into account implicitly in its analysis.

d 74. On the one hand, the Commission observes that the land, which is located alongside a major road, is easily accessible and has modern facilities, according to the description in point 2 of the Laureijssen report. However, the court considers that, on account of its generality and vagueness, that argument does not appear in this case capable of explaining, by itself, the conclusion at which the Laureijssen report arrives. For the rest, although the expert mentions those factors in his report, he does not draw any explicit inference therefrom in his assessment or in his conclusion as to the value of the land.

e 75. On the other, the Commission takes the view that account should be taken of the reference in the first paragraph of point 3.2 of the Laureijssen report, according to which '[a]s a general rule, land prices are determined on the basis of the addition of the purchase or asset value, the cost of providing services, infrastructure and change-of-use work, the benefits, the risks etc'. However, the court notes that according to the case file, the costs of providing services are in fact taken into account in point 3 of the sale undertaking of 1 July 1993 and in point C.6 of the deed of sale of 8 February 1994, and points out that the Laureijssen report unequivocally states that they, together with the asset value of the land, are already included in the cost price on which Maarheeze based itself when selling the land to Valmont (see paras 47, 48, above). As to the other factors, it is sufficient to state that they are not examined in the Laureijssen report any more than they are in the decision.

f 76. Fourthly, the Commission bases a line of argument in its answers to the court's written questions, and subsequently at the hearing, on a document produced at its own initiative entitled 'Proposal of the [Maarheeze municipal] council of 17 June 1980' which aims, in particular, at fixing the general terms and conditions of the sale and a sale price of the plots of land intended for industrial use.



77. Even if that document, of which the Commission was not in possession when it adopted the decision, since its reply to the court's written questions make it clear that it was sent in a letter from the Netherlands authorities of 15 January 2004, could be taken into account, it does not mean it must be followed. a

78. Admittedly, the document deals with the carrying-out, in 1980, of an extension to the Den Engelsman industrial estate, into which Valmont moved in 1994. The document says of that extension that '[t]he gross surface is of +/- 2.85 hectares, and the net surface area to be made available is +/- [1.74] hectares', so that 'the sale price should be fixed at NLG 45/m<sup>2</sup> excluding VAT'. However, without it being necessary to examine the relevance in the present case of a proposal relating to a developed area of land 14 years prior to the transaction in question as a response to '[v]arious undertakings established in [the] municipality [which] asked to be taken into account for the purchase of industrial land', the gross surface area of which is, moreover, smaller than that of the land sold to Valmont, it suffices to note that there is nothing in the file to suggest that the proposal in question was ever adopted by Maarheeze. b

79. On the contrary, the decision of Maarheeze municipal council of 26 June 1980 concerning general terms and conditions for the sale of land intended for industrial use, to which the deed of sale of 8 February 1994 refers and which was also produced before the court, does not contain, for its part, any reference whatever to the sale price. c

80. Moreover, perusal of the proposal of 17 June 1980 on which the Commission is placing reliance leads to the observation that it intended to fix a sale price of NLG 45/m<sup>2</sup> on the basis of a cost price of NLG 44.10/m<sup>2</sup> and, therefore, to limit the immediate pecuniary benefit obtained by Maarheeze from the sale of the land in question to NLG 0.90/m<sup>2</sup>. That document is therefore not such as to establish the reasonable nature of the conclusion at which the Laureijssen report arrived, which found a cost price of NLG 32/m<sup>2</sup> and a market price of NLG 42.50/m<sup>2</sup>, so that there is a discrepancy of NLG 10.50/m<sup>2</sup>, that is to say ten times greater than that in the document in question, between those two figures. d

81. Fifthly, the Commission maintained in its replies to the court's written questions that the market price of NLG 42.50/m<sup>2</sup> is corroborated by a report of the Netherlands ministry for social housing, development and the environment entitled '1993 inquiry into industrial estates and the location of spare offices' and included as annex 25 to its defence. With regard to the land acquired by Valmont, that report mentioned a price of NLG 47/m<sup>2</sup>. However, it must be stated that, as produced by the Commission as an annexure to its pleadings, that document consists of a page-long general synthesis in which there is no mention of the information in question. e

82. Sixthly, the Commission claimed at the hearing that the Laureijssen report was, amongst the expert reports available to it, the only relevant document since its purpose was to estimate the price of the land to be sold freehold by private contract in the same state as at the time of sale. On the other hand, as stated in recital (17) of the decision, it could not rely on the Troostwijk report since it evaluated the whole industrial estate, including buildings, rather than the land as sold by Maarheeze, that is to say undeveloped. f

83. None the less, although the Commission was able to observe as a matter of fact that the purpose of the Troostwijk report was to estimate the land as developed, to take the view that that was insufficient and to refer to the g

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a Laureijssen report, the purpose of which it believed to correspond to the wording of the fifth paragraph of point II.2(a) of the communication on land sales, it was still necessary to establish its evidential value.

b 84. It must further be observed that, in recital (18) of the decision, the Commission disregarded the Troostwijk letter, which stated in particular that the Laureijssen report did not take any account of the fact that the land was not totally accessible from the public highway and, therefore, overvalued its price, on the ground that '[t]hat statement is not ... supported by any evidence' and that '[t]he [Laureijssen report] explicitly states that the experts visited the site'.

c 85. However, although the first paragraph of point 3.1 of the Laureijssen report suggests that the expert actually visited the site, that is also the case as regards the author of the Troostwijk report, according to the first paragraph of the section of his report, entitled 'Reply'. The Commission in any event acknowledged as much at the hearing.

d 86. Accordingly, having noted the existence of a discrepancy between the Laureijssen and Troostwijk reports regarding a factual element affecting the price of the land and not having any information available to consider that the Laureijssen report was accurate in that respect and that the Troostwijk report was not, the Commission, which had taken the view that the latter did not employ a satisfactory calculation method and was not suited in that specific regard, could not extend that opinion and simply disregard the Troostwijk letter as of no evidential value. Furthermore, although the method consisting in calculating the value of undeveloped land on the basis of that of developed land might appear imperfect, it can hardly be denied that its interest lay in the fact that it was free from speculation, as Valmont stated at the hearing without being challenged on that point.

f 87. Seventhly, the Commission argued that, even supposing that the cost price of NLG 32/m<sup>2</sup> constituted a market price which it was constrained to compare with the selling price of NLG 30/m<sup>2</sup>, it was nevertheless true that there was a discrepancy of NLG 2/m<sup>2</sup> between those prices and that therefore Maarheeze did not derive any pecuniary benefit from the sale.

g 88. None the less, that finding is not relevant, since it follows from the case law cited at para 45, above that it was still necessary to determine whether the sale price of NLG 30/m<sup>2</sup>, which produces a full price of NLG 900,000, diverged from the market price of NLG 32/m<sup>2</sup>, which gives a full price of NLG 960,000, sufficiently to be classified as state aid. In other words, it was for the Commission to assess the discrepancy of 6.25% between those figures in the light of art 87(1) EC and, on that basis, to come to a conclusion as to the existence or otherwise of state aid.

h 89. It follows from the foregoing that Valmont's arguments are well founded. The Laureijssen report does not support the Commission's conclusion that the sale price is less than the market price and therefore contains an element of state aid.

i 90. Accordingly, the Commission has misapplied art 87(1) EC inasmuch as it considered, on the basis of an expert's report devoid of evidential value in that respect, that the sale of the land contained an element of aid.

91. Article 1 of the decision must therefore be annulled in so far as it declares that the sale of the land contains an element of state aid, without there being any need to examine the rest of the present plea in law or the other pleas in law put forward in that regard. Consequently, arts 2, 3 and 4 of that decision must also be annulled in so far as they concern the sale of the land.

*The plea in law alleging infringement of art 87(1) EC inasmuch as the construction of the car park contains no benefit* a

*Arguments of the parties*

92. Valmont claims, first of all, that the information transmitted to the Commission during the administrative procedure shows that the car park built on the land it purchased from Maarheeze is used free of charge by other undertakings. According to Valmont, the information includes, besides the letters from undertakings examined by the Commission in recitals (20) and (21) of the decision (see para 15, above), a letter of 6 October 2000 sent to it by Maarheeze and which it produced as annex 6d to its application initiating proceedings. b

93. Secondly, Valmont understands that the Commission might correctly have considered it to be, in recital (20) of the decision, as being the principal beneficiary of the car park, but contests the relevance of certain factual elements on which the Commission relies in support of that assessment. c

94. Thirdly, Valmont maintains that, in the circumstances of the present case, the Commission, first, disregarded the conclusiveness of the existence of the opportunity or the right conferred on third parties to use its own car park and, secondly, failed to take account thereof in its reasoning. d

95. Fourth and lastly, it contests the approach of the Commission consisting in describing an infrastructure such as the car park as semi-public and arbitrarily concluding that half of the financing granted by a public body for its construction must be deemed a benefit.

96. In reply to those arguments, the Commission states that, in view of the information available, which it claimed did not include the letter produced by Valmont as annex 6d to its application initiating proceedings, it could consider that half of the financing granted by Maarheeze in view of the construction of the car park could be deemed a benefit. e

97. First, the Commission did not misassess the facts by considering that the car park constituted a semi-public infrastructure. Indeed, it would appear that that infrastructure was not public, that is to say freely accessible to everyone at any time on the same conditions and without prior authorisations and that Valmont could be considered to be its principal beneficiary. However, it also appeared that undertakings other than Valmont could make use of that infrastructure under a 'gentlemen's agreement' between Valmont and Maarheeze and that Valmont could not legitimately be considered to be the exclusive beneficiary thereof. f

98. Secondly, in the absence of a legal rule requiring it to classify an infrastructure such as that referred to in the present case as purely public or private and in the light of information attesting to its hybrid nature, the Commission was entitled to classify the infrastructure as semi-public. That approach was all the more legitimate since the Commission was required to determine accurately the benefit contained in the financing granted to Valmont and that, in the present case, such an operation depended directly on the use made of that infrastructure. g

99. Thirdly, in order to overcome such a classification, Valmont ought to have shown that it did not use the infrastructure in question any more than it would use a public car park, which it did not demonstrate, since Valmont was the owner of the land on which it is built. h

100. Fourthly and lastly, the logical consequence of classification as a semi-public infrastructure is that half the financing granted for constructing it i



- a constitutes state aid. Howbeit, Valmont did not explain why the Commission should have classified as a benefit a smaller proportion of that financing.

*Findings of the court*

- b 101. Before examining the plea in law, the letter appended as annex 6d to the application initiating proceedings must be excluded from the proceedings. That letter from Maarheeze to Valmont was classified by the latter as among documents which were appended by the Netherlands authorities to the observations they submitted to the Commission during the formal investigation procedure on 12 December 2000.

- c 102. As observed in para 38, above, the legality of a Commission decision in the matter of state aid must be assessed in the light of the information available to the Commission when the decision was adopted. As the Commission rightly pointed out, the consequence of that principle is that, whereas there is nothing to prevent an applicant from developing, in support of an action for annulment of such a decision, a legal plea which it did not raise, as an interested third party, during the formal investigation procedure, it is not, on the other hand, d permissible for it to rely on factual arguments which were unknown to the Commission and which it had not notified to the latter during that procedure (see, to that effect, *Kneissl Dachstein Sportartikel AG v European Commission* Case T-110/97 [1999] ECR II-2881 (para 102) and *Salomon SA v European Commission* Case T-123/97 [1999] ECR II-2925 (para 55)).

- e 103. In the present case, the Commission claimed in its defence that the letter in question had not been produced during the administrative procedure and Valmont rejoined, first, that it was entitled to rely in judicial proceedings on any factual element, even if unknown by the Commission and not notified thereto and, secondly, that that document did not, in any event, contain any information which was not already in the letters from undertakings referred to in para 15, above.

- f 104. In the light of the case law cited in paras 38 and 102, above, the first of those objections is manifestly unfounded in law. As regards the second objection, the court points out that, although the letter in question does indeed refer to factual information notified to the Commission by the Netherlands authorities, it contains, furthermore, new factual information as the Commission, in any event, stated in reply to a written question of the court without being challenged on that point. That letter must therefore be removed g as not fulfilling the requisite conditions for inclusion in the context of judicial review.

- h 105. As to the substance, art 1 of the decision states that the construction of the car park contains an element of state aid amounting to NLG 125,000 (€56,723), and recitals (20) to (22) of the decision make it clear that half of the financing granted to that end is also classified as state aid.

106. The Commission, in that connection, put forward an argument in three stages.

- i 107. First, it takes the view that the car park could not be regarded as public given that Valmont was the main beneficiary, as is evidenced by its legal status as proprietor of the car park, by the fact that it was, in all probability, the main user, by the fact that it would in any event have been responsible for the cost of providing services necessary for carrying on business and, moreover, by the fact that the fencing surrounding the car park did not give passers-by the impression that it was a public infrastructure (see recital (2) of the decision). The Commission added, in particular, that the 'gentlemen's agreement'

entered into, according to the Netherlands authorities and Valmont, between the latter and Maarheeze for the purpose of enabling public access to the car park was not sufficient to establish the public nature of that infrastructure. a

108. Next, the Commission considered that the car park should be regarded as semi-public on the ground, first, that it was actually regularly used by other undertakings free of charge, as emerges from the letters from undertakings mentioned in para 15, above, secondly, that it was potentially accessible to other undertakings and, thirdly, that the long-term nature of that situation, which was the result of the 'gentlemen's agreement' between Valmont and Maarheeze, was guaranteed by Maarheeze's powers under the municipal land use plan (see recital (21) of the decision). b

109. Finally, in view of those factors, the Commission indicated that it regarded half of the costs of providing services for the car park as normal business costs, that, since Maarheeze had financed all the costs of providing services, it had favoured Valmont and that it must be found that there was a benefit amounting, in essence, to half the financing in issue (see recital (22) of the decision). c

110. As Valmont maintains, the line of argument used by the Commission in order to classify half of the financing in issue as state aid is erroneous. d

111. In view of the arguments by which the Commission changed, at the hearing, some of the considerations appearing in its own decision, it is appropriate to consider, first, the assessment of the Commission, in the decision, of the facts of the case as they emerge from the information available and, next, to examine the conclusions drawn by the Commission, in its decision, from that assessment as to the legal classification of the facts. e

#### —Assessment of the facts

112. It is for the court, when hearing and determining an action for annulment of a Community act, itself to interpret that act, in particular where, as in the present case, the institution from which it emanates explains how the considerations in that act are to be understood (see, to that effect, the judgment of the Court of Justice in *Thyssen Stahl AG v European Commission* Case C-194/99 P [2003] ECR I-10821 (paras 55, 56), confirming, on appeal, the judgment of the Court of First Instance in *Thyssen Stahl AG v European Commission* Case T-141/94 [1999] ECR II-347 (para 392)). f

113. In the present case, the court observes that the Commission stated in recital (21) of the decision that undertakings other than Valmont had, in some cases, access or, in others, could have continued free access to the car park. It also accepted the explanations put forward by the Netherlands authorities, set forth in recital (13) of the decision, regarding the 'gentlemen's agreement' between Maarheeze and Valmont, taking the view that Maarheeze 'is in a position to be able to enforce strict observance of its ['gentlemen's agreement'] with Valmont and to ensure the continued use [of the] land as a car park by virtue of its powers under the municipal land use plan'. g  
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114. Examination of the file, in particular of the documents on which the Commission claims to have relied in reply to the questions put at the hearing, leads to the conclusion that those considerations are not erroneous. i

115. Indeed, perusal of the letters from undertakings cited at para 15, above, on which the Commission relied, confirms that, far from being reserved for the exclusive use of Valmont, access to the car park was open to other undertakings under arrangements concluded with them. It is thus clear from them, first, that Valmont authorises certain undertakings active in the delivery

a and transport industry to make use of that infrastructure. Secondly, that authorisation has continued uninterrupted since 1994, when Valmont established itself on its site. Thirdly, such authorisation can be assumed to be continuous, since it covers evenings and weekends. Fourthly, they confer on the undertakings concerned benefits which are not limited to the right to use parking spaces but also cover rights of various kinds including that of loading and unloading, storage of equipment and easier access to locked-off property belonging to those undertakings. It also contributes to protecting those undertakings against a number of risks such as theft of equipment and the bogging-down of the heavy vehicles which such undertakings use. Fifthly, it palliates the lack of public infrastructure suitable for the parking of trailers and, as the Commission has pointed out, avoids their being parked on the streets of Maarheeze. Sixthly, the benefits are granted to the undertakings in question by Valmont free of charge.

116. Likewise, the wording of the letter of 14 May 2001 included in annex 25 to the defence, which the Commission explained at the hearing was the basis for its considerations relating to the 'gentlemen's agreement', leads to the confirmation that the arrangements described in the preceding paragraph are connected with an agreement concluded directly between Valmont and Maarheeze. It therefore follows, first, that the latter concluded and comply with a 'gentlemen's agreement' whose aim is to ensure public use of the car park. Secondly, that the continued and long-term nature of that agreement are, furthermore, guaranteed by a legislative prohibition on the change of use of the land set aside for use as a car park.

117. Accordingly, there is no credence in the argument whereby the Commission, seeking to modify a number of considerations in the decision, claimed that, in point of fact, only a few undertakings made occasional use of the car park when it suited Valmont and that, therefore, the final assessment in the decision was hardly too severe.

118. It remains true, however, that the Commission itself observed in recital (21) of the decision that the infrastructure 'is available for use by other firms as well' under a 'gentlemen's agreement' between Valmont and Maarheeze; as stated above, it follows from the case file and the oral submissions of the parties that those considerations are not erroneous.

119. Similarly, the court must reject argument by which the Commission sought to change its assessment of the 'gentlemen's agreement' examined in recitals (20) and (21) of the decision by maintaining that, at most, it was apparent from the letter of 14 May 2001, cited in para 116, above, that Maarheeze exerted, by means of powers under the municipal land use plan, a 'certain amount of control' over the use made by Valmont of the car park.

120. That document shows not only that Maarheeze is in a position to be able to ensure the long-term and continued use in various ways of the car park granted to other undertakings but also that that possibility originates in a pre-existing agreement, as the Commission itself points out in recital (21) of the decision.

121. Moreover, at the hearing, Valmont confirmed without being challenged that it could not terminate unilaterally the 'gentlemen's agreement' concluded with Maarheeze and applied uninterrupted since then.

122. It is thus apparent from both the decision and the case file that a general arrangement was concluded between Valmont and Maarheeze, that it is applied by them and that, furthermore, its application is ensured by means of a legislative provision and that the consequence is that the car park belonging to



Valmont is an infrastructure which is effectively available to a number of other undertakings and potentially to more. It is also apparent that that arrangement solves specific problems concerning parking, storage, loading, unloading, access and security in both the interest of the undertakings concerned and in the public interest. That latter aspect was, moreover, confirmed at the hearing by Valmont and not contested by the Commission. a

123. On the other hand, neither the decision nor, furthermore, the case file shows that Valmont was required by Netherlands law to allow other undertakings to make free and continued use, in different ways, of its own car park since the date of the acquisition of the land on which that infrastructure was constructed. Neither does it appear that that land was subject, at the time of its acquisition, to any rights of use or servitudes for the benefit of other undertakings. b  
c

124. In those circumstances, as a result of the agreement it concluded with Maarheeze for the use of land which it owns, Valmont bears a burden in the public interest.

—The legal classification of the facts d

125. After pointing out, as described above, that the car park was not public (see recital (20) of the decision) and considering that it was nevertheless semi-public by virtue of an agreement concluded with Maarheeze, under which Valmont allowed other parties to make regular and free use thereof (see recital (21) of the decision), the Commission took the view, 'in view of [those factors]', that half of the financing granted by Maarheeze for the construction of that infrastructure constituted normal business costs (see recital (22) of the decision). For that reason, the Commission took the view that half of the financing granted by Maarheeze which effectively benefited Valmont amounted to business costs which it should normally have borne and placed it at an advantage; as a corollary, the Commission took the view, implicitly but necessarily, that the other half of that financing in fact benefited other undertakings and did not benefit Valmont. e  
f

126. When questioned on that point at the hearing, the Commission confirmed, in clear terms, that that was indeed what was meant in the decision. It thus explained that 'the construction of the car park is of benefit to Valmont, but also a benefit to other undertakings, therefore the Commission considers that 50% of the costs of construction amount to State aid'. g

127. That must also be the interpretation as regards the Commission's written pleadings. It thus explained that 'once [it] had found that a number of neighbouring undertakings, under the gentlemen's agreement ... could use the [car park] in question, it could not properly consider that Valmont was the exclusive beneficiary' of that infrastructure (para 55 of the rejoinder). h

128. Consequently, while concluding that the second half of the financing in question could not be classified as state aid, since it did not benefit Valmont, the Commission also concluded that the first half of that financing, for its part, on the other hand amounted to state aid.

129. In that regard, it must be pointed out that the court has held that, where a state measure must be regarded as compensation for the services provided by the recipient undertakings in order to discharge public service obligations, so that those undertakings do not enjoy a real financial benefit and the measure thus does not have the effect of putting them in a more favourable competitive position than the undertakings competing with them, such a measure is not caught by art 87(1) EC (see the judgments of the Court of Justice in *Altmark* i

a *Trans GmbH v Nahverkehrsgesellschaft Altmark GmbH* (Oberbundesanwalt beim Bundesverwaltungsgericht, third party) Case C-280/00 [2005] All ER (EC) 610, [2003] ECR I-7747 (para 87) and *Enirisorse SpA v Ministero delle Finanze* Joined cases C-34–38/01 [2003] ECR I-14243 (para 31)).

b 130. However, for such compensation to escape classification as state aid in a particular case, a number of conditions must be satisfied (see the *Altmark Trans* case (para 88) and the *Enirisorse* case (para 31)).

c 131. First, the recipient undertaking must actually have public service obligations to discharge, and the obligations must be clearly defined. Second, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner, to avoid it conferring an economic benefit which may favour the recipient undertaking over competing undertakings. Third, the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations. Fourth, where the undertaking which is to discharge public service obligations, in a specific case, is not chosen pursuant to a public procurement procedure, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations (see the *Altmark Trans* case (paras 89–95)).

f 132. In the present case, as has been stated above, it follows from the Commission's own assessments, which are not erroneous, that Valmont bears a burden in allowing others to use its car park in various ways regularly and free of charge, under an agreement concluded, in the public interest as much as in that of the third parties concerned, with a territorial authority. It is also apparent from those assessments that a portion of the financing granted by the territorial authority for the construction of that car park effectively benefits Valmont.

g 133. In those circumstances, the Commission could not automatically consider that that portion of the financing necessarily benefited Valmont but should first examine, in the light of the information available, whether or not that portion of the financing could be regarded as being in fact compensation for the burden borne by Valmont. To that end, it was required to ascertain whether the conditions set out in paras 130 and 131, above were satisfied.

h 134. However, the decision shows that the Commission merely considered that that portion of the financing benefited Valmont, and does not show at all that the Commission examined the question as to whether it could be regarded as being compensation for the burden borne by Valmont.

i 135. When asked at the hearing to state its views in that regard, the Commission claimed that the portion of the financing classified as state aid in the decision had rightly been so classified since it had been granted without expressly being made subject to the mandatory provision of specific services.

136. None the less, in so far as the Commission therefore suggests that the conditions necessary for that portion of the financing to escape being classified as state aid are not satisfied, it must be pointed out that it is not for the Community judicature to replace the Commission by carrying out in its stead an examination it never carried out and substituting the conclusions to which it then arrives.

137. It follows from the foregoing that the Commission has not established in the decision nor, furthermore, at the hearing, to the requisite legal standard that half of the financing granted to Valmont for it to construct a car park on its premises should be classified as state aid under art 87(1) EC. a

138. Article 1 of the decision must therefore be annulled in so far as it declares that the construction of the car park contains an element of state aid, without there being any need to examine the rest of the present plea in law or the other pleas in law put forward in that regard. Consequently, arts 2, 3 and 4 of that decision must also be annulled in so far as they concern the construction of the car park. b

139. It follows that the decision must be annulled in its entirety.

#### COSTS c

140. Under art 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the other party's pleadings. As Valmont has applied for costs and the Commission has been unsuccessful, the Commission must be ordered to pay the costs. d

On those grounds, the Court of First Instance (Fourth Chamber, Extended Composition) hereby:

(1) Annuls Commission Decision (EC) 2002/142 (on the state aid implemented by the Netherlands in favour of Valmont Nederland BV);

(2) Orders the Commission to pay the costs. e



*a* **Criminal proceedings against  
Greenham and another**  
(Case C-95/01)

*b* COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES (SIXTH CHAMBER)  
JUDGES SKOURIS (ACTING FOR THE PRESIDENT OF THE SIXTH CHAMBER),  
GULMANN, PUISOCHET, MACKEN (RAPPORTEUR) AND COLNERIC  
ADVOCATE GENERAL MISCHO

*c* 18 APRIL, 16 MAY 2002, 5 FEBRUARY 2004

*d* *European Community – Freedom of movement – Goods – Restriction on freedom – Restrictions justified on grounds of protection of public health – Restriction on marketing foodstuffs intended for human consumption containing unauthorised additives – Whether restriction justifiable where same foodstuffs lawfully marketed in other member states – Articles 28, 30 EC (formerly EC Treaty, arts 30, 36).*

In France, before the conditions under which nutrients might be added to foodstuffs had been laid down by Community legislation, a list was maintained, by reference to the opinion of the competent authorities, of substances with nutritional purposes which might lawfully be incorporated into foodstuffs intended for particular nutritional uses. The defendants were prosecuted for offences of marketing foodstuffs intended for human consumption which contained chemical products whose use had not been declared lawful. Before the national court, it was argued that, since the foodstuffs in question were already lawfully marketed in other member states, the national authorities could not prohibit their free movement and marketing in the national territory. The national court decided to stay the proceedings and refer for preliminary ruling under art 234 EC (formerly art 177 of the EC Treaty) a question concerning the compatibility with arts 28 EC<sup>a</sup> and 30 EC<sup>b</sup> of the prevention of the free movement and marketing of a food supplement lawfully sold in another member state.

*g* **Held** – Where, as in the main proceedings, nutrients such as vitamins or minerals, other than those whose use had been declared lawful in the member state concerned, had been added to foodstuffs lawfully manufactured and marketed in another member state, arts 28 and 30 EC did not preclude a member state from prohibiting the marketing of such foodstuffs without prior authorisation, provided: (i) that the prior authorisation procedure was readily accessible, capable of being completed within a reasonable time, and open to challenge in the courts; and (ii) that refusal to authorise marketing was based on a detailed assessment of the risk to public health, based upon the most reliable scientific data available and the most recent results of international

*i* <sup>a</sup> Article 28 EC provides: 'Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States.'

<sup>b</sup> Article 30 EC, so far as material, provides: 'The provisions of Articles 28 and 29 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of ... the protection of health and life of humans ... Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.'

research. If, which was for the national court to check, the rules and principles flowing from the free movement of goods were applicable to the main proceedings, such rules as had been adopted might be justified, as a measure having equivalent effect to a quantitative restriction within the meaning of art 28 EC, in so far as they complied with the requirements of art 30 EC. A member state's discretion relating to the protection of public health for the purposes of art 30 EC was particularly wide where there remained uncertainty as to the current state of scientific research concerning certain nutrients, which were not, as a general rule harmful in themselves, but which might have special harmful effects solely if taken to excess as part of the general diet, the composition of which could not be foreseen or monitored. However, since the exercise of that discretion was subject to the principle of proportionality and the requirement that art 30 EC was to be applied strictly, in every case, a decision to prohibit the marketing of a fortified foodstuff, which was in fact the most restrictive obstacle to trade, might be adopted only if the alleged risk to public health appeared to be sufficiently established on the basis of the latest scientific data available. Where scientific uncertainty persisted, a member state might, in accordance with the precautionary principle, take protective measures without having to wait until the existence and gravity of those risks were demonstrated fully, provided that the risk assessment was not based on purely hypothetical considerations. In the main proceedings, it was for the referring court to determine whether, in the legal and factual circumstances, the prohibition on the marketing of the foodstuffs in question satisfied the requirements of Community law in order that the restriction on the free movement of goods might be justified (see judgment paras 33, 34, 37–40, 42, 43, 49, 50, below).

## Notes

For justifications for restrictions on trade between member states, see 52 *Halsbury's Laws* (4th edn) para 12-98.

For the EC Treaty, arts 28, 30 EC (formerly arts 30, 36), see 50 *Halsbury's Statutes* (4th edn) Current Statutes Service (issue 88) 363, 364.

## Cases cited

- Bellon* (Criminal proceedings against) Case C-42/90 [1990] ECR I-4863, ECJ.
- Brandsma* (Criminal proceedings against) Case C-293/94 [1996] All ER (EC) 837, [1996] ECR I-3159, ECJ.
- Debus* (Criminal proceedings against) Joined cases C-13/91 and C-113/91 [1992] ECR I-3617, ECJ.
- EC Commission v France* Case C-216/84 [1988] ECR 793, ECJ.
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- EC Commission v Germany* Case 178/84 [1987] ECR 1227, ECJ.
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- European Commission v Denmark* Case C-192/01 [2003] ECR I-9693, ECJ.
- European Commission v France* Case C-184/96 [1998] ECR I-6197, ECJ.
- European Commission v France* Case C-24/00 (2001) Transcript (opinion), 26 June, (2004) Transcript (judgment), 5 February, ECJ.
- European Commission v Germany* Case C-102/96 [1998] ECR I-6871, ECJ.
- Guimont* (Criminal proceedings against) Case C-448/98 [2000] ECR I-10663, ECJ.
- Harpegnies* (Criminal proceedings against) Case C-400/96 [1998] ECR I-5121, ECJ.
- Kainuun Liikenne Oy, Re* Case C-412/96 [1998] ECR I-5141, ECJ.

- a *Ministère public v Mathot* Case 98/86 [1987] ECR 809, ECJ.  
*Ministère public v Muller* Case 304/84 [1986] ECR 1511, ECJ.  
*Monsanto Agricoltura Italia SpA v Presidenza del Consiglio dei Ministri* Case C-236/01 [2003] ECR I-8105, ECJ.  
*Motte* (Criminal proceedings against) Case 247/84 [1985] ECR 3887, ECJ.
- b *Oosthoek's Uitgeversmaatschappij BV* (Criminal proceedings against) Case 286/81 [1982] ECR 4575, ECJ.  
*Procureur du Roi v Dassonville* Case 8/74 [1974] ECR 837, ECJ.  
*Pubblico Ministero v Ratti* Case 148/78 [1979] ECR 1629, ECJ.  
*R v Ministry of Agriculture, Fisheries and Food, ex p Hedley Lomas (Ireland) Ltd* Case C-5/94 [1996] All ER (EC) 493, [1996] ECR I-2553, ECJ.
- c *R v Ministry of Agriculture, Fisheries and Food, ex p National Farmers' Union* Case C-157/96 [1998] ECR I-2211, ECJ.  
*Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* Case 120/78 [1979] ECR 649, ECJ.  
*Rombi and Arkopharma SA* (Criminal proceedings against) Case C-107/97 [2000] ECR I-3367, ECJ.
- d *Sandoz BV* (Criminal proceedings against) Case 174/82 [1983] ECR 2445, ECJ.  
*Società Agricola Fattoria Alimentare SpA v Amministrazione delle Finanze dello Stato* Case C-337/88 [1990] ECR I-1, ECJ.  
*Société Civile Agricole du Centre d'Insémination de la Crespelle v Coopérative d'Élevage et d'Insemination Artificielle du Département de la Mayenne* Case C-323/93 [1994] ECR I-5077, ECJ.
- e *van Bennekom* (Criminal proceedings against) Case 227/82 [1983] ECR 3883, ECJ.

### Reference

By judgment of 19 February 2001, the Tribunal de Grande Instance de Paris (Regional Court, Paris) referred to the Court of Justice of the European Communities for a preliminary ruling under art 234 EC (formerly art 177 of the EC Treaty) a question on the interpretation of arts 28 and 30 EC (formerly arts 30 and 36 of the EC Treaty). That question was raised in the course of criminal proceedings against Mr John Greenham and Mr Léonard Abel, joint directors of NSA France SARL (hereinafter NSA France), whose seat is in Paris, France, which distributes foodstuffs from NSA International, a company established in the United Kingdom. Written observations were submitted on

- f behalf of: Mr Greenham and Mr Abel by M Jeannin, Avocat; the French government by G de Bergues and R Loosli-Surrans, acting as agents; the Greek government by S Spyropoulos, C Georgiadis and N Dafniou, acting as agents; the Spanish government by S Ortiz Vaamonde, acting as agent; the Commission of the European Communities by M Shotter and J Adda, acting as agents. Oral observations were made by Mr Greenham and Mr Abel, the French government, the Greek government and the Commission. The language of the case was French. The facts are set out in the opinion of the Advocate General.
- g
- h

- i 16 May 2002. **The Advocate General (J Mischo)** delivered the following opinion<sup>1</sup>.

1. The Tribunal de Grande Instance (Regional Court), Paris, France, asks whether arts 28 and 30 EC (formerly arts 30 and 36 of the EC Treaty) preclude national legislation which prohibits the marketing of a food supplement lawfully sold in another member state.

<sup>1</sup> Original language: French.



## I—LEGAL BACKGROUND

*A—Community law*

2. There is no Community legislation which lays down the conditions governing the addition of nutrients to common foodstuffs. Some foodstuffs intended for particular nutritional uses are covered by directives adopted by the Commission of the European Communities on the basis of Council Directive (EEC) 398/89 (on the approximation of the laws of the member states relating to foodstuffs intended for particular nutritional uses)<sup>2</sup>. These include products such as baby foods, meal substitutes, gluten-free foods or foods for sportsmen.

*B—National provisions*

3. The French legislation which applies to the marketing of food supplements and common foodstuffs enriched with vitamins, minerals and other nutrients such as amino acids is the Decree of 15 April 1912 implementing the Law of 1 August 1905 on fraud and falsification with respect to products or services relating to foodstuffs, and in particular meats, prepared meat products, fruits, vegetables, fish and preserved foods.

4. Article 1 of the Decree, as worded in Decree No 73-138 of 12 February 1973, provides:

'It is prohibited to possess with a view to sale, to make use of or to sell any goods and foodstuffs intended for human consumption to which chemical products have been added, other than those whose use is declared lawful by the orders made jointly by the Minister of Agriculture and Rural Development, the Minister of Economics and Finance, the Minister of Industrial and Scientific Development and the Minister of Public Health, on the basis of the Opinion of the Conseil supérieur d'hygiène publique de France (French public health authority, hereinafter the CSHPF) and the Académie nationale de médecine (National Academy of Medicine).'

5. Decree No 99-242 of 26 March 1999 amended that decree by substituting the opinion of the Agence de Sécurité Sanitaire des Aliments (food safety agency, the AFSSA) for those of the CSHPF and the Académie National de Médecine.

6. Decree No 97-964 of 14 October 1997 was inserted into the Decree of 15 April 1912 and for the first time defines food supplements as—

'Products intended to be ingested as a supplement to traditional foods in order to make up for the real or assumed insufficiency of daily intake.'

## II—THE MAIN PROCEEDINGS AND THE QUESTION REFERRED FOR A PRELIMINARY RULING

7. Mr Greenham and Mr Abel, defendants in the main proceedings and joint managers of the company NSA France SARL (hereinafter NSA France), are charged with having, in Paris in 1998 and in any case on the national territory during a period in respect of which criminal proceedings are not time-barred, committed two offences. First, they are charged with having displayed and offered for sale adulterated foodstuffs by marketing food supplements ('JUICE + mélange de légumes et de fruits') to which were added the substance 'coenzyme Q10', a chemical substance whose use in human food is not authorised in France, and vitamins in amounts greater than the daily

<sup>2</sup> OJ 1989 L186 p 27.

a recommended intake or in excess of the safety limits set by the CSHPF. They are also charged with having misled consumers in regard to product quality by marketing meal substitutes ('JUICE + Lite, arôme chocolate et arôme vanille') which do not comply with the requirements laid down in Commission Directive (EC) 96/8 (on foods intended for use in energy-restricted diets for weight reduction)<sup>3</sup>, in particular because the energy they provide is below the threshold set in the legislation and they are deficient in certain minerals.

b 8. Those actions follow upon a series of samples taken by the Direction Générale de la Concurrence, de la Consommation et de la Répression des Fraudes (hereinafter the DGCCRF) of the above-mentioned products, marketed in France by NSA France. The laboratories of the DGCCRF established their non-compliance.

c 9. The defendants in the main proceedings claimed, before the referring court, that the products in question were already in circulation in the European Union, and in particular in the United Kingdom, when they took up their posts, and that coenzyme Q10 has been in free circulation in Spain and Italy since 1995 and was still in free circulation in 2000 in Germany and the United Kingdom. They therefore maintained that the French authorities were not entitled to prevent the free movement and the marketing of those products.

d 10. Since it considered that the decision in the case before it required the interpretation of arts 28 and 30 EC, the Tribunal de Grande Instance de Paris, decided to stay proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

e 'Must Articles 28 and 30 of the Treaty be interpreted as prohibiting a Member State from preventing the free movement and marketing of a food supplement lawfully sold in another Member State?'

### III—ANALYSIS

#### f Preliminary observations

11. In view of certain statements or requests put forward during the proceedings before the court, three preliminary observations are in order.

12. First, the French government is uncertain as to the applicability, in the present case, of art 28 EC. It considers, first, that the referring court makes no mention of Mr Greenham and Mr Abel being engaged in importing.

g 13. Second, it points out that it is settled case law that a national measure falls under that article only in so far as it applies to situations connected with the importation of goods in intra-Community trade<sup>4</sup>.

h 14. Therefore, referring to the judgment in *Criminal proceedings against Rombi and Arkopharma SA*<sup>5</sup>, where the court held (at para 72) that it 'is not in a position to determine whether the rules and principles relating to the free movement of goods apply to an activity of the kind at issue in the main proceedings', on the grounds that 'it is not apparent from the documents in the main proceedings that the activity carried on by Arkopharma involved either exporting or importing the products concerned', the French government makes its observations subject to the referring court's verifying whether the above-mentioned condition for the applicability of art 28 EC is satisfied.

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3 OJ 1996 L55 p 22.

4 See the judgments in *Criminal proceedings against Oosthoek's Uitgeversmaatschappij BV* Case 286/81 [1982] ECR 4575 (para 9), *Ministère public v Mathot* Case 98/86 [1987] ECR 809 (paras 3, 7-9), *Criminal proceedings against Guimont* Case C-448/98 [2000] ECR I-10663 (para 21).

5 Case C-107/97 [2000] ECR I-3367.

15. It does appear from the written observations by Mr Greenham and Mr Abel that they imported the contested products from the United Kingdom. They state that '[o]n 23 March 1998, the [DGCCRF] carried out an inspection at the premises of the Société NSA France (National Safety Association), which distributes products coming from the Société NSA International, a British company with its headquarters in Camberley—Surrey, 80 Park Street'<sup>6</sup>. In addition, it emerges from the DGCCRF's report of 30 December 1998 on the offence that 'the products are in fact stored in a Dutch warehouse'.

16. I must therefore base my reply to the question referred by the national court on the assumption that the products were imported from another member state.

17. Second, the French government and the Commission point out—correctly, in my opinion—that although, in the case which is the subject of the reference, the proceedings relate to both food supplements and meal substitutes, the question asked by the referring court concerns only food supplements.

18. Although the referring court does not explain the reason for this, it seems to me that the reasons lie in the fact that, as can be inferred from the order for reference, Directive 96/8 applies to the meal substitutes in issue.

19. If such is the case, art 30 EC, to which the question referred for a preliminary ruling is specifically directed, is no longer applicable. It is settled case law that, where Community directives provide for harmonisation of the measures necessary to achieve the specific objective laid down in art 30 EC, that article cannot be applied<sup>7</sup>.

20. I shall therefore not take a view on the interpretation of arts 28 and 30 EC in the light of national legislation such as that which applies in France to food supplements.

21. Third, Mr Greenham and Mr Abel ask the court to rule on the application to the present case of Directive 96/8.

22. They claim that, since the inspection of meal substitutes at the premises of NSA France was carried out by the DGCCRF before France transposed Directive 96/8, it follows directly from art 6 of that directive that the prohibition on trade in non-compliant products did not apply until after 31 March 1999, which is later than the establishment of the facts by the DGCCRF.

23. Suffice it to observe, once again, that the referring court has not submitted any question relating to the meal substitutes which are the subject of Directive 96/8, although the right to determine the questions to be put to the court devolves upon the national court alone<sup>8</sup>.

24. I therefore consider that it is not for me to take a view on the interpretation of that directive.

6 Emphasis added by the author.

7 See the judgments in *Pubblico Ministero v Ratti* Case 148/78 [1979] ECR 1629 (para 36), *Société Civile Agricole du Centre d'Insémination de la Crespelle v Coopérative d'Élevage et d'Insemination Artificielle du Département de la Mayenne* Case C-323/93 [1994] ECR I-5077 (para 31), *R v Ministry of Agriculture, Fisheries and Food, ex p Hedley Lomas (Ireland) Ltd* Case C-5/94 [1996] All ER (EC) 493, [1996] ECR I-2553 (para 18) and *European Commission v Germany* Case C-102/96 [1998] ECR I-6871 (para 21).

8 See, inter alia, *Società Agricola Fattoria Alimentare SpA v Amministrazione delle Finanze dello Stato* Case C-337/88 [1990] ECR I-1 (para 20) and *Re Kainuun Liikenne Oy* Case C-412/96 [1998] ECR I-5141 (paras 23, 24).



*a The question referred for a preliminary ruling*

25. The referring court asks whether arts 28 and 30 EC are to be interpreted as prohibiting a member state from preventing the free movement and marketing of a food supplement lawfully sold in another member state.

*b* 26. Formulated in such absolute terms, the question calls for a negative answer. As the Greek government has most judiciously pointed out, the mere fact that a particular food supplement is freely marketed in other member states is not in itself sufficient for authorisation of its marketing to be imposed automatically, that is to say for that reason alone, in the member state concerned.

*c* 27. It is sufficient in that regard to refer to the judgment in *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein*, known as the 'Cassis de Dijon' judgment<sup>9</sup>, where the court held, it is true, in the operative part, that '[t]he concept of "measures having an effect equivalent to quantitative restrictions on imports"' contained in art 30 of the EEC Treaty was to be understood as meaning that 'the fixing of a minimum alcohol content for alcoholic beverages intended for human consumption by the legislation of a Member State also falls within the prohibition laid down in that provision where the importation of alcoholic beverages lawfully produced and marketed in another Member State is concerned'. However, that was because the court had first established that the requirement in question did not serve a purpose in the general interest such as to take precedence over the requirements of the free movement of goods.

*e* 28. In para 8 of that judgment, the court held that obstacles to movement within the Community resulting from disparities between the national laws relating to the marketing of the products in question must be accepted in so far as those provisions may be recognised as being necessary in order to satisfy overriding requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, fair trading and consumer protection.

*f* 29. However, it must above all be borne in mind that, under art 30 EC—

*g* '[t]he provisions of Articles 28 and 29 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of ... the protection of health and life of humans ... Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.'

*h* 30. In the present case, the prohibition on the marketing of the food supplements at issue appears to have been motivated specifically by a concern for 'the protection of health and life of humans' within the meaning of art 30 EC.

*i* 31. It is clear from the order for reference that criminal proceedings were brought against Mr Greenham and Mr Abel because 'the DGCCRF laboratory established the non-conformity ... of the food supplements JUICE + mélange de légumes and JUICE + mélange de fruits as the result of the addition of coenzyme Q10 and excessive amounts of several vitamins'. The referring court also makes it clear that 'the addition of [coenzyme Q10] is prohibited in food supplements'.

32. It is thus necessary to analyse in greater detail the conditions under which, according to the court's case law, a member state may under art 30 EC rely on the protection of the health and life of humans in imposing a restriction on the free movement of goods.

33. I shall subsequently consider, in the alternative, whether the absence of a nutritional need can justify an import prohibition. Finally, I shall present some observations on two other questions which have arisen in the course of the present proceedings.

#### 1. *The protection of the health and life of persons*

34. It is clear from the court's case law<sup>10</sup> that, inasmuch as there are uncertainties in the present state of scientific research with regard to the harmfulness of food additives, it is for the member states, in the absence of full harmonisation, to decide what degree of protection of the health and life of humans they intend to assure, having regard for the requirements of the free movement of goods within the Community.

35. It is also clear from the court's case law, especially the judgments in the *Sandoz* case, cited above, *Criminal proceedings against Motte*<sup>11</sup>, *Ministère public v Muller*<sup>12</sup> and *EC Commission v Germany*, known as the 'Beer Purity Law' judgment<sup>13</sup>, that Community law does not preclude the adoption by the member states of legislation whereby the use of additives is subjected to prior authorisation granted by a measure of general application for specific additives, in respect of all products, for certain products only or for certain uses. This is also true of the fixing of a maximum level for the use of an additive in certain products. Such legislation meets a legitimate need of health policy, namely that of restricting the uncontrolled consumption of food additives.

36. Nevertheless, the principle of proportionality which underlies the last sentence of art 30 EC requires that the power of the member states to prohibit imports of products from other member states should be restricted to what is necessary to attain the objectives of protection being legitimately pursued<sup>14</sup>.

37. The case law of the court also makes clear that it is the responsibility of the competent national authorities to prove that a substance is harmful. It is for them to demonstrate, in each case, that their legislation is necessary in order effectively to protect the interests referred to in art 30 EC and, in particular, that the marketing of the product in question poses a risk to public health<sup>15</sup>. In so doing, they are to take account of the findings of international scientific research, and in particular of the work of the Community's Scientific Committee for Food, the Codex Alimentarius Committee of the FAO [Food

10 See, inter alia, *Criminal proceedings against Sandoz BV* Case 174/82 [1983] ECR 2445, *Criminal Proceedings against Debus* Joined Cases C-13/91 and C-113/91 [1992] ECR I-3617, *Criminal Proceedings against Brandsma* Case C-293/94 [1996] All ER (EC) 837, [1996] ECR I-3159, *Criminal Proceedings against Harpegnies* Case C-400/96 [1998] ECR I-5121.

11 Case 247/84 [1985] ECR 3887.

12 Case 304/84 [1986] ECR 1511.

13 Case 178/84 [1987] ECR 1227.

14 See *Harpegnies*' case, cited in footnote 10, above (para 34).

15 See *Muller's* case, cited in footnote 12, above (para 25), *Commission v Germany* Case 178/84, cited in footnote 13, above (para 46), *Criminal proceedings against Bellon* Case C-42/90 [1990] ECR I-4863 (para 16) and *Debus*' case, cited in footnote 10, above (paras 17, 18).

a and Agriculture Organisation (of the United Nations)] and the World Health Organisation, and of the eating habits<sup>16</sup> prevailing in the importing member state<sup>17</sup>.

38. In my opinion, this does not mean, however, that a member state is required to prove with complete certainty the existence of a serious risk. It is sufficient that it provide specific and plausible arguments that the protection of public health is jeopardised<sup>18</sup>.

b 39. There are areas in which scientific research is not yet sufficiently advanced for it to be possible to determine with certainty the quantities and concentrations at which certain substances might become harmful and the exact effects to which they might give rise.

c 40. Scientific uncertainty, inter alia in the field of vitamins<sup>19</sup>, has, moreover, led the court to allow the member states considerable latitude.

d 41. Thus, in the judgment in the *Sandoz* case, cited above, although it first (at para 18) set out the principle that 'national rules providing for ... a prohibition [on imports] are justified only if authorizations to market are granted when they are compatible with the need to protect health', the court subsequently recognised (at para 19) that '[s]uch an assessment is, however, difficult to make in relation to additives such as vitamins' and concluded, finally, (at para 20) that 'Community law permits national rules prohibiting without prior authorization the marketing of foodstuffs lawfully marketed in another Member State to which vitamins have been added', adding merely that 'the marketing [is to be] authorized when the addition of vitamins meets a real need, especially a technical or nutritional one'.

e 42. Since then, that prudent approach has been confirmed by the Commission and the Council. Common Position (EC) 18/2002 adopted on 3 December 2001 by the Council, with a view to adopting a Directive of the European Parliament and of the Council on the approximation of the laws of the member states relating to food supplements<sup>20</sup>, reads as follows:

f 'Only vitamins and minerals normally found in, and consumed as part of, the diet should be allowed to be present in food supplements although this does not mean that their presence therein is necessary. Controversy as to the identity of those nutrients that could potentially arise should be avoided. Therefore it is appropriate to establish a positive list of those vitamins and minerals.' (See para (9) of the preamble.)

g And:

h 'Excessive intake of vitamins and minerals may result in adverse effects and therefore necessitate the setting of maximum safe levels for them in food supplements, as appropriate. Those levels must ensure that the

i 16 The Greek government also pointed out that climatic conditions might also play a role; thus, vitamin E will be absorbed differently according to the amount of sun a country receives.

17 See the judgments in *Motte's* case, cited in footnote 11, above (para 24), *Muller's* case, cited in footnote 12, above (para 24); and *Commission v Germany* Case 178/84, cited in footnote 13, above (para 44).

18 See the opinion in *European Commission v France* Case C-24/00 (2001) Transcript (opinion), 26 June, (2004) Transcript (judgment), 5 February (para 131).

19 See the *Sandoz* case, cited in footnote 10, above, and *Criminal proceedings against van Bennekom* Case 227/82 [1983] ECR 3883 (paras 36–38).

20 OJ 2002 C90 E p 1.



normal use of the products under the instructions of use provided by the manufacturer will be safe for the consumer.' (See para (13) of the preamble.) a

43. Until that directive has been adopted and maximum limits set by the Commission under the relevant legislation, member states are obviously entitled to apply those criteria in their national legislation. b

44. In that context, reference can also be made, as has been done by several participants in the present proceedings, to the judgment of the Court of the European Free Trade Association (the EFTA Court) of 5 April 2001<sup>21</sup>, which appears to me to confirm the prudent approach advisable in the matter. That court held as follows:

'29. The national authority must address the issue of the protection of health and life of humans. A purely hypothetical or academic consideration will not suffice. It is not only the specific effects of the marketing of a single product with a set amount of additives that are relevant. It may be appropriate to take into account the aggregate effect of the presence in the market of a number of natural or artificial supply sources of a given nutrient, and of the possibility of future additional sources that can reasonably be foreseen. c

30. In many cases, the assessment of such questions will show that there is a great measure of scientific and practical uncertainty linked to the issue under consideration. A proper application of the precautionary principle presupposes, first, an identification of potentially negative health consequences arising, in the present case, from a proposed fortification, and, secondly, a comprehensive evaluation of the risk to health based on the most recent scientific information. d

31. When the insufficiency, or the inconclusiveness, or the imprecise nature of the conclusions to be drawn from those considerations make it impossible to determine with certainty the risk of hazard, but the likelihood of considerable harm still persists were the negative eventuality to occur, the precautionary principle would justify the taking of restrictive measures.' e

45. It follows from all the foregoing considerations that it is for the referring court to determine whether the competent national authorities have demonstrated, in light of prevailing national eating habits and of the results of international scientific research, whether prohibiting the addition of coenzyme Q10 and of excessive vitamin content (within the meaning of the applicable national legislation) in the food supplements at issue is necessary in order to protect the health and life of persons. f

46. In carrying out that assessment, the national court must take into consideration the fact that the national authorities are entitled to refer to the precautionary principle. That means that a member state may have recourse to art 30 EC where it has serious suspicions but no certainty as to the danger posed by a substance, but where serious harm could occur if the suspicion proved to be correct. g

47. Mr Greenham and Mr Abel also refer to several factual elements which they claim demonstrate that the prohibition at issue is not justified by the protection of public health, and they ask the court to find that such is the case. h

<sup>21</sup> *EFTA Surveillance Authority v Norway* E-3/00 [2001] 2 CMLR 1184. i

a 48. However, such an assessment goes beyond the framework of the present reference, which concerns only the interpretation of the Community provisions on which the national court has put its question to this court. In any case, the referring court has not provided us with any information which would enable us to take a view on the question of whether, in concrete terms, the contested prohibition is justified by the protection of public health.

b  
2. *The absence of nutritional need*

49. Until now, my analysis has dealt with the exception relating to the protection of the health and life of persons laid down in art 30 EC.

c 50. The Commission, however, also touches on the question whether a restriction on the free movement of a foodstuff may be justified by the absence of nutritional need relating to one or more of the substances incorporated in that foodstuff, and it proposes that the court should rule on that point in its reply to the question referred for a preliminary ruling.

d 51. Referring to the judgment of the EFTA Court, cited above, the Commission considers that only the existence of a risk to public health, and not the mere fact that the addition of the substances at issue do not respond to a nutritional need, can justify a restrictive measure such as that at issue in the main proceedings under art 30 EC.

e 52. I would note, in that regard, that the order for reference contains no indication that the prohibition on marketing the foodstuffs at issue was justified by the absence of a nutritional need for coenzyme Q10 or the vitamin content of those foodstuffs. It thus appears to me that it is not necessary for the court to deal with that problem in its judgment. For what it is worth, however, I should like to make the following observations on that matter.

53. In its judgment, cited above, the EFTA Court stated as follows:

f '27. The need to safeguard public health has been recognised as, and remains, a primary concern, and the level of protection chosen by the Contracting Parties should not be placed in question. However, the principle of proportionality must be respected.

g 28. In that process, the *question of nutritional need* with regard to additives to foodstuffs in any given population *may have a proper place*. Indeed, the most authoritative definition of "fortification and enrichment" is directly linked to this element (See Codex Alimentarius General Principles for the Addition of Essential Nutrients to Foods ...). However, under the requirement of proportionality, the need to safeguard public health must be balanced against the principle of the free movement of goods. The *mere finding by a national authority of the absence of nutritional need will not justify an import ban*, a most restrictive measure, on a product which is freely traded in other EEA States.'<sup>22</sup>

h 54. The EFTA Court thus accepts that nutritional need can play a role, but that that role is to be assessed in the context of the principle of proportionality.

55. In the case before it, the EFTA Court finally held that the Kingdom of Norway had failed to fulfil its obligations for the following two reasons:

i —its approach was inconsistent because, while prohibiting the marketing of 'corn flakes' fortified with iron, it permitted a type of cheese to which a sizeable amount of iron had been added to be sold freely in the country;

—it did not carry out a comprehensive assessment of the risk which the addition of iron to foodstuffs might entail. a

56. In its own case law, the Court of Justice has approached the problem of nutritional needs in two different contexts.

57. In *EC Commission v France*<sup>23</sup>, the court considered the case of a member state which had invoked public health grounds in order to prohibit the importation of a product<sup>24</sup>, its reasoning being that nutritional value for that product was lower or its fat content higher than another product already available on the market in question<sup>25</sup>. b

58. The court held that public health grounds could not be invoked in such a case, since—

'[i]t is plain that the choice of foodstuffs available to consumers in the Community is such that the mere fact that an imported product has a lower nutritional value does not pose a real threat to human health. Moreover, as the Commission has pointed out without being contradicted by the French Government, there are products on the market in France which are also of lower nutritional value or are composed substantially of the same fats used in milk substitutes yet there is no ban on marketing them.'<sup>26</sup> c

59. At issue in that case was a product obtained from natural substances whose nutritional value was simply lower than that of competing products. It was totally inconceivable that that could constitute a valid ground for prohibiting imports. d

60. In a whole series of other cases, in contrast, the court was confronted with chemical substances which had been added to foodstuffs on the ground that this met a real need, in particular a technological or dietary need. e

61. It should be recalled that, in particular in *Debus'* case, cited above, the court held that—

'Community law does not preclude the adoption by the Member States of legislation whereby the use of additives is subjected to prior authorization granted by a measure of general application for specific additives, in respect of all products, for certain products only or for certain uses. This is also true of the fixing of a maximum level for the use of an additive in certain products. Such legislation meets a legitimate need of health policy, namely that of restricting the uncontrolled consumption of food additives.'<sup>27</sup> f

62. It unquestionably follows from that case law that the member states are entitled to control and, in so far as is necessary, restrict the use of additives in foodstuffs and that they can do so by means of a system based on the principle that everything which is not authorised is prohibited. g

63. In addition, as regards chemical substances, it appears to follow from the court's case law that the existence of a genuine threat to public health is not h

<sup>23</sup> Case C-216/84 [1988] ECR 793. i

<sup>24</sup> It concerned a powdered milk substitute composed of vegetable fats.

<sup>25</sup> Classic powdered milk.

<sup>26</sup> See *Commission v France*, cited in footnote 23, above (para 15).

<sup>27</sup> See *Debus'* case, cited in footnote 10, above (para 14). My emphasis. See also the judgments cited above in the *Sandoz* case (para 17) and *Commission v Germany* Case 178/84 (para 42).



a the only factor which a member state can take into account. In para 17 of *Debus*<sup>28</sup> case, cited above, the court made clear that—

‘the use of a specific additive which is authorized in another Member State *must be authorized* in the case of a product imported from that Member State where ... the additive in question does *not* present a risk to

b public health and meets a real need, especially a technological one.’<sup>28</sup>

64. In *EC Commission v France*<sup>29</sup>, concerning the addition of nitrate to cheese, the court held that—

‘an application to have an additive included on the list in question *may be rejected* by the competent administrative authorities *only if the additive does not meet any genuine need, in particular a technological need, or presents a danger to public health.*’<sup>30</sup>

c  
65. The court therefore appears to consider that, even if a substance does not present a risk to public health, the marketing of the foodstuff in which it is incorporated can nevertheless be prohibited if that substance does not meet a genuine need.

d 66. There is no doubt that the concept of ‘real need’ also covers that of ‘nutritional need’. In para 20 of the judgment in the *Sandoz* case, cited above, the court explicitly referred to ‘a real need, especially a technical or *nutritional* one’<sup>31</sup>.

e 67. It also seems to me that the approach taken in *Commission v France*, cited above, according to which a health threat is not the only criterion to be taken into account, finds an echo in para (11) of the preamble to Common Position 18/2002, in which it is stated that ‘[t]he chemical substances used as sources of vitamins and minerals in the manufacture of food supplements should be safe and also be available to be used by the body’.

f 68. Finally, it should be observed that the concept of ‘nutritional need’ is no stranger to the positive law of the Community now in force. Article 1(3) of Commission Directive (EC) 2001/15 (on substances that may be added for specific nutritional purposes in foods for particular nutritional uses)<sup>32</sup> reads as follows:

g ‘The use of nutritional substances in foods for particular nutritional uses shall result in the manufacture of *safe products that fulfil the particular nutritional requirements* of the persons for whom they are intended as established by generally accepted scientific data.’<sup>33</sup>

h 69. The two texts which I have just cited tend to confirm the conclusion which I think can be drawn from the court’s judgment in *Commission v France* Case C-344/90, cited above: namely, that artificial substances incorporated in foodstuffs must not only be risk-free but must also serve a useful purpose.

70. That rather contradicts the argument of the Commission that the absence of nutritional need can never in itself justify a prohibition on imports.

i 28 My emphasis. See also the judgments in *Muller’s* case, cited in footnote 12, above (para 25), *Commission v Germany* Case 178/84, cited in footnote 13, above (para 44) and *Bellon’s* case, cited in footnote 15, above (para 14).

29 Case C-344/90 [1992] ECR I-4719.

30 See *Commission v France*, cited above (para 10). My emphasis.

31 My emphasis.

32 OJ 2001 L52 p 19.

33 My emphasis.

71. One has the distinct impression that, for the Community legislature, as for the court, the incorporation of chemical substances in foodstuffs must, as far as possible, be avoided, even if the harmfulness of a given substance is not proven. It is as if they were all potentially dangerous.

72. One might, therefore, be tempted to conclude that, until a positive list of authorised substances has been drawn up at Community level, national authorities are entitled to prohibit not only dangerous substances (including those to be treated as such in the application of the precautionary principle) but also those which can be proved not to satisfy any genuine nutritional need.

73. For my part, I would prefer an intermediate solution inspired by the *Sandoz* case, cited above, whereby, in the presence of scientific uncertainty as to the harmfulness of a 'nutrient'<sup>34</sup> and apart from cases where the precautionary principle might apply, member states must authorise the 'nutrient' in question when it meets a genuine nutritional need and may, conversely, prohibit it when it does not meet such a need.

### 3. Easily accessible procedure

74. Mr Greenham and Mr Abel also request the court to find that the national legislation at issue infringes arts 28 and 30 EC in that traders cannot obtain an authorisation under a procedure which is easily accessible and which can be concluded within a reasonable time.

75. It does indeed follow from the case law of the court that authorisation to market products is to be granted according to a procedure which is easily accessible to traders, can be completed within a reasonable period and which, if it leads to a rejection, enables that rejection to be challenged before the courts<sup>35</sup>.

76. Nevertheless, as can be inferred from the order for reference and as the French government confirms in the present case, Mr Greenham and Mr Abel marketed the products at issue without having first lodged an application which could have been investigated by the French competent authorities.

77. The detailed rules of the French authorisation procedure are thus not at issue in the main proceedings and it is therefore not necessary to go more closely into that question.

### 4. The mutual recognition clause

78. Finally, Mr Greenham and Mr Abel, referring to *European Commission v France*<sup>36</sup>, request the court to find that the French Republic has failed to include in its legislation any mutual recognition clause which would allow the marketing on French territory of food supplements freely marketed in other member states.

79. In that regard, I should like to refer to my opinion of 26 June 2001, cited above, where I concluded that arts 28 and 30 EC do not impose the inclusion of a mutual recognition clause in national legislation such as Decree No 73-138, which refers to 'all goods and foodstuffs intended for human consumption to which chemical products have been added'<sup>37</sup>.

<sup>34</sup> As opposed to an 'additive', the term 'nutrient' is used in Common Position 18/2002.

<sup>35</sup> See the judgments cited above in *Muller's* case (para 26), *Bellon's* case (paras 16, 17) and *Commission v France* Case C-344/90 (para 9).

<sup>36</sup> Case C-184/96 [1998] ECR I-6197.

<sup>37</sup> See paras 27-64.

**a** V—CONCLUSION

80. In the light of the foregoing considerations, I propose the following reply to the question on which the Tribunal de Grande Instance de Paris, seeks a preliminary ruling:

**b** Articles 28 and 30 EC are to be interpreted as precluding national legislation which prohibits the free movement and marketing of a food supplement lawfully sold in another member state, unless an overriding requirement can justify restricting or even prohibiting the marketing of the product. In that case, the measures taken must be necessary and proportionate to the objective. In assessing whether those measures can be justified on the ground of the protection of the health and life of persons

**c** laid down in art 30 EC, the national court must determine whether the national authorities have carried out a risk assessment relating to the substances at issue in accordance with the latest scientific information available and with the eating habits prevailing in the member state in question.

**d** 5 February 2004. **The COURT OF JUSTICE (Sixth Chamber)** delivered the following judgment.

1. By judgment of 19 February 2001, received at the Court of Justice of the European Communities on 27 February 2001, the Tribunal de Grande Instance de Paris (Regional Court, Paris) referred to the Court of Justice for a preliminary ruling under art 234 EC (formerly art 177 of the EC Treaty)

**e** a question on the interpretation of arts 28 and 30 EC (formerly arts 30 and 36 of the EC Treaty).

2. That question was raised in the course of criminal proceedings against Mr Greenham and Mr Abel, joint directors of NSA France SARL (hereinafter NSA France), whose seat is in Paris, France, which distributes foodstuffs

**f** from NSA International, a company established in the United Kingdom.

**LEGAL BACKGROUND**

*Community legislation*

3. It is common ground that at the time of the facts which gave rise to the main proceedings there were no provisions of Community legislation laying

**g** down the conditions under which nutrients, such as vitamins and minerals, could be added to foodstuffs for daily consumption.

4. As regards foodstuffs intended for particular nutritional uses, some are now covered by directives adopted by the Commission of the European Communities under Council Directive (EEC) 89/398 (on the approximation of

**h** the laws of the member states relating to foodstuffs intended for particular nutritional uses) (OJ 1989 L186 p 27).

*National legislation*

5. Article L 213-1 of the French Code de la Consommation (Consumer

**i** Code), in the version applicable to the main proceedings provides:

'Anyone, whether or not a party to the contract, who by any means or conduct whatsoever, even through a third party, deceives or attempts to deceive a contracting party:

1. as to the nature, type, origin, material qualities, composition or content in active principles of any goods



2. as to the quantity of items delivered or as to their identity by delivering goods other than those specified as the subject-matter of the contract, or a

3. as to fitness for use, the risks inherent in the product's use, the checks made, the methods of use or the precautions to be taken

shall be liable to imprisonment for two years or to a fine of FRF 250 000 or to both.' b

6. The French legislation applicable to the marketing of food supplements and foodstuffs for daily consumption fortified with vitamins, minerals and other nutrients such as amino acids is the Decree of 15 April 1912 laying down administrative regulations for implementing the Law of 1 August 1905 to prevent deception in the sale of goods and adulteration of foodstuffs relating to victuals, and particularly meat, prepared meat products, fruit, vegetables, fish and preserved foods. c

7. Article 1 of the decree, as amended by Decree No 73-138 of 12 February 1973 (JORF of 15 February 1973, p 1728), provides:

'It shall be an offence to possess with a view to sale, to put on sale or to sell any goods or foodstuffs intended for human consumption to which chemical products have been added other than those whose use has been declared lawful by orders made jointly by the Minister for Agriculture and Rural Development, the Minister for the Economy and Finance, the Minister for Industrial and Scientific Development and the Minister for Public Health, on the advice of the Conseil supérieur d'hygiène publique de France (French Public Health Authority, the CSHPF) and the Académie nationale de médecine (National Academy of Medicine).' d

8. Decree No 99-242 of 26 March 1999 (JORF of 28 March 1999, p 4653) amended the Decree of 15 April 1912 by substituting the advice of the Agence Française de Sécurité Sanitaire des Aliments (French Food Safety Agency, AFSSA) for that of the CSHPF and the Académie Nationale de Médecine. e

9. Article 1 of Decree No 91-827 of 29 August 1991 on foodstuffs intended for particular nutritional uses (JORF of 31 August 1991, p 11424) provides:

'Foodstuffs are regarded as being intended for particular nutritional uses if, as a result of their particular composition or of a particular process in their manufacture, they are clearly different from foodstuffs for daily consumption, are suitable for the stated nutritional purpose and are marketed in such a way as to indicate that they fulfil that purpose.' f

10. Article 3 of the same decree reads as follows: g

'Joint orders made by the ministers responsible for consumer affairs, agriculture and health after obtaining the opinion of the [CSHPF], shall determine: h

(a) The list and conditions for use of substances with a nutritional purpose, such as vitamins, minerals, amino acids and other substances, which it is lawful to incorporate in foodstuffs intended for particular nutritional uses, as well as the standards of purity which are applicable to those substances ...' i

11. Decree No 97-964 of 14 October 1997 (JORF of 21 October 1997, p 15266), which supplements the Decree of 15 April 1912, defines, for the first

- a time, food supplements as 'products intended to be ingested in addition to the daily diet, in order to compensate for an actual or presumed insufficiency of daily intake'.

THE MAIN PROCEEDINGS AND THE QUESTION REFERRED FOR A PRELIMINARY RULING

- b 12. Mr Greenham and Mr Abel were prosecuted for having committed, in the course of 1998, two offences relating to the sale of foodstuffs.

13. First, they were charged with having displayed and put on sale allegedly adulterated foodstuffs by marketing products (food supplements 'Juice Plus + vegetable mixture' and 'Juice Plus + fruit mixture') to which had been added the substance 'coenzyme Q10', a nutrient whose addition is not authorised in France for human consumption, and vitamins in quantities exceeding that of the recommended daily intake or exceeding the safety limits laid down by the CSHPF.

- d 14. Secondly, they were prosecuted for having misled consumers, in particular as to the material quality of the products, by marketing meal substitutes 'Juice Plus + Lite, chocolate and vanilla flavour' which do not comply with the regulatory requirements applicable with regard to Commission Directive (EC) 96/8 (on foods intended for use in energy-restricted diets for weight reduction) (OJ 1996 L55 p 22), particularly because of an energy rating lower than the threshold set by the regulations and a deficiency of certain minerals.

- e 15. The charges were based on two samples taken on 23 March 1998 by the Directorate-General for Competition, Consumers and Prevention of Fraud from foodstuffs marketed in France by NSA France.

- f 16. Before the referring court, the defendants in the main proceedings argued, first, that the foodstuffs in question were already lawfully marketed in the other member states of the European Union when they took up their posts, and, secondly, that coenzyme Q10 is permitted in, among others, Spain, Italy, Germany and the United Kingdom. Therefore, the French authorities could not prohibit the free movement and the marketing of those foodstuffs in France.

- g 17. Since it considered that the outcome of the proceedings before it required an interpretation of arts 28 and 30 EC, the Tribunal de Grande Instance de Paris decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Must Articles 28 and 30 of the Treaty be interpreted as prohibiting a Member State from preventing the free movement and marketing of a food supplement lawfully sold in another Member State?'

- h THE QUESTION REFERRED

*Observations submitted to the court*

- i 18. The defendants in the main proceedings maintain that national legislation such as that at issue in the main proceedings, which precludes the free marketing of food supplements lawfully marketed in another member state although no serious health risk has been proved, constitutes a measure having equivalent effect to a quantitative restriction, contrary to arts 28 and 30 EC.

19. They submit that the French authorities have been unable to prove that the national legislation is necessary in order to avoid a serious risk to public health and that it cannot be replaced by a measure which is less restrictive of intra-Community trade, such as labelling.

20. In addition, they argue that, contrary to the requirements of Community law, traders cannot obtain authorisation to market those food supplements by a readily accessible procedure which can be completed within a reasonable time. a

21. The French government submits that a system prohibiting marketing without authorisation is compatible with Community law if it meets certain requirements laid down thereby. The authorisation procedure must be readily accessible, capable of being completed within a reasonable time and permit refusals to be challenged before the courts. b

22. It points out that in the main case no application for authorisation was submitted by NSA France, which, indeed, deliberately proceeded to market the products in question without having previously submitted an application which could have been examined by the French authorities.

23. The Greek government submits that the mere fact that a particular food supplement is freely marketed in other member states is not sufficient for its marketing to be permitted automatically in the member state concerned without undergoing the authorisation procedure provided for for that purpose by the rules in force in that member state. The relevant national provisions can and should lay down certain conditions for authorising the marketing of food supplements, whether they are produced in the member state concerned or imported from another member state. Such conditions can consist of a procedure for prior authorisation. c  
d

24. Whilst refraining from taking a position on the question referred, the Spanish government observes that under its own food legislation none of the products which are the subject of the question referred is regarded as a foodstuff and that, therefore, they cannot be marketed freely on the Spanish foodstuffs market. Moreover, the addition of coenzyme Q10 is not provided for in that legislation. e

25. The Commission submits that the addition to foodstuffs of a particular nutrient allowed in another member state must be permitted in a product imported from that state provided that, taking account of the results of international scientific research and the nutritional habits in the member state where it is imported, the nutrient does not pose a risk for public health. f

26. According to the Commission, it is for the national court to decide whether the competent authorities of the member state concerned have evaluated the risks relating to the nutrients in question, thus enabling them to decide whether the legislation relating to such nutrients is necessary for the effective protection of public health. g

27. With regard to the main proceedings, it states that the referring judgment gives no indication as to either the safety limits fixed by the CSHPF for the consumption of vitamins or how those limits were established.

28. In relation to coenzyme Q10, the Commission submits that no information has been produced concerning the public health risks which the addition of that nutrient to a foodstuff could entail. h

### *Reply of the court*

29. By its question, the referring court is asking, in essence, whether arts 28 and 30 EC must be interpreted as meaning that they preclude a member state from prohibiting the marketing without prior authorisation of foodstuffs lawfully manufactured and marketed in another member state, if nutrients such as vitamins or minerals have been added thereto other than those whose use has been declared lawful in the first member state. i



- a 30. It must be observed at the outset that, while the main proceedings concern charges relating both to food supplements and to meal substitutes, the question referred covers only food supplements to which have been added coenzyme Q10, whose addition is not authorised in France, and vitamins in quantities exceeding the safety limits laid down by the CSHPF or exceeding the recommended daily intake.
- b 31. The free movement of goods between member states is a fundamental principle of the EC Treaty which finds its expression in the prohibition, set out in art 28 EC, of quantitative restrictions on imports between member states and all measures having equivalent effect.
- c 32. The prohibition set out in art 28 EC on measures having an effect equivalent to restrictions covers all commercial rules enacted by the member states which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade (see in particular *Procureur du Roi v Dassonville* Case 8/74 [1974] ECR 837 (para 5) and *European Commission v Denmark* Case C-192/01 [2003] ECR I-9693 (para 39)).
- d 33. The file of the main proceedings seems to indicate that they concern foodstuffs imported from another member state where they are lawfully manufactured and/or marketed. It is, however, for the national court, which alone has jurisdiction to determine and evaluate the facts in the proceedings before it, to check that such is the case and that the rules and principles flowing from the free movement of goods are indeed to be applied to those proceedings (see, to that effect, *Criminal proceedings against Rombi and Arkopharma SA* Case C-107/97 [2000] ECR I-3367 (para 72)).
- e 34. National rules such as those at issue in the main proceedings, which prohibit the marketing of foodstuffs to which nutrients have been added, such foodstuffs being lawfully manufactured and/or marketed in the exporting member state but prohibited in the importing member state, or which require that such substances have been previously included on a national list provided for that purpose in order that the marketing of the foodstuffs to which they have been added may be authorised, can be justified, as a measure having equivalent effect to a quantitative restriction within the meaning of art 28 EC, in so far as they comply with the requirements of art 30 EC, as interpreted by the court.
- f 35. First, such rules must make provision for a procedure enabling economic operators to have a nutrient included on the national list of authorised substances. The procedure must be one which is readily accessible and can be completed within a reasonable time, and, if it leads to a refusal, the decision of refusal must be open to challenge before the courts (see to that effect *EC Commission v France* Case C-344/90 [1992] ECR I-4719 (para 9) and today's judgment in *European Commission v France* Case C-24/00 (2001) Transcript (opinion), 26 June, (2004) Transcript (judgment), 5 February (para 26)).
- g 36. Secondly, an application to obtain the inclusion of a nutrient on the national list of authorised substances may be refused by the competent national authorities only if such substance poses a genuine risk to public health (see *Commission v Denmark*, cited above (para 46)).
- h 37. It is of course for the member states, in the absence of harmonisation and to the extent that there is still uncertainty in the current state of scientific research, to decide on the level of protection of human health and life they wish to ensure and whether to require prior authorisation for the marketing

of foodstuffs, taking into account the requirements of the free movement of goods within the Community (see *Commission v Denmark*, cited above (para 42)). a

38. That discretion relating to the protection of public health is particularly wide where it is shown that there is still uncertainty in the current state of scientific research as to certain nutrients, such as vitamins, which are not as a general rule harmful in themselves but may have special harmful effects solely if taken to excess as part of the general diet, the composition of which cannot be foreseen or monitored (see *Criminal proceedings against Sandoz BV* Case 174/82 [1983] ECR 2445 (para 17) and *Commission v Denmark*, cited above (para 43)). b

39. However, in exercising their discretion relating to the protection of public health, the member states must comply with the principle of proportionality. The means which they choose must therefore be confined to what is actually necessary to ensure the safeguarding of public health; they must be proportionate to the objective thus pursued, which could not have been attained by measures less restrictive of intra-Community trade (see the *Sandoz* case (para 18) and *Commission v Denmark* (para 45)). c

40. Furthermore, since art 30 EC provides for an exception, to be interpreted strictly, to the rule of free movement of goods within the Community, it is for the national authorities which invoke it to show in each case, in the light of national nutritional habits and in the light of the results of international scientific research, that their rules are necessary to give effective protection to the interests referred to in that provision and, in particular, that the marketing of the products in question poses a real risk to public health (see to that effect the *Sandoz* case (para 22), *Criminal proceedings against van Bennekom* Case 227/82 [1983] ECR 3883 (para 40) and *Commission v Denmark* (para 46)). d

41. A prohibition on the marketing of foodstuffs to which nutrients have been added must therefore be based on a detailed assessment of the risk alleged by the member state invoking art 30 EC (see *Commission v Denmark* (para 47)). e

42. A decision to prohibit the marketing of a fortified foodstuff, which is in fact the most restrictive obstacle to trade in products lawfully manufactured and marketed in other member states, can be adopted only if the alleged real risk for public health appears to be sufficiently established on the basis of the latest scientific data available at the date of the adoption of such decision. In such a context, the object of the risk assessment to be carried out by the member state is to appraise the degree of probability of harmful effects on human health from the addition of certain nutrients to foodstuffs and the seriousness of those potential effects (see *Commission v Denmark* (para 48)). f

43. It is clear that such an assessment of the risk could reveal that scientific uncertainty persists as regards the existence or extent of real risks to human health. In such circumstances, it must be accepted that a member state may, in accordance with the precautionary principle, take protective measures without having to wait until the existence and gravity of those risks are fully demonstrated (see to that effect *R v Ministry of Agriculture, Fisheries and Food, ex p National Farmers' Union* Case C-157/96 [1998] ECR I-2211 (para 63)). However, the risk assessment cannot be based on purely hypothetical considerations (see *Monsanto Agricoltura Italia SpA v Presidenza del Consiglio dei Ministri* Case C-236/01 [2003] ECR I-8105 (para 106) and *Commission v Denmark* (para 49)). g

44. At the hearing, the French government stated that NSA France had been informed by letter of 21 October 1996 that the opinion of the CSHPF had not h

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a been in favour of the addition of coenzyme Q10 to human food, following an application by another economic operator for authorisation to place on the market. According to that government, the opinion, dated 11 June 1996, is based on the absence of nutritional need as regards the addition of coenzyme Q10 and, above all, on the lack of toxicological data on the effects of that substance.

b 45. It also argued at the hearing that the French authorities' reasoning with regard to applications for authorisation concerning the addition of nutrients to foodstuffs is based on the conclusion that there is no reason to authorise the marketing of a foodstuff to which have been added such substances, which, even if at present they pose no danger to public health, are none the less capable of giving rise to such a risk in future, especially as such substances  
c bestow no nutritional benefit.

46. While it is true that the court has observed that, in a context of scientific uncertainty, the criterion of the nutritional need of the population of a member state can play a role in its detailed assessment of the risk which the addition of nutrients to foodstuffs may pose for public health, the absence  
d of such a need cannot, by itself, justify a total prohibition, on the basis of art 30 EC, on marketing foodstuffs lawfully manufactured and/or marketed in other member states (see *Commission v Denmark* (para 54)).

47. Moreover, as noted in paras 41–43 of this judgment, a prohibition on marketing foodstuffs to which nutrients have been added must be based on a detailed assessment of the real risk to public health alleged by the national  
e authorities invoking art 30 EC, established on the basis of the most reliable scientific data available and the most recent results of international research (see *Commission v Denmark* (para 51)).

48. Where it proves to be impossible to determine with certainty the existence or extent of the alleged risk because of the insufficiency, inconclusiveness or imprecision of the results of studies conducted, but the  
f likelihood of real harm to public health persists should the risk materialise, the precautionary principle justifies the adoption of restrictive measures (see *Commission v Denmark* (para 52)).

49. It is for the referring court to determine whether, in the legal and factual circumstances obtaining in the member state concerned, the prohibition on  
g marketing the foodstuffs in question satisfies the requirements of Community law in order that the restriction on the free movement of goods may be justified.

50. Having regard to all those considerations, the reply to the question referred must be that arts 28 and 30 EC must be interpreted as meaning that they do not preclude a member state from prohibiting the marketing without  
h prior authorisation of foodstuffs lawfully manufactured and marketed in another member state, where nutrients such as vitamins or minerals have been added thereto other than those whose use has been declared lawful in the first member state, provided that certain conditions are satisfied.

First, the prior authorisation procedure must be readily accessible and capable of being completed within a reasonable time and, if it leads to a  
i refusal, the decision of refusal must be open to challenge before the courts. Secondly, refusal to authorise marketing must be based on a detailed assessment of the risk to public health, based on the most reliable scientific data available and the most recent results of international research.



## COSTS

51. The costs incurred by the French, Greek and Spanish governments and by the Commission, which have submitted observations to the court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds, the Court of Justice (Sixth Chamber) in answer to the question referred to it by the Tribunal de Grande Instance de Paris by judgment of 19 February 2001, hereby rules:

Articles 28 and 30 EC must be interpreted as meaning that they do not preclude a member state from prohibiting the marketing without prior authorisation of foodstuffs lawfully manufactured and marketed in another member state, where nutrients such as vitamins or minerals have been added thereto other than those whose use has been declared lawful in the first member state, provided that certain conditions are satisfied.

First, the prior authorisation procedure must be readily accessible and capable of being completed within a reasonable time and, if it leads to a refusal, the decision of refusal must be open to challenge before the courts. Secondly, refusal to authorise marketing must be based on a detailed assessment of the risk to public health, based on the most reliable scientific data available and the most recent results of international research.

**a** **Sniaze SA v European Commission**  
**(supported by Austria and others,**  
**intervening)**  
**b** **(Case T-88/01)**

COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES (FIFTH CHAMBER, EXTENDED COMPOSITION)

JUDGES LINDH (PRESIDENT), GARCÍA-VALDECASAS, COOKE, MENGOSZI AND MARTINS RIBEIRO

**c** 17 JUNE 2004, 14 APRIL 2005

*European Community – Procedure – Action for annulment – Admissibility – Individual concern – Meaning of individual concern – Whether action inadmissible – Article 230 EC (formerly EC Treaty, art 173).*

**d** The applicant was a Spanish company which was in the business of, inter alia, producing and selling artificial and cellulose fibres. In July 2000, Commission Decision (EC) 2001/102 (on state aid granted by Austria to Lenzing Lyocell GmbH & Co KG (LLG)) was adopted (the decision). LLG was an Austrian company which produced lyocell, a fibre made from cellulose.

**e** Article 1<sup>a</sup> of the decision provided that the provision of certain guarantees did not constitute aid within the meaning of art 87(1) EC<sup>b</sup> (formerly art 92(1) of the EC Treaty). Article 2<sup>c</sup> provided that a guarantee amounting to €14.5m complied with guidelines approved by the Commission of the European Communities and art 3<sup>d</sup> stated that amounts of aid provided for land acquisition and equity capital was compatible with the common market.

**f** Subsequently, the applicant brought an action seeking annulment of arts 1 to 3 of the decision. The Commission and the interveners contended that the application should be dismissed as inadmissible.

**g** **Held** – Under the fourth paragraph of art 230 EC (formerly art 173 of the EC Treaty), a natural or legal person could institute proceedings against a decision addressed to another person only if that decision was of direct and individual concern to him. Persons other than those to whom a decision was addressed could claim to be concerned individually only if that decision affected them by reason of certain attributes peculiar to them or by reason of circumstances in which they were differentiated from all other persons, and by virtue of those factors distinguished them individually just as in the case of the person addressed.

**h** In the field of state aid, undertakings in competition with the undertaking in receipt of aid which had played an active role in the procedure in respect of an individual aid had been recognised as being individually concerned by the Commission decision closing that procedure,

**i** <sup>a</sup> Article 1 is set out at judgment para 12, below

<sup>b</sup> Article 87(1) provides, so far as material: ‘... any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, insofar as it affects trade between Member States, be incompatible with the common market.’

<sup>c</sup> Article 2 is set out at judgment para 12, below

<sup>d</sup> Article 3 is set out at judgment para 12, below

provided that their position on the market was substantially affected by the aid which was the subject of that decision. An undertaking could not therefore rely solely on its status as a competitor of the undertaking in receipt of aid but additionally had to show that having regard to the extent of any participation by it in the procedure and to the extent of the detriment to its market position, its circumstances distinguished it in a similar way to the undertaking in receipt of the aid. The court therefore had to consider to what extent the applicant's participation in the procedure and the effect of the aid on its market position were capable of distinguishing it. In the instant case, the applicant had played only a minor role in the course of the pre-litigation procedure. As regards the extent to which the applicant's market position was affected, it was not for the Community court, when considering whether the application was admissible, to make a definitive finding on the competitive relationship between the applicant and the undertaking in receipt of the aid. It was for the applicant to adduce pertinent reasons to show that the Commission's decision could adversely affect its legitimate interests by seriously jeopardising its position on the market in question. In the instant case, the applicant had not adduced pertinent reasons to show that the decision might adversely affect its legitimate interests by seriously jeopardising its position on the market. In the light of that failure, and the limited role played by the applicant in the course of the pre-litigation procedure, the applicant was not individually concerned by the decision. Consequently, the application would be declared inadmissible (see judgment paras 51, 54–60, 78–80, below). *Cie française de l'azote (Cofaz) SA v EC Commission* Case 169/84 [1986] ECR 391 considered.

## Notes

For the powers of the Court of Justice of the European Communities, see 47 *Halsbury's Laws* (4th edn) (2001 reissue) para 409.

For the EC Treaty, art 173 (now art 230 EC), see 50 *Halsbury's Statutes* (4th edn) Current Service (issue 88) 429.

## Cases cited

*Arbeitsgemeinschaft Deutscher Luftfahrt-Unternehmen v European Commission* Case T-86/96 [1999] ECR II-179, CFI.

*Association des Aciéries Européennes Indépendantes (EISA) v European Commission* Case T-239/94 [1997] ECR II-1839, CFI.

*Association of Sorbitol Producers within the EC (ASPEC) v European Commission* Case T-435/93 [1995] ECR II-1281, CFI.

*Associazione Italiana Tecnico Economica del Cemento (AITEC) v European Commission* Joined cases T-447–449/93 [1995] ECR II-1971, CFI.

*BP Chemicals Ltd v European Commission* Case T-11/95 [1998] ECR II-3235, CFI.

*Cie française de l'azote (Cofaz) SA v EC Commission* Case 169/84 [1986] ECR 391, ECJ.

*Comité d'entreprise de la Société française de production v European Commission* Case T-189/97 [1998] ECR II-335, CFI; *aff'd* Case C-106/98 P [2000] ECR I-3659, ECJ.

*Comité International de la Rayonne et des Fibres Synthétiques (CIRFS) v EC Commission* Case C-313/90 [1993] ECR I-1125, ECJ.

*Conseil national des professions de l'automobile (CNPA) v European Commission* Case C-341/00 P [2001] ECR I-5263, ECJ.



- a Foreningen af Jernskibs- og Maskinbyggerier I Danmark, Skibsværftsforeningen v European Commission Case T-266/94 [1996] ECR II-1399, CFI.*  
*Germany v EC Commission* Joined cases C-324/90 and C-342/90 [1994] ECR I-1173, ECJ.
- b Intermills (SA) v EC Commission Case 323/82 [1984] ECR 3809, ECJ.*  
*Italy v European Commission Case C-47/91 [1994] ECR I-4635, ECJ.*  
*Kaysersberg SA v European Commission Case T-290/94 [1997] ECR II-2137, CFI.*  
*Matra SA v EC Commission Case C-225/91 [1993] ECR I-3203, ECJ.*  
*Neotype Techmashexport GmbH v EC Commission* Joined cases C-305/86 and C-160/87 [1990] ECR I-2945, ECJ.
- c Plaumann & Co v EEC Commission Case 25/62 [1963] ECR 95, ECJ.*  
*Riviera Auto Service Établissements Dalmasso SA v European Commission* Joined cases T-185/96, T-189/96 and T-190/96 [1999] ECR II-93, CFI.  
*Società 'Eridania' Zuccherifici Nazionali v EEC Commission* Joined cases 10/68 and 18/68 [1969] ECR 459, ECJ.
- d Svenska Journalistförbundet (supported by Sweden) v EU Council (supported by France) Case T-174/95 [1998] All ER (EC) 545, [1998] ECR II-2289, CFI.*

### Application

By application lodged at the Registry of the Court of First Instance of the European Communities on 17 April 2001, Sniace SA, a company established in Madrid, Spain, applied for the annulment of Commission Decision (EC)

- e 2001/102 (on state aid granted by Austria to Lenzing Lyocell GmbH & Co KG).* Sniace SA was represented by J Baró Fuentes, M Gómez de Liaño y Botella and F Rodríguez Carretero, lawyers. The Commission of the European Communities was represented by D Triantafyllou and J Buendía Sierra, acting as agents, with an address for service in Luxembourg. The Commission was supported by the Republic of Austria, represented by H Dossi and
- f M Burgstaller, acting as agents, with an address for service in Luxembourg; Lenzing Lyocell GmbH & Co KG, a company established in Heiligenkreuz im Lafnitztal, Austria; and Land Burgenland, Austria, represented by U Soltész, lawyer. The language of the case was Spanish. The facts are set out in the judgment of the court.*

- g 14 April 2005. The COURT OF FIRST INSTANCE (Fifth Chamber, Extended Composition) delivered the following judgment.*

### FACTS

- h 1. Sniace SA (hereinafter the applicant) is a Spanish company whose principal activities are the production and sale of artificial and synthetic fibres, cellulose, cellulose fibres (viscose staple fibres), continuous polyamide thread, unwoven felt and sodium sulphate, forestry and the co-production of electricity.*
- i 2. Lenzing Lyocell GmbH & Co KG (hereinafter LLG) is an Austrian company, a subsidiary of the Austrian company Lenzing AG, which produces, among other things, viscose fibres and modal. LLG's business is the production and sale of lyocell, a new type of fibre made from pure natural cellulose. It is also produced by the British company Courtaulds plc, which markets it under the name Tencel.*

*3. In 1995, LLG started construction of a factory for the production of lyocell in the business park at Heiligenkreuz-Szentgotthárd, in a cross-border area between Austria and Hungary. The factory is located in the Austrian part of the area, in the province of Burgenland.*

4. In 1995, the Austrian public body Wirtschaftsbeteiligungs AG (hereinafter the WiBAG) informed the Commission of the European Communities informally of its intention to grant state aid to LLG for the investment project. By letter of 30 August 1995, the Republic of Austria informed the Commission that the aid would be granted under regional aid scheme N 589/95, approved by the Commission by letter of 3 August 1995. By letter of 5 October 1995, the Commission informed the Republic of Austria that individual notification of the intended aid in the form of grants was unnecessary since they were covered by an approved aid scheme, whilst putting it on notice not to grant aid in the form of guarantees to LLG without previously informing the Commission of them. a

5. On 21 April 1997, the Austrian authorities sent the Commission application forms for co-financing under the European Regional Development Fund (ERDF) for two large-scale investment projects in the business park to be carried out by Business Park Heiligenkreuz GmbH (hereinafter BPH) and Wirtschaftspark Heiligenkreuz Servicegesellschaft mbH (hereinafter WHS). b

6. Because of information contained in those forms and in a contract made in 1995 between the province of Burgenland and LLG, the Commission decided to re-investigate the case concerning the aid granted to LLG. After a meeting and an exchange of letters with the Austrian authorities, it decided to enter that case on the register for non-notified state aid. Subsequently there were other meetings and exchanges of correspondence between the Commission and the Austrian authorities. c

7. By letter of 29 October 1998, the Commission informed the Austrian government of its decision of 14 October 1998 to initiate the procedure laid down in art 93(2) of the EC Treaty (now art 88(2) EC) in respect of various measures adopted by the Austrian authorities in favour of LLG (hereinafter the decision to initiate the procedure). The measures in question consisted of state guarantees for subsidies and loans amounting to €50.3m, an advantageous price of €4.4 per square metre for 120 hectares of industrial land and guarantees of fixed prices for basic communal services for 30 years. The Commission enjoined the Austrian government, in accordance with the principles stated by the court in *Germany v EC Commission* Joined cases C-324/90 and C-342/90 [1994] ECR I-1173, to furnish it with certain information in order that it might examine the compatibility of those measures with the common market. d

8. The Commission also enjoined it, in accordance with the principles stated by the court in its judgment of 5 October 1994 in *Italy v European Commission* Case C-47/91 [1994] ECR I-4635 (the *Italgrani* case) (paras 21–24), to provide it with a range of information intended to enable it to determine whether certain of the other measures adopted by the Austrian authorities in favour of LLG were covered by approved or existing aid schemes. The other member states and the parties concerned were given notice of the initiation of that procedure and were requested, by the publication of that letter in the Official Journal of the European Communities of 13 January 1999 (OJ 1999 C9 p 6), to submit any observations they might have. e

9. The Austrian government replied to that letter from the Commission by letters of 15 March and of 16 and 28 April 1999. The United Kingdom and other third parties concerned, among them (by letter of 12 February 1999) the applicant, also submitted their observations. f

10. After examining the information submitted to it by the Austrian authorities, the Commission, by letter of 14 July 1999, informed the Austrian g

a government of its decision of 23 June 1999 to extend the procedure initiated under art 88(2) EC (hereinafter the decision to extend the procedure) to four other measures in favour of LLG. They are the following: ad hoc investment aid of €0.4m for the land purchase, the taking of an equity holding of €21.8m terminable only after 30 years and with a 1% per year return, aid of an unknown amount for the creation of company-specific infrastructure and  
b environmental aid, of €5.4m, possibly granted otherwise than in accordance with an existing aid scheme. The Commission invited the Austrian government to submit its observations. The other member states and interested parties were notified of the extension of the procedure and were requested to submit any observations by the publication of that letter in the Official Journal of the  
c European Communities of 4 September 1999 (OJ 1999 C253 p 4). The Austrian government submitted its observations by letter of 4 October 1999. The United Kingdom and other parties concerned, including (by letter of 4 October 1999) the applicant, also submitted their observations. The Austrian government provided additional information by letters of 25 February and 27 April 2000.

d 11. On 19 July 2000 the Commission adopted Decision (EC) 2001/102 (on state aid granted by Austria to LLG) (OJ 2001 L38 p 33) (hereinafter the contested decision).

12. The operative part of that decision is as follows:

*Article 1*

e The aid which Austria has granted to ... (LLG), Heiligenkreuz, through the provision of guarantees amounting to EUR 35,80 million (a guarantee by a consortium of commercial and public-sector banks amounting to EUR 21,8 million and three guarantees by the ... (WHS) amounting to EUR 1,4 million, EUR 10,35 million and EUR 2,25 million) and through a land price of EUR 4,4 per mFootnote reference, but no text associated with it. for the acquisition of 120 hectares of industrial land, through  
f fixed-price guarantees by the Province of Burgenland for the provision of process utilities and through the provision of aid of an unknown amount in the form of the creation of company-specific infrastructure does not constitute aid within the meaning of Article 87(1) [EC].

*Article 2*

g The aid which Austria has granted to LLG through the provision of a guarantee amounting to EUR 14,5 million by [the] WiBAG complies with the guarantee guidelines approved by the Commission under [reference] number N 542/95.

h The environmental aid amounting to EUR 5,37 million complies with the environmental aid guidelines approved by the Commission under [reference] number N 93/148.

*Article 3*

i The individual aid which Austria has granted in the form of aid amounting to EUR 0,4 million for land acquisition and in the form of equity capital amounting to EUR 21,8 million is compatible with the common market.

*Article 4*

This Decision is addressed to the Republic of Austria.'

PROCEDURE

13. By application lodged at the Court Registry on 17 April 2001, the applicant brought this action.



14. By documents lodged at the Registry on 6 June, 16 and 26 July 2001 respectively, LLG, the Republic of Austria and the province of Burgenland applied for leave to intervene in this action in support of the form of order sought by the Commission. a

15. By letter of 16 October 2001, the applicant requested measures of organisation of procedure seeking the disclosure by the Commission of a series of documents referred to in its defence and in the contested decision, as well as of certain information, particularly on the market for the products in question. On 14 November 2001, as a measure of organisation of procedure, the Commission was requested to disclose some of those documents. It complied with that request within the period prescribed. b

16. By letter of 10 December 2001, the applicant requested that confidential treatment be accorded to certain information contained in Annexes 14 and 15 of its application with regard to LLG, the Republic of Austria and the province of Burgenland. c

17. By order of 18 February 2002, the President of the Fifth Chamber, Extended Composition, granted the applications for leave to intervene and for confidential treatment. d

18. On 21 May 2002, LLG and the province of Burgenland lodged a joint statement in intervention.

19. On 23 May 2002, the Republic of Austria lodged its statement in intervention.

20. The Commission and the applicant lodged their observations on the statements in intervention on 19 July and 6 September 2002, respectively. e

21. Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Fifth Chamber, Extended Composition) decided to open the oral procedure.

22. The parties presented oral argument and their answers to the questions put by the court at the hearing on 17 June 2004. f

#### FORMS OF ORDER SOUGHT BY THE PARTIES

23. The applicant claims that the court should:

—declare the action admissible and well founded;

—annul art 1 of the contested decision, inasmuch as the Commission decides therein that the provision of guarantees amounting to €35.8m does not constitute state aid within the meaning of art 87(1) EC (formerly art 92(1) of the EC Treaty); g

—annul art 2 of the contested decision, inasmuch as the Commission decides therein that the aid granted by the Republic of Austria to LLG through the provision of a guarantee of €14.5m by the WIBAG complies with the guarantee guidelines approved by the Commission under reference number N 542/95; h

—annul art 3 of the contested decision;

—alternatively, annul art 1 of the contested decision inasmuch as the Commission decides therein that the fixed price guarantees by the province of Burgenland for the provision of communal services and the provision of aid of an unknown amount in the form of the creation of company-specific infrastructure do not constitute state aid within the meaning of art 87(1) EC; i

—order the Commission to pay the costs.

24. In its reply, the applicant also claims that the court should annul art 2 of the contested decision, inasmuch as the Commission decides therein that the

a environmental aid of €5.37m complies with the guidelines for the financing of environmental protection approved by the Commission under reference number N 93/148.

25. The Commission contends that the court should:

—reject the unsubstantiated pleas in law and the new pleas in law put forward by the applicant as inadmissible;

b —in any event, dismiss the action as unfounded in its entirety;

—order the applicant to pay the costs.

26. The interveners contend that the court should:

—dismiss the action as inadmissible and, in any event, as unfounded;

—order the applicant to pay the costs.

c

#### ADMISSIBILITY

##### *Arguments of the parties*

27. The interveners object to the admissibility of the action on the ground that the applicant is not individually concerned by the contested decision.

d 28. The Republic of Austria observes that, in the context of control of state aid, a Commission decision closing a procedure initiated pursuant to art 88(2) EC is of individual concern to the undertakings who were responsible for the complaint which led to that procedure and whose views were heard and determined the conduct of that procedure, provided, however, that their position on the market is substantially affected by the aid which is the subject of that decision (see *Cie française de l'azote (Cofaz) SA v EC Commission* Case 169/84 [1986] ECR 391 (paras 24, 25)).

e 29. It submits, first, that the fact that the applicant may be a party concerned for the purposes of art 88(2) EC cannot confer on it standing to bring proceedings against the contested decision. It notes that, according to the case law, a natural or legal person may be individually concerned by reason of its status as a party concerned only by a Commission decision refusing to open the examination stage provided for by art 88(2) EC (see *BP Chemicals Ltd v European Commission* Case T-11/95 [1998] ECR II-3235 (paras 88, 89)). In such a case, it can ensure that its procedural guarantees are complied with only if it is entitled to challenge that decision before the Community judicature (see the *BP Chemicals* case, cited above (para 89)). However, where, as in the present case, the Commission has adopted its decision at the end of the examination stage, the parties concerned have in fact availed themselves of their procedural guarantees, so that they can no longer be regarded, by virtue of that status alone, as being individually concerned by that decision.

f 30. The Republic of Austria adds that the applicant's participation in the procedure under art 88(2) EC does not suffice to distinguish it individually as it would the person to whom the contested decision is addressed (see *Arbeitsgemeinschaft Deutscher Luftfahrt-Unternehmen v European Commission* Case T-86/96 [1999] ECR II-179 (para 50)). It follows from the case law that, in state aid matters, participation in that procedure is only one of the factors capable of establishing that a natural or legal person is individually concerned by the decision which it seeks to have annulled (see the *Cofaz* case, cited above (para 25) and *Comité d'entreprise de la Société française de production v European Commission* Case T-189/97 [1998] ECR II-335 (para 44)).

g 31. Secondly, the Republic of Austria submits that the applicant is not entitled to base an argument on the fact that its interests are affected by the grant of the contested measures, as referred to in para 16 of the court's judgment in

*SA Intermills v EC Commission* Case 323/82 [1984] ECR 3809. The passage extracted from that judgment does not, in actual fact, concern the question of standing to bring proceedings. a

32. Thirdly, the Republic of Austria argues that the applicant has not shown that its position on the market may be substantially affected by the measures at issue. It points out that those measures refer exclusively to the construction of a factory to produce lyocell, a product which the applicant does not manufacture. It adds that there is no particular competitive relationship between that product and those of the applicant. It submits, more particularly, that the Commission correctly found, in the contested decision, that viscose fibres and lyocell were covered by two different markets. b

33. On that last point, the Republic of Austria contends, first, that, from purchasers' point of view, lyocell and viscose fibres cannot be substituted for each other. In support of that contention, it explains that lyocell has specific characteristics which distinguish it from viscose, like its high resistance in the dry state and, in dampness, its low shrinkage in water, its high absorbency of dyes, its softness to the touch, its similarity to silk and its miscibility with other textile fibres. Its specific 'surface characteristics' and its tendency to fibrillate permit the introduction of new products with new properties, such as the 'stonewashed' and 'peach skin' effects, which could not be obtained by using viscose fibres. In addition, in certain fields in which lyocell is used, such as denim, the use of viscose fibres is technically impossible. Lyocell's very high resistance permits exceptionally high productivity in spinning and weaving. Since lyocell costs more to produce, it is intended for segments of the market in which products are of higher quality and more expensive. The Republic of Austria refers also to certain findings made by the Commission in its Decision (EC) 2004/237 (declaring a concentration to be incompatible with the common market and the functioning of the EEA Agreement) (Case COMP/M.2187—CVC/Lenzing) (OJ 2004 L82 p 20). c  
d  
e

34. Secondly, the Republic of Austria asserts that the manufacturing processes of lyocell and viscose fibres are fundamentally different. Viscose manufacture requires a process of chemical conversion, whereas that of lyocell is obtained by a physical process, namely by the use of an aqueous solution of N-methyl-morpholine oxide (NMMO). It points out that lyocell's manufacturing process has required substantial research and that it is less harmful to the environment than that of viscose fibres, which requires substantial consumption of chemicals. It states that— f

'the new technology used in the manufacture of lyocell fibres is characterised ... by fewer manufacturing stages, shorter delays in the process, lower consumption of chemicals and closed manufacturing cycles.'  
g  
h

35. The Republic of Austria adds that the losses of market shares and the decrease in turnover relied upon by the applicant are attributable not to the grant of the contested measures to LLG, but to the financial and economic difficulties and to the over-indebtedness with which the applicant had to cope for several years from the early 1990s. It refers, in that regard, to Commission Decision (EC) 1999/395 (on state aid implemented by Spain in favour of Sniace SA, located in Torrelavega, Cantabria) (OJ 1999 L149 p 40). i

36. LLG and the province of Burgenland maintain that there is no competitive relationship between LLG and the applicant, since the applicant



a does not operate in the lyocell sector. In that regard, they rely on the same arguments as those presented by the Republic of Austria and reproduced above.

37. In its rejoinder, the Commission requests the court to examine, of its own motion, the question of the applicant's standing to bring proceedings, since it concerns an absolute bar to proceeding. It expresses serious doubt that b the applicant's competitive position is substantially affected by the measures at issue, since they are intended exclusively for the production of lyocell, which forms part of a different market from that of viscose. In that regard, it stresses, more particularly, that the price of lyocell is appreciably higher than that of viscose fibres and that those two types of fibre are not used in the same ways. c In addition, it points out that the applicant, in the observations which it submitted in the course of the pre-litigation procedure, confined itself to 'repeating doubts set forth in the decision [initiating the procedure]'.

38. The applicant submits, first, that it has been consistently held that an intervenor is not entitled to raise an objection of inadmissibility which was not formulated in the form of order sought by the defendant (see *Kaysersberg SA v d European Commission Case T-290/94* [1997] ECR II-2137 (para 76) and *Riviera Auto Service Établissements Dalmasso SA v European Commission* Joined cases T-185/96, T-189/96 and T-190/96 [1999] ECR II-93 (para 25)). It leaves it to the court to decide whether it is appropriate to examine of its own motion the plea of inadmissibility alleging lack of standing to bring proceedings.

39. The applicant submits, next, that it is directly and individually concerned e by the contested decision.

40. As regards the requirement of being individually concerned, it asserts, first, that it participated actively in the pre-litigation procedure by submitting its written observations.

41. Secondly, it claims that it was disadvantaged by the grant of the measures at issue to LLG 'according to the court's case law, particularly in the judgment f in ... [the *Intermills* case]', cited above.

42. Thirdly, the applicant argues that the said measures cause it economic loss 'in terms of loss of market share, [of] lowering of turnover and [of] incorporeal assets'. To demonstrate the reality and extent of that loss, it refers to a note which is set out in Annex 14 to the application.

43. In that note, the applicant makes the following submissions: g

—the world and European viscose markets are characterised by a decrease in production capacity and consumption;

—that situation is 'incompatible with the creation of a new substitute industry benefiting from preferential European financing';

h —'... lyocell is used without distinction, with a varying competitive advantage, in place of traditional viscose fibre or as a substitute for it';

—LLG's supply of lyocell is equivalent to 3.5% of the European viscose market;

i —'there is no doubt that a supply equivalent to 3.5% of the market entails an even greater change in the prices, conditions, etc., where, by reason of its investment/writing-down costs, it can compete unfairly to the detriment of other fibres in a position of economic inferiority and liable therefore to result in losses, whereas lyocell fibre, which needs no writing down, may give rise to profits';

—the applicant consequently ceased to produce, and therefore to sell, the following quantities of viscose: ...<sup>1</sup> tonnes in 1997, ... tonnes in 1998, ... tonnes in 1999, ... tonnes in 2000, with a decrease of ... tonnes per year forecast from 2001; a

—that is equivalent to a loss of net revenue of: ... Spanish pesetas (ESP) in 1997, ESP ... in 1998, ESP ... in 1999, ESP ... in 2000, ESP ... according to its forecasts for 2001 and ESP ... according to forecasts for the period 2001–2007; b

—the supply of lyocell by LLG also led to a ‘change of at least ...% in the market price’, entailing the following losses for the applicant: ESP ... in 1997, ESP ... in 1998, ESP ... in 1999, ESP ... in 2000, ESP ... according to its forecasts for 2001 and ESP ... according to forecasts for the period 2002–2007;

—in addition, LLG annually puts on the market, ‘through special outlets which then sell at extremely low prices’, about 1,000 tonnes of ‘by-products’ (or ‘sub-standard products’), which has forced the applicant to lower its prices for ‘products of the same quality’; c

—that has entailed, for the applicant, a loss of revenue of ESP ... per year.

44. In its reply, the applicant refers to the fact that LLG manufactures and sells, under the trade mark ‘Pro-Viscose’, a product made up of a mixture of viscose and lyocell (hereinafter proviscose) and asserts that it is in competition with viscose. It submits that it is clear from a note attached to the reply that LLG has offered proviscose to several of the applicant’s customers ‘at a price comparable to that of traditional viscose’. d

45. In its observations on the statements in intervention, the applicant maintains that it is ‘incontestably’ a company competing with LLG. The viscose fibre which it produces is in direct competition with the products manufactured by LLG, namely lyocell, ‘sub-standards of lyocell’ and proviscose. In support of the latter assertion, it provides an expert report by an ‘independent consultant’, Mr F Marsal Amenós, as well as the evidence of an ‘independent trader’, the company Manfib Sas Lyocell is only an ‘improved viscose fibre’ which can be substituted ‘in most applications’ for the latter. The applicant recognises that lyocell fibres cost more than viscose fibres and argues that proviscose was created in order to ‘avoid that problem’. In that regard, it asserts that, in view of lyocell’s higher price, LLG has introduced on the market proviscose and a ‘sub-standard of lyocell (of lower quality)’ at ‘prices close to that of viscose’. It adds that lyocell fibres have attained a significant share, namely between 5 and 10%, of the European market for cut cellulose fibres, a market which was hitherto supplied exclusively by the European viscose producers. e

46. At the hearing, the applicant submitted that LLG had put ‘sub-standard lyocell’ on the market for certain applications (cigarette filters, wet wipes, chiffons, etc). It also stated that lyocell was a product of higher quality than viscose, particularly in terms of resistance, that it presented a certain number of technical characteristics and that the price of ‘pure lyocell’ was higher than that of viscose. As regards the latter point, the applicant stated that it is when it is mixed with other products that lyocell can be supplied at competitive prices compared to those of viscose. f

47. Finally, the applicant accepts that, according to the case law, the mere fact that a measure may exercise an influence on the competitive relationships existing on a given market cannot suffice to allow any trader in any competitive relationship whatever with the addressee of the measure to be regarded as g

<sup>1</sup> Confidential data omitted. i

- a* directly and individually concerned by that measure (see *Società 'Eridania' Zuccherifici Nazionali v EEC Commission* Joined cases 10/68 and 18/68 [1969] ECR 459 (para 7)). However, it stresses that, first, there is only a limited number of producers on the market for the products concerned (there are only five manufacturers in the market sector for 'commodity viscose staple fibres' and three in the market sector for 'spundyed viscose staple fibres') and, second,
- b* that the investment project will entail a significant increase in production capacity.
48. As regards the requirement of direct concern, the applicant submits that the contested decision has left intact all the effects of the contested measures, although it had sought from the Commission a decision eliminating or amending those measures (see the *Cofaz* case (para 30) and *Associazione Italiana Tecnico Economica del Cemento (AITEC) v European Commission* Joined cases T-447-449/93 [1995] ECR II-1971 (para 41)).
- c*

#### Findings of the court

49. Under the fourth paragraph of art 40 of the Statute of the Court of Justice, an application to intervene is to be limited to supporting the form of order sought by one of the parties. In addition, as provided in art 116(3) of the Rules of Procedure of the Court of First Instance, the intervener must accept the case as he finds it at the time of his intervention.
50. In the form of order sought, the Commission has confined itself to seeking the dismissal of the action on the substance and has not challenged the applicant's standing to bring proceedings.
- e*
51. As interveners, the Republic of Austria, LLG and the province of Burgenland are therefore not entitled to raise a plea of inadmissibility.
52. However, it is settled case law that, under art 113 of the Rules of Procedure, the court may at any time of its own motion consider whether there exists any absolute bar to proceeding with a case, including any raised by interveners (see *Foreningen af Jernskibs- og Maskinbyggerier I Danmark, Skibsværftsforeningen v European Commission* Case T-266/94 [1996] ECR II-1399 (para 40), *Association des Aciéries Européennes Indépendantes (EISA) v European Commission* Case T-239/94 [1997] ECR II-1839 (para 26) and *Svenska Journalistförbundet (supported by Sweden) v EU Council (supported by France)* Case T-174/95 [1998] All ER (EC) 545, [1998] ECR II-2289 (para 79); see also, to that effect, *Neotype Techmashexport GmbH v EC Commission* Joined cases C-305/86 and C-160/87 [1990] ECR I-2945 (para 18), *Comité International de la Rayonne et des Fibres Synthétiques (CIRFS) v EC Commission* Case C-313/90 [1993] ECR I-1125 (para 23) and *Matra SA v EC Commission* Case C-225/91 [1993] ECR I-3203 (para 13)).
- f*
- g*
- h* 53. In this case, the plea of inadmissibility invoked by the interveners raises the question whether there is an absolute bar to proceeding, so far as concerns the applicant's standing to bring proceedings (see, to that effect, *Conseil national des professions de l'automobile (CNPA) v European Commission* Case C-341/00 P [2001] ECR I-5263 (para 32) and the *EISA* case, cited above (para 27)). It can therefore be considered by the court of its own motion.
- i* 54. In that regard, it must be noted that, under the fourth paragraph of art 230 EC (formerly art 173 of the EC Treaty), a natural or legal person may institute proceedings against a decision addressed to another person only if that decision is of direct and individual concern to him. Since the contested decision was addressed to the Republic of Austria, it must be considered whether the applicant satisfies those two requirements.



55. As regards the question whether the applicant is individually concerned by the contested decision, it must be observed that, according to a consistent line of decisions, persons other than those to whom a decision is addressed may claim to be concerned individually only if that decision affects them by reason of certain attributes peculiar to them or by reason of circumstances in which they are differentiated from all other persons, and by virtue of these factors distinguishes them individually just as in the case of the person addressed (see *Plaumann & Co v EEC Commission* Case 25/62 [1963] ECR 95, *Comité d'entreprise de la Société française de production v European Commission* Case C-106/98 P [2000] ECR I-3659 (para 39) and *Association of Sorbitol Producers within the EC (ASPEC) v European Commission* Case T-435/93 [1995] ECR II-1281 (para 62)).

56. As regards, more particularly, the field of state aid, not only the undertaking in receipt of the aid but also the undertakings competing with it which have played an active role in the procedure initiated pursuant to art 88(2) EC in respect of an individual aid have been recognised as being individually concerned by the Commission decision closing that procedure, provided that their position on the market is substantially affected by the aid which is the subject of the contested decision (see the *Cofaz* case (para 25)).

57. An undertaking cannot therefore rely solely on its status as a competitor of the undertaking in receipt of aid but must additionally show that, having regard to the extent of any participation by it in the procedure and to the extent of the detriment to its market position, its circumstances distinguish it in a similar way to the undertaking in receipt of the aid (see the *Comité d'entreprise* case, cited above (para 41)).

58. In the present case, the court must therefore consider to what extent the applicant's participation in the procedure initiated under art 88(2) EC and the effect of the aid on its market position are capable of distinguishing it, in accordance with art 230 EC.

59. First, the court finds that the applicant played but a minor role in the course of the pre-litigation procedure. It lodged no complaint with the Commission. The conduct of the procedure was not largely determined by the observations which it submitted by its letters of 12 February and 4 October 1999 (see, to that effect, the *Cofaz* case (para 24)). Thus, in its observations of 12 February 1999, the applicant confines itself, in essence, to reproducing certain of the Commission's findings in the decision to initiate the procedure, commenting on them briefly, but without providing any specific evidence. Likewise, in its observations of 4 October 1999, it confines itself to asserting, without giving the least detail or any evidence, that the measures referred to in the decision to extend the procedure amount to state aid and that they should be declared incompatible with the common market.

60. Second, as regards the extent to which the applicant's position on the market was affected, it should be borne in mind, that, as stated in para 28 of the judgment in the *Cofaz* case, it is not for the Community court, when it is considering whether the application is admissible, to make a definitive finding on the competitive relationship between the applicant and the undertakings in receipt of the aid. In that context, it is for the applicant alone to adduce pertinent reasons to show that the Commission's decision may adversely affect its legitimate interests by seriously jeopardising its position on the market in question.

- a 61. In addition, in this case, the measures referred to in the contested decision concern exclusively a factory for the production of lyocell and it is common ground that the applicant neither manufactures that type of fibre nor foresees doing so in the future.
- b 62. However, the applicant relies on three arguments in an attempt to establish that its position on the market may be seriously jeopardised by the contested decision.
63. First, in its application, it alleges, in essence, that viscose and lyocell are in direct competition with each other.
- c 64. Without it being necessary, at the stage of considering admissibility, to rule definitively on the exact limits of the market for the products in question, it suffices to hold that that allegation is undermined by various evidence in the case file.
- d 65. First, lyocell has certain physical characteristics which differentiate it clearly from viscose fibre. The applicant thus observes expressly, in para 23 of its application, that 'lyocell is of natural origin and biodegradable; the solvent used is not toxic, can be recycled, complies with the standards on the absence of toxic substances, has high resistance as much in [cases of] conditioning [as when subject to] humidity and has a low shrinkage percentage'. Likewise, at the hearing, it recognised that lyocell had 'some advantages on the technical level', was of higher quality than viscose fibre and offered very high resistance. Furthermore, it did not dispute that lyocell was characterised by a tendency to fibrillation, which enabled the creation of fabrics which are full bodied and silky to the touch.
- e 66. As regards that last property of lyocell, the applicant confined itself to declaring that 'it [was] out of fashion and [was] ... no longer appreciated today' (para 26 of the application).
- f 66. The applicant's assertion that lyocell can be substituted for viscose 'in most applications' is not convincingly substantiated. In particular, the 'expert report' of the 'independent consultant' which it attached to its observations on the statements in intervention, in order to support that assertion, is hardly convincing. It is, in fact, only a single-page document, which contains only a few paragraphs and a highly superficial analysis of the question. The document contains, also, some obviously incorrect statements, such as the one about the great similarity between the manufacturing processes and between the properties of lyocell and viscose fibres (see para 65, above and para 69, below).
- g 67. As for the evidence of an 'independent trader', which the applicant also attached to its observations on the statements in intervention, it establishes at the very most that, for certain specific applications, certain customers of the applicant have woven into their products lyocell or proviscose in place of viscose.
- h 67. Furthermore, that assertion is contradicted by LLG's statement at a conference, which the applicant invokes in support of its argument (para 30 of and Annex 14 to the application) and according to which lyocell is 'an additional fibre whose applications are different'.
- i 68. Secondly, it is common ground that the price of lyocell is substantially higher than that of viscose fibres. That point was expressly admitted by the applicant, both in its pleadings (para 26 of the application and paras 77 and 78 of the applicant's observations on the statements in intervention) and at the hearing. Thus, it has, for example, recognised on several occasions that lyocell could be marketed at prices competitive to those of viscose fibres only if it was mixed with other products.

69. Finally, according to the applicant's own statements, the manufacturing processes of lyocell, on the one hand, and that of viscose fibres, on the other hand, differ to a great extent. Indeed, at para 23 of its application, it states that 'for [l]yocell ... a solvent is used for the cellulose paste (type NMMO), whereas the manufacturing process of traditional viscose involves stages of mercerisation and xanthogenation' and that 'by comparison with the manufacturing process of traditional viscose ... [l]yocell [is produced] by using a solvent rather than by following the traditional manufacturing stages of viscose'. Yet further, in para 36 of its reply, it argues that 'from the point of view of the manufacturing procedure, [it] agrees with the Commission when it states that lyocell is produced by procedures different from the traditional procedures for manufacturing viscose'.

70. In any event, even assuming that there is a direct competitive relationship between lyocell and viscose fibre, the applicant's statements in its pleadings and, more particularly, in the note in Annex 14 to its application, do not establish sufficiently that the contested decision is capable of significantly affecting its position on the market. The statements contained in that note are based, in fact, on completely unsupported assumptions, such as the fact that LLG's production of lyocell has, since 1997, completely replaced that of viscose and that it is intended exclusively for the European market. In addition, in that note, the applicant asserts that, because '[LLG's] supply is equivalent to 3.5% of the market', the applicant ceased, from 1997, to produce, and therefore to sell, certain quantities of viscose without substantiating its statement with any evidence and without even providing any explanation whatever on the method by which it calculated those quantities. Similarly, it must be observed that it adduces no evidence in support of its allegation that the 'supply led to a change of at least ...% in the market price'.

71. Secondly, the applicant invokes the existence of, besides 'pure lyocell' and proviscose, 'sub-standards of lyocell' which it also describes as lyocell of 'lower quality'. In the note in Annex 14 to its application, it states, in that regard, that LLG sells, through 'special outlets' and 'at extremely low prices', 1,000 tonnes of those 'by-products' per year, which has forced it to lower its prices by ESP ... per kg for 'products of the same quality'.

72. In that regard, it must be stated that the evidence in the file does not establish the existence of different qualities of lyocell. It must be pointed out, more particularly, that, in its pleadings, the applicant gives no detail as to what the expression 'sub-standards of lyocell' covers. It did not, moreover, seriously challenge the statement made on several occasions by LLG and the province of Burgenland at the hearing that inferior quality lyocell does not exist. As regards the evidence of an 'independent trader' annexed to the applicant's observations on the statements in intervention, it sheds no light on that point, the trader confining itself to noting that 'sub-standards' are part of 'LLG's modified fibres', like lyocell and proviscose.

73. Even assuming that LLG produces inferior quality lyocell which it sells at extremely low prices, the applicant has not at all substantiated its argument that, as a result, it had to lower its prices for 'products of the same quality'. Nor, moreover, does it substantiate in any way the quantities and price reduction upon which it relies.

74. Thirdly, in its reply and in its observations on the statements in intervention, the applicant places greater reliance on the competition which, it submits, exists between proviscose and viscose. It claims that its situation on the market is affected by the fact that LLG markets proviscose at prices



a competitive to those of viscose and that, having regard to the higher quality of the former, customers prefer it to the latter.

75. In that regard, it must be stated that the applicant again merely makes allegations which are insufficiently substantiated.

b 76. First, the note which it attaches to its reply in support of those allegations is not at all convincing, being merely a document drawn up by its internal services limited to setting out very general information obtained from conversations with some of its customers.

c 77. Second, even assuming that proviscose and viscose are used in the same applications and sold at comparable prices, it must be observed that the applicant gives no indication, not even a brief one, of the losses or other negative consequences which it has suffered as a result of LLG's supply of proviscose. Details are even more necessary in that regard since it is common ground that proviscose is a new product, which was not manufactured and put on the market until the year following that of the contested decision's adoption.

d 78. It follows from the foregoing considerations that the applicant has not adduced pertinent reasons to show the contested decision may adversely affect its legitimate interests by seriously jeopardising its position on the market.

79. In the light of that fact and of the limited role played by the applicant in the course of the pre-litigation procedure (see para 59, above), it must be held that the applicant is not individually concerned by the contested decision.

e 80. It follows that the application must be declared inadmissible without the need to consider whether the applicant is directly concerned by the contested decision.

f 81. As regards the request for measures of organisation of procedure submitted by the applicant on 16 October 2001, to the extent that it covers documents and information not covered by the measure of organisation of procedure ordered on 14 November 2001, there is no need to act on it, since the documents contained in the case file and the explanations given at the hearing are sufficient to enable the court to give judgment in these proceedings.

#### COSTS

g 82. Under art 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, and the Commission has applied for costs, the applicant must pay the costs incurred by the Commission in addition to its own costs.

h 83. The Republic of Austria must bear its own costs in accordance with the first subparagraph of art 87(4) of the Rules of Procedure. Under the third subparagraph of art 87(4) of the Rules of Procedure, LLG and the province of Burgenland must bear their own costs.

On those grounds, the Court of First Instance (Fifth Chamber, Extended Composition) hereby:

- i (1) Dismisses the action as inadmissible.  
(2) Orders the applicant to bear its own costs and to pay those incurred by the Commission.  
(3) Orders the interveners to bear their own costs.

# Gillette Company and another v LA-Laboratories Ltd Oy

(Case C-228/03)

COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES (THIRD CHAMBER)

JUDGES ROSAS (PRESIDENT OF THE CHAMBER), BORG BARTHET, VON BAHR, LÖHMUS AND Ó CAOIMH (RAPPORTEUR)

ADVOCATE GENERAL TIZZANO

21 OCTOBER, 9 DECEMBER 2004, 17 MARCH 2005

*European Community – Trade marks – Infringement – Spare parts and accessories – Application of mark on labelling or packaging – Sticker affixed to packaging stating replaceable razor blades compatible with claimant companies' handle – Limitation of the effects of trade mark – Scope of limitation – Honest practices in industrial or commercial matters – Criteria for determining whether use of trade mark necessary to indicate intended purpose of product – Council Directive (EEC) 89/104, art 6(1)(c).*

The claimant companies were the registered proprietors of the trade marks 'Gillette' and 'Sensor' which related to razors composed of a handle and a replaceable blade. The defendant company sold, inter alia, replaceable blades under the mark 'Parason Flexor'. The packaging of that product had a sticker affixed to it with the words: 'All Parason Flexor and Gillette Sensor handles are compatible with this blade.' Article 4 of the Finnish trade mark law provided, inter alia, that it was an unauthorised use, when putting on the market spare parts which were suited to a third party's product, to refer to that party's sign in a manner that was liable to create the impression that the product originated from the proprietor of the sign or that the proprietor had agreed to the use of the sign. The claimants' action in respect of infringement of their marks was successful at first instance. On appeal the Court of Appeal of Helsinki held that: (i) the new blades could be regarded as a spare part within art 4 of the Finnish trade mark law; (ii) the indication on the sticker could be useful to the consumer; and (iii) the packaging of the blades unequivocally indicated the origin of the product and could not have given the impression that there was a commercial connection between the claimants and the defendant. It therefore dismissed the claimants' action. On appeal, the Finnish Supreme Court, took the view that the case raised questions as to the interpretation of art 6(1)(c)<sup>a</sup> of First Council Directive (EEC) 89/104 (to approximate the laws of the member states relating to trade marks) in relation to: (i) the criteria for determining whether a product was comparable to a spare part or an accessory, (ii) the requirement that use of a mark belonging to another person had to be necessary in order to indicate the intended purpose of a product, and (iii) the concept of honest practices in industrial or commercial matters. Consequently, it referred a number of questions to the Court of Justice of the European Communities for a preliminary ruling.

**Held** – (1) The lawfulness or otherwise of the use of the trade mark under art 6(1)(c) depended on whether that use was necessary to indicate the

<sup>a</sup> Article 6(1)(c) is set out at judgment para 7, below

a intended purpose of a product. Use of the trade mark by a third party who was not its owner was necessary in order to indicate the intended purpose of a product marketed by that third party where such use in practice constituted the only means of providing the public with comprehensible and complete information on that intended purpose in order to preserve the undistorted system of competition in the market for that product. It was for the national court to determine whether, in the case in the main proceedings, such use was necessary, taking account of the nature of the public for which the product marketed by the third party in question was intended. Since art 6(1)(c) made no distinction between the possible intended purposes of products when assessing the lawfulness of the use of the trade mark, the criteria for assessing the lawfulness of the use of the trade mark with accessories or spare parts in particular were thus no different from those applicable to other categories of possible intended purposes for the products (see judgment paras 29, 30, 33, 35, 37–39, below).

(2) The condition of ‘honest use’ within the meaning of art 6(1)(c) constituted in substance the expression of a duty to act fairly in relation to the legitimate interests of the trade mark owner. The use of the trade mark would not be in accordance with honest practices in industrial and commercial matters if, for example: (i) it was done in such a manner as to give the impression that there was a commercial connection between the third party and the trade mark owner; (ii) it affected the value of the trade mark by taking unfair advantage of its distinctive character or repute; (iii) it entailed the discrediting or denigration of that mark; or (iv) where the third party presented its product as an imitation or replica of the product bearing the trade mark of which it was not the owner. The fact that a third party used a trade mark of which it was not the owner, in order to indicate the intended purpose of the product which it marketed, did not necessarily mean that it was presenting it as being of the same quality as, or having equivalent properties to, those of the product bearing the trade mark. Whether there had been such presentation depended on the facts of the case, and it was for the referring court to determine whether it had taken place by reference to the circumstances. Whether the product marketed by the third party had been presented as being of the same quality as, or having equivalent properties to, the product whose trade mark was being used was a factor which the referring court had to take into consideration when it verified that that use was made in accordance with honest practices in industrial or commercial matters (see judgment paras 42–49, below).

(3) Where a third party that used a trade mark of which it was not the owner marketed not only a spare part or an accessory but also the product itself with which the spare part or accessory was intended to be used, such use fell within the scope of art 6(1)(c) in so far as it was necessary to indicate the intended purpose of the product marketed by the latter and was made in accordance with honest practices in industrial and commercial matters (see judgment para 53, below).

## Notes

For the exemption from infringement where use of a trade mark is necessary to indicate the intended purpose of a product, see 48 *Halsbury's Laws* (4th edn) (2000 reissue) para 91.



## Cases cited

*Anheuser-Busch Inc v Budjovicky Budvar, narodn i podnik* Case C-245/02 (2004) Transcript (opinion), 29 June, (2004) Transcript (judgment), 16 November, ECJ.

*Ansul BV v Ajax Brandbeveiliging BV* Case C-40/01 [2003] ECR I-2439, ECJ.

*Arsenal Football Club plc v Reed* Case C-206/01 [2003] All ER (EC) 1, [2003] Ch 454, [2003] 3 WLR 450, [2002] ECR I-10273, ECJ.

*Bayerische Motorenwerke AG (BMW) v Deenik* Case C-63/97 [1999] All ER (EC) 235, [1999] ECR I-905, ECJ.

*Gerolsteiner Brunnen GmbH & Co v Putsch GmbH* Case C-100/02 [2004] ECR I-691, ECJ.

*Hoffman-La Roche & Co AG v Centrafarm Vertriebsgesellschaft Pharmazeutischer Erzeugnisse mbH* Case 102/77 [1978] ECR 1139, ECJ.

*Marca Mode CV v Adidas AG* Case C-425/98 [2000] All ER (EC) 694, [2000] ECR I-4861, ECJ.

*Merz & Krell GmbH & Co v Deutsches Patent- und Markenamt* Case C-517/99 [2002] All ER (EC) 441, [2001] ECR I-6959, ECJ.

*Parfums Christian Dior SA v Evora BV* Case C-337/95 [1997] ECR I-6013, ECJ.

*Philips Electronics NV v Remington Consumer Products Ltd* Case C-299/99 [2002] All ER (EC) 634, [2003] Ch 159, [2003] 2 WLR 294, [2002] ECR I-5475, ECJ.

*SA CNL-SUCAL NV v HAG GF AG* Case C-10/89 [1990] ECR I-3711, ECJ.

*Toshiba Europe GmbH v Katun Germany GmbH* Case C-112/99 [2002] All ER (EC) 325, [2001] ECR I-7945, ECJ.

## Reference

By decision of 23 May 2003, the Korkein Oikeus, Finland, referred to the Court of Justice of the European Communities five questions (set out at judgment para 23, below) for a preliminary ruling under art 234 EC (formerly art 177 of the EC Treaty) concerning the interpretation of art 6(1)(c) of First Council Directive (EEC) 89/104 (to approximate the laws of the member states relating to trade marks). The reference was made in a dispute between, on the one hand, The Gillette Company and Gillette Group Finland Oy (Gillette Co, Gillette Group Finland and, collectively, the Gillette companies) and, on the other, LA-Laboratories Ltd Oy (LA-Laboratories), concerning the latter's use of the Gillette and Sensor marks on the packaging of its products. Observations were submitted on behalf of: Gillette Co and Gillette Group Finland Oy, by R Hilli and T Groop, Asianajajat; LA-Laboratories Ltd Oy, by L Latikka, Hallituksen Puheenjohtaja; the Finnish government by T Pynnä, acting as agent; the United Kingdom government, by C Jackson, acting as agent, assisted by M Tappin, Barrister; the Commission of the European Communities by M Huttunen and N B Rasmussen, acting as agents. The language of the case was Finnish. The facts are set out in the opinion of the Advocate General.

9 December 2004. **The Advocate General (A Tizzano)** delivered the following opinion<sup>1</sup>.

## I—INTRODUCTION

1. This case concerns a reference for a preliminary ruling by the Suomen Korkein Oikeus (Finnish Supreme Court) on the interpretation of art 6(1)(c) of

<sup>1</sup> Original language: Italian.

a First Council Directive (EEC) 89/104 (to approximate the laws of the member states relating to trade marks) (hereinafter Directive 89/104, or simply the directive)<sup>2</sup>. In summary, the national court is asking the court to determine in what circumstances the use of a third party's trade mark is to be considered lawful in terms of the directive.

b II—LEGISLATIVE BACKGROUND

*The relevant Community law*

2. The Community has intervened in the area of trade mark law, so far as concerns us here, by the adoption of Directive 89/104, which approximates the laws of the member states in various respects but stops short of full harmonisation.

c 3. The tenth recital of that directive states, *inter alia*, that the function of the protection afforded by the registered trade mark 'is in particular to guarantee the trade mark as an indication of origin'.

4. Next of relevance for the purposes of this case is art 5(1), which provides as follows:

d 'The registered trade mark shall confer on the proprietor exclusive rights therein. The proprietor shall be entitled to prevent all third parties not having his consent from using in the course of trade:

(a) any sign which is identical with the trade mark in relation to goods or services which are identical with those for which the trade mark is registered;

e (b) any sign where, because of its identity with, or similarity to, the trade mark and the identity or similarity of the goods or services covered by the trade mark and the sign, there exists a likelihood of confusion on the part of the public, which includes the likelihood of association between the sign and the trade mark.'

f 5. Also fundamental for present purposes is art 6(1), which reads as follows:

'The trade mark shall not entitle the proprietor to prohibit a third party from using, in the course of trade ...

(c) the trade mark where it is necessary to indicate the intended purpose of a product or service, in particular as accessories or spare parts;

g provided he uses them in accordance with honest practices in industrial or commercial matters.'

6. Finally, mention must be made of Council Directive (EEC) 84/450 (relating to the approximation of the laws, regulations and administrative provisions of the member states concerning misleading advertising)<sup>3</sup>, as amended by European Parliament and Council Directive (EC) 97/55 (so as to include comparative advertising)<sup>4</sup> (hereinafter Directive 84/450 as amended and Directive 97/55, respectively), the purpose of which, according to art 1—

i 'is to protect consumers, persons carrying on a trade or business or practising a craft or profession and the interests of the public in general against misleading advertising and the unfair consequences thereof and to lay down the conditions under which comparative advertising is permitted.'

2 OJ 1989 L40 p 1.

3 OJ 1984 L250 p 17.

4 OJ 1997 L290 p 18.

7. Article 3a(1) of Directive 84/450 as amended is in the following terms:

'Comparative advertising shall, as far as the comparison is concerned, be permitted when the following conditions are met ...

(d) it does not create confusion in the market place between the advertiser and a competitor or between the advertiser's trade marks, trade names, other distinguishing marks, goods or services and those of a competitor;

(e) it does not discredit or denigrate the trade marks, trade names, other distinguishing marks, goods, services, activities, or circumstances of a competitor ...

(g) it does not take unfair advantage of the reputation of a trade mark, trade name or other distinguishing marks of a competitor or of the designation of origin of competing products;

(h) it does not present goods or services as imitations or replicas of goods or services bearing a protected trade mark or trade name.'

#### National law

8. In Finland, trade marks are regulated by the Tavaramerkkilaki (Finnish Law on Trade Marks, hereinafter the Tavaramerkkilaki)<sup>5</sup>.

9. Article 4(1) of the Tavaramerkkilaki sets out the exclusive right of the proprietor of a sign in the following terms:

'The right to a sign for a product under §§1 to 3 of this law means that no one other than its proprietor may use in the course of trade as a sign for his products a sign liable to be confused therewith, on the product or its packaging, in advertising or business documents or otherwise, including also use by word of mouth.'

10. Article 4(2) then specifies:

'It is regarded as unauthorised use for the purposes of the first subparagraph *inter alia* if a person, when putting on the market spare parts, accessories or the like which are suited to a third party's product, refers to that party's sign in a manner that is liable to create the impression that the product put on the market originates from the proprietor of the sign or that the proprietor has agreed to the use of the sign.'

11. According to the order for reference, that provision is to be understood as a qualification of the trade mark owner's exclusive right in that it is not an infringement for a party when marketing its own products to mention the trade mark of a third party in such a way as not to create the impression that the product put on the market originates from the proprietor of the sign or that the latter has consented to its use.

#### III—FACTS AND PROCEDURE

12. The Gillette Company of the United States is owner of the GILLETTE and SENSOR trade marks, both registered in Finland for various products including razors. Its Finnish subsidiary Gillette Group Finland Oy (the two companies will together be referred to as Gillette) holds the exclusive right to use those marks in Finland, where it markets various shaving products, including a razor, consisting of a handle and a replaceable blade, and blades sold separately.

<sup>5</sup> Law on Trade Marks No 1964/7 of 10 January 1964.



a 13. Products of the same kind—a razor consisting of a handle and a replaceable blade as well as blades sold separately—are also sold in Finland by the Finnish company LA-Laboratories Ltd Oy (hereinafter LA). LA has been marketing blades under the PARASON FLEXOR trade mark, on the packaging of which was placed a red sticker bearing the words ‘These blades fit all PARASON FLEXOR HANDLES and all GILLETTE SENSOR HANDLES’.

b 14. According to the order for reference, LA was not authorised by licence or other agreement to use Gillette’s trade marks.

c 15. Gillette thereupon brought proceedings against LA in the Helsingin Käräjäoikeus (Helsinki District Court), claiming that the defendant’s conduct infringed its registered trade marks GILLETTE and SENSOR. According to the plaintiff, LA’s conduct created the false impression that LA’s products were identical or similar to its own products or that LA was licensed or otherwise lawfully entitled to use the said trade marks.

d 16. That argument was accepted by the Helsingin Käräjäoikeus, which, by decision of 30 March 2000, held that by using the trade marks in question on its Parason Flexor razor blade packages, LA had infringed Gillette’s exclusive right under art 4(1) of the Tavaramerkkilaki.

e 17. The Helsingin Käräjäoikeus took the view that the case did not come within the exception provided for by art 4(2) of the Tavaramerkkilaki. That exception, which was subject to strict interpretation in the light of Directive 89/104, in particular art 6(1)(c), did not apply to the main product but only to spare parts, accessories and the like. In the view of the Käräjäoikeus, both the handle and the blade were main components of the razor and hence did not fall within the ambit of the exception.

f 18. The Finnish court therefore ordered LA not to continue or repeat the conduct in question, to remove from the packages the references to GILLETTE and SENSOR, to destroy the relevant stickers used in Finland, and to pay damages to Gillette.

g 19. LA appealed to the Helsingin Hovioikeus (Helsinki Court of Appeal) which by judgment of 17 May 2001 reversed the decision of the lower court in toto.

h 20. The appellate court first held that the blades constituted spare parts within the meaning of art 4(2) of the Tavaramerkkilaki. In any event, a consumer already in possession of a Gillette Sensor handle was informed by the sticker that this handle can be used not only with Gillette’s blades but with Parason Flexor blades too. The court also found that the packages of Parason razor blades were marked prominently with the PARASON and FLEXOR trade marks, showing clearly the origin of the products, whereas the GILLETTE and SENSOR marks appeared in small letters on relatively small stickers placed on the razor blade packages. That practice could not be regarded as exploiting the trade reputation of a third party’s trade mark or as creating the impression of a business connection between the owners of the different marks concerned. The appellate court therefore concluded that LA had used Gillette’s trade marks in a manner permitted by art 4(2) of the Tavaramerkkilaki.

i 21. Gillette appealed to the Korkein Oikeus, which then raised doubts as to the interpretation of art 6(1)(c) of Directive 89/104.

22. Accordingly, by order of 23 May 2003, it decided to stay the proceedings and to refer the following questions to the Court of Justice:

'When applying Article 6(1)(c) of the First Council Directive 89/104/EEC to approximate the laws of the Member States relating to trade marks;

(1) What are the criteria

(a) on the basis of which the question of regarding a product as a spare part or accessory is to be decided, and

(b) on the basis of which those products to be regarded as other than spare parts and accessories which can also fall within the scope of the said subparagraph are to be determined?

(2) Is the permissibility of the use of a third party's trade mark to be assessed differently, depending on whether the product is like a spare part or accessory or whether it is a product which can fall within the scope of the said subparagraph on another basis?

(3) How should the requirement that the use must be "necessary" to indicate the intended purpose of a product be interpreted? Can the criterion of necessity be satisfied even though it would in itself be possible to state the intended purpose without an express reference to the third party's trade mark, by merely mentioning only for instance the technical principle of functioning of the product? What significance does it have in that case that the statement may be more difficult for consumers to understand if there is no express reference to the third party's trade mark?

(4) What factors should be taken into account when assessing accordance with honest commercial practice? Does mentioning a third party's trade mark in connection with the marketing of one's own product constitute a reference to the fact that the marketer's own product corresponds, in quality and technically or as regards its other properties, to the product designated by the third party's trade mark?

(5) Does it affect the permissibility of the use of a third party's trade mark that the economic operator who refers to the third party's trade mark also markets, in addition to a spare part or accessory, a product of his own which that spare part or accessory is intended to be used with?

23. In the ensuing proceedings, written observations were submitted by the appellant in the main proceedings, the United Kingdom government, the Finnish government and the Commission of the European Communities.

24. At the hearing on 21 October 2004, representations were made on behalf of the parties in the main proceedings, the Finnish government and the Commission.

#### IV—LEGAL ANALYSIS

##### *Introduction*

25. The essential function of a trade mark, according to the tenth recital to Directive 89/104 and settled case law, is that of guaranteeing the origin of goods<sup>6</sup>.

26. If that function is to be properly protected, a trade mark owner must be able to prevent unauthorised use by third parties liable to engender confusion among consumers and resulting in their mistakenly attributing a particular

<sup>6</sup> See, ex multis, *Hoffman-La Roche & Co AG v Centrafarm Vertriebsgesellschaft Pharmazeutischer Erzeugnisse mbH* Case 102/77 [1978] ECR 1139 (para 7), *Arsenal Football Club plc v Reed* Case C-206/01 [2003] All ER (EC) 1, [2002] ECR I-10273 (para 51), *Ansul BV v Ajax Brandbeveiliging BV* Case C-40/01 [2003] ECR I-2439 (para 36) and *Anheuser-Busch Inc v Budjovický Budvar, národný podnik* Case C-245/02 (2004) Transcript (opinion), 29 June, (2004) Transcript (judgment), 16 November (para 59).

a product to the trade mark owner. Article 5(1) of the directive therefore gives the owner an exclusive right to the use of the mark.

27. That right is not absolute, however. Article 6 of the directive provides that in certain circumstances a trade mark may be lawfully affixed to products other than those of the trade mark owner.

b 28. In particular, according to that article, the use of a third party's trade mark is lawful where it: indicates the intended purpose of a product, is necessary to that end and is in accordance with honest practices in industrial or commercial matters (hereinafter also honest practices).

29. The reasons justifying that restriction on the exclusive use of the trade mark have been elucidated by the court. According to settled case law—

c 'by a limitation of the effects of the rights derived from Article 5 of Directive 89/104 by the proprietor of a trade mark, Article 6 of that directive seeks to reconcile the fundamental interests of trade-mark protection with those of free movement of goods and freedom to provide services in the common market in such a way that trade mark rights are able to fulfil their essential role in the system of undistorted competition  
d which the Treaty seeks to establish and maintain ...'<sup>7</sup>

30. It can therefore be said that, in limiting the exclusive right provided for under art 5, art 6(1)(c) of Directive 89/104 seeks to balance the owner's interest in the trade mark being able to perform to the full its function of guaranteeing the product's origin against the interest of other traders in having full access  
e to the market, but leaving the door open—as would appear borne out by the broad reference to free movement in the court's statement quoted above and as we will see below—for other interests too to come into play.

#### *The first and second questions*

f 31. Following those preliminary observations, I now come to the questions referred by the national court.

32. By its first two questions, which I will consider together, the national court asks, in substance, what criteria are to be used, when applying art 6(1)(c) of Directive 89/104, to distinguish main products from accessories and spare parts, and to determine which other products, apart from spare parts and accessories, are capable of falling within the scope of that provision. This with  
g a view to ascertaining whether in the case of such other products the lawfulness or otherwise of affixing a third party's trade mark must be assessed differently than in the case of spare parts and accessories.

33. As we have seen, one of the conditions to be satisfied in order for a third party's trade mark to be lawfully placed on a product is that it must perform  
h the function of indicating the intended purpose of the product, not its origin.

34. It seems to me that from that perspective the question of using a third party's trade mark to indicate intended purpose, without adding anything concerning origin, arises in substantially the same terms for every product or service.

i 35. Of course, the issue will arise more often for accessories and spare parts, which have to be used in conjunction with a main product that in most cases cannot be identified otherwise than by its trade mark. One need think only of an exhaust pipe or a bicycle rack specially designed for the Volkswagen Polo, to

<sup>7</sup> See *Gerolsteiner Brunnen GmbH & Co v Putsch GmbH* Case C-100/02 [2004] ECR I-691 (para 16) and cases cited there.



take the examples adduced by the United Kingdom government. But the same situation can also arise with two products that are capable of being used together but of which neither is the accessory or spare part of the other. Taking our cue again from the United Kingdom government, we may consider the example of a computer produced by company A and an operating system produced by company B which are mutually compatible. These are neither accessories nor spare parts because each product exists in its own right. And yet the producer in each case has a legitimate interest in informing the public that its product can have the other's product as its intended purpose.

36. I therefore take the view that there are no goods or services excluded *ex ante* from the scope of art 6(1)(c) of the directive by virtue of the condition now under consideration. Thus, regardless of whether the item in question is a main product, an accessory, or a spare part, if using a third party's trade mark is necessary in order to indicate its intended purpose, this condition must be regarded as satisfied.

37. This interpretation appears to me to be borne out by other considerations. To begin with the letter of the provision in question, I note that the reference to accessories and spare parts is preceded by the expression 'in particular'. That suggests that the limitation of the exclusive right can also apply to products which are not accessories or spare parts, all the more so since, as the Commission points out, its original proposal for a directive specifically excluded that possibility but was subsequently amended in precisely that respect<sup>8</sup>.

38. In addition, as the United Kingdom government pointed out, the provision in question refers to the intended purpose not only of goods but also of services, for which it would be difficult to conceive of spare parts or accessories.

39. All this confirms, in my opinion, that for the purposes of the application of art 6(1)(c) of the directive, it is not necessary first to categorise an item as main product or accessory or spare part, because the fundamental factor in all cases is whether the use of the third party's trade mark is necessary in order to indicate the intended purpose of the product (or service) and does not give rise to confusion as to its origin.

40. But if that is so, it does not then appear to me necessary, for present purposes, for the court to decide the criteria to be used to identify main products and to distinguish them from accessories and spare parts, as the first question asks.

41. I therefore propose that the first and second questions should be answered to the effect that since all that needs to be established, for the purposes of the application of art 6(1)(c) of the directive, is whether the use of the third party's trade mark is necessary in order to indicate the intended purpose of the product (or service) and does not give rise to confusion as to its origin, the assessment of the lawfulness of the use of a third party's trade mark does not vary according to whether it is a main product or an accessory or spare part.

<sup>8</sup> Article 5 of the Proposal for a First Council Directive to approximate the laws of the member states relating to trade marks, presented by the Commission on 25 November 1980, provided that '[t]he trade mark shall not entitle the proprietor thereof to prohibit a third party from using, in the course of trade ... (c) the trade mark for the purpose of indicating the intended purpose of accessories or spares parts ...' (OJ 1980 C351 p 1).

*a The third question*

42. By its third question, the national court asks in substance what factors should be taken into account in determining whether the use of a third party's trade mark is 'necessary', within the meaning of art 6(1)(c) of the directive, to indicate the intended purpose of a product.

*b* 43. In their observations to the court, the intervening parties support two very different interpretations of this condition that the use of a third party's trade mark must be necessary.

44. The United Kingdom government suggests that the condition should be considered satisfied if the use of the trade mark is an 'efficient and accurate means'<sup>9</sup> of informing potential purchasers as to the intended purpose of the product.

*c* 45. It argues that the purpose of the provision in question is to assist in promoting undistorted competition and that too strict an interpretation of the condition would have the effect of neutering the provision.

46. In the United Kingdom's view, if the condition that the use of a third party's trade mark must be necessary were interpreted as being satisfied only if no other way can be found of conveying the information needed by the potential purchaser to understand the intended purpose of the product, then in practice the provision might never apply. In virtually every case it would be possible to conceive of some way of indicating the intended purpose of the product other than by using the third party's trade mark, for example by using a picture or a technical description of the type of product it will fit.

*e* 47. This view is shared by the Finnish government and the Commission, who believe it is important also to take into account the characteristics of potential purchasers of the product carrying the third party's trade mark. What is 'necessary' to communicate varies according to whether the product is one aimed at final consumers or at other businesses. Only in the latter case could technical details adequately convey the information as to the intended purpose of the product, without it being 'necessary' therefore to use the third party's trade mark. For average consumers, however, the absence of the trade mark would make it more difficult to understand a product's intended purpose, unless there are technical standards which are universally known and which allow even the average consumer to understand easily the intended purpose of the product in question. A case in point, as was observed at the hearing, is that of tyres, where a system of easy-to-understand codes is used to let potential buyers know which models are right for their cars.

*f* 48. Quite the opposite view is taken by Gillette, which contends for a rigidly and exclusively economic interpretation of the condition in question. According to Gillette, the use of a third party's trade mark can be considered 'necessary' only if it is the sole means by which the user can market its own product on a sustainable economic basis.

*h* 49. Applying that interpretation to the case in hand, Gillette observes that LA's blades have as their intended purpose not only Gillette's handles but also LA's own handles and indeed, as emerged during the hearing, other makes of handle as well. It follows, in Gillette's view, that LA's blades would have access to the market and could be marketed on an economically viable basis even without it being stated on the packaging that they also fit the handles produced by Gillette.

*i*

<sup>9</sup> Footnote not relevant to the English version.

50. It would be different if it were not possible to indicate any intended purpose for LA's blades without mentioning the trade marks in question, because in that case there would be no demand for the blades and therefore no possibility whatsoever of trading viably. But such is not the case here, Gillette maintains, given that LA itself also produces handles, so that its blades would not be completely denied access to the market if the Gillette trade marks were not allowed to appear on their packaging. a

51. For my part, I have no difficulty accepting that the approach proposed by Gillette appears more in keeping with the letter of art 6(1)(c) of the directive, which refers to the use of the third party's trade mark not as 'efficient' but as 'necessary', and needless to say the two are not synonymous. b

52. Moreover, this seems to be borne out by a comparison of the final text of the provision and the Commission's original proposal<sup>10</sup>. The latter provided that third parties could use a third party's trade mark '*for the purpose of indicating the intended purpose of accessories or spare parts*'<sup>11</sup>; the final version, as we have seen, is couched in more restrictive terms, providing that such use is permitted 'where it is necessary to indicate the intended purpose ...' c

53. That said, however, it has to be asked whether the matter can be disposed of by a semantic analysis of an isolated phrase of the provision in question or whether a more comprehensive approach is called for that takes fuller account of the meaning and scope of that provision and the purposes it seeks to achieve. d

54. More specifically, it has to be asked whether trade mark protection, which is inarguably the fundamental aim of the directive, is to be seen purely in terms of the trade mark proprietor's needs, and is therefore, as Gillette argues, subject only to such limits as are strictly economically necessary to permit other suppliers to have a viable presence in the market, or whether the exception introduced by art 6(1) is also premised on the importance of other needs. e

55. It seems to me in fact that that provision opens the door also to other values and interests which it does not expressly mention but which in the broader perspective it would be difficult to ignore. All the more so as they are referred to in the judgment quoted at para 29, above, where the court stated that art 6(1)— f

'seeks to reconcile the fundamental interests of trade-mark protection with those of free movement of goods and freedom to provide services in the common market in such a way that trade mark rights are able to fulfil their essential role in the system of undistorted competition which the Treaty seeks to establish and maintain ...' g

56. It is therefore, as the court points out, a matter of reconciling two different interests, both of which however are directed at ensuring a system of undistorted competition and thus, ultimately, the right of consumers to choose from a variety of interchangeable products. What this means, in other words, is that, as well as protecting the economic interests of the trade mark owner, the directive also seeks to ensure choice for consumers by allowing them not only to be sure about the origin of products but also to enjoy to the full the benefits resulting from competition between different products capable of satisfying the same need. h

<sup>10</sup> See art 5(c), quoted in footnote 8, above.

<sup>11</sup> My emphasis. i



a 57. However, since the exception provided for by art 6(1) is meant to balance these different interests, it follows that, in the context of the more comprehensive analysis of the provision I mentioned above, one cannot simply rely on textual arguments derived from one phrase in that provision to give primacy to one of those interests and to discount the others, because the purpose of the provision, according to the court, is to reconcile all of them.

b 58. Moreover, an important testimony to the need to take into account, and as far as possible conciliate, the different requirements in play seems to me to be found, once more, in the case law of the court, in this instance in *Bayerische Motorenwerke AG (BMW) v Deenik*<sup>12</sup>, in which the court did indeed reconcile the requirement of protecting the trade mark owner with that of protecting the consumer even in terms of maximising competition and providing complete information.

c 59. I would recall, so far as concerns us here, that in that case the owner of a garage not part of the BMW network carried on business repairing BMW cars and described himself in advertisements as 'specialised in BMWs'. BMW claimed that such conduct was not within the exception in art 6(1)(c) of the directive and should therefore be held to be an infringement of BMW's exclusive right. In its view, since the trader could also carry on an economically viable business offering repair services without naming any specific make of car (and hence any trade mark), the use of the BMW trade mark did not satisfy the condition of necessity laid down by that provision.

d 60. But that interpretation of the condition in question, which is not in my view dissimilar to that contended for by Gillette in this case, does not seem to me to have met the court's favour. For instead of considering whether the garage owner's business would be commercially viable were he to drop the references to the BMW trade mark, the court focused solely on the need to provide his prospective customers with the fullest possible information.

e 61. Having first noted that 'the use [of the BMW mark] [was] intended to identify the goods in respect of which the service [was] provided [and was] necessary to indicate the intended purpose of the service', it went on to find that 'if an independent trader carries out the maintenance and repair of BMW cars or is in fact a specialist in that field, that fact cannot in practice be communicated to his customers without using the BMW mark'<sup>13</sup>.

f 62. In so doing, the court espoused the approach followed by Advocate General Jacobs in his opinion in that case<sup>14</sup>, when he noted that the issue in such circumstances was in effect whether a trader in the position described above was 'free to describe the nature of the services he is offering'<sup>15</sup>. The Advocate General went so far as to assert that 'to prevent such use of the mark would be an undue restriction on the trader's freedom'<sup>16</sup>.

g 63. It seems to me that the interpretation of the condition in question emanating from that case is less rigid than what Gillette seeks. The condition appears to be satisfied simply by the fact that the use of a third party's trade

12 Case C-63/97 [1999] All ER (EC) 235, [1999] ECR I-905.

13 See the BMW case (paras 59, 60).

i 14 In his opinion delivered on 2 April 1998, Advocate General Jacobs (at para 54) dismissed as 'unrealistic' the proposition that the garage owner could have provided his services without needing to name any specific make of car, observing that 'if [he] does in fact specialise in maintaining and repairing BMW cars it is difficult to see how he could effectively communicate that fact to his customers without using the sign BMW'.

15 See para 54 of the opinion.

16 See para 55 of the opinion.

mark is the only effective means of extending the range of products from which the prospective purchaser can choose. a

64. If that interpretation is transposed to the present case, it follows that, were the Gillette trade marks not to appear on LA's blade packages, consumers might have no other means of apprehending the objective fact that those products fit Gillette handles, and might thereby be denied information material to their purchasing decisions. Accordingly, if it were the only means of providing that information, the use of the Gillette trade marks should be considered 'necessary' within the meaning of the directive. b

65. It would naturally be for the national court to decide the issue, that is, to ascertain whether without the references to the Gillette trade marks on LA's blade packages, potential purchasers could be effectively informed by other means that those blades can be used with Gillette handles. The use of Gillette's trade marks might not be necessary, for example, if there were technical standards known to consumers indicating which handles fit which blades (as in the aforementioned case of tyres). c

66. That being so, and while stating my preference for the above approach, I must acknowledge that, besides the fact that it does not fully meet the objections of a general nature raised by Gillette (undue reduction of the trade mark owner's protection), it also leaves a large grey area as to its application. But this consequence, in my opinion, is difficult to avoid if the discussion of the test of necessity continues to be conducted in isolation from the remaining conditions set out in art 6(1), reducing it in effect, as I have said, to a semantic dispute about the relevant phrase in that provision. d

67. It is a different matter, however, if account is taken of the fact that that test does not represent the entirety of the provision in question, but is in fact accompanied by, and strictly correlated with, a clear condition as to the manner of use of the trade mark claimed to be necessary (ie in accordance with honest practices). In other words, the fact that the interpretation of that condition is the subject of a separate question referred for a preliminary ruling should not have the effect of splitting the issue in such a way as to lose sight of the direct link which exists between the different parts of the provision and which is therefore going to affect the interpretation of each of them. e

68. It seems to me that the grey area which, as I have said, is an inevitable concomitant of the test of necessity, can be resolved at the stage of examining the circumstances and manner of use of the trade mark, in the terms indicated by art 6(1). In this way too it is possible to meet legitimate concerns as to the damage that might be done to trade mark protection as a result of a less rigorous interpretation of the condition of necessity. f

69. The less rigorous that interpretation may be, the more stringent will be the scrutiny of the manner of use. At the same time, it is precisely on the more solid ground of that scrutiny that the actual 'necessity' of the use of the mark can be better assessed and such doubts as may always arise in the abstract in that regard dispelled. g

70. Besides, the court did not deal with the issue under consideration by separate and sequential tests, first 'measuring' the degree to which the use of the third party's trade mark was 'necessary' and then determining whether that use was in accordance with 'honest practices'. Instead it adopted a unitary approach, in which I would say that the emphasis was placed less on the issue of 'necessity' than on compliance with honest practices, on the basis that they h

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a are decisive in avoiding any confusion as to the origin of the product and hence to the protection of the trade mark proprietor<sup>17</sup>.

71. It is therefore only with the above qualifications that I propose that the court should answer the third question to the effect that the use of a third party's trade mark is 'necessary' to indicate the intended purpose of a product if it constitutes the only means of providing consumers with complete  
b information as to the possible uses of the product in question.

#### *The fourth question*

72. We now come to the interpretation of the phrase 'honest practices in industrial or commercial matters', which by its fourth question the national  
c court asks the court to provide, in view of the fact that art 6(1) of Directive 89/104 makes the right of a third party to use a trade mark subject to compliance with those practices.

73. In this regard, I would note that, according to settled case law, '[t]he condition of "honest practice" constitutes ... the expression of a duty to act fairly in relation to the legitimate interests of the trade mark owner'<sup>18</sup>. That  
d being so, however, it still remains to ascertain the scope of that duty, given that it is not defined in Directive 89/104.

74. It seems to me that this can be done simply by consulting the relevant case law of the court, which provides the means by which to demarcate the scope of the duty in question. The court has explained that a third party cannot use a trade mark 'in a way that may create the impression that there is a  
e commercial connection between the other undertaking and the trade mark proprietor, and in particular that ... there is a special relationship between the two undertakings'<sup>19</sup>. It also noted that an undertaking using a third party's trade mark must not take 'unfair advantage of its distinctive character or  
f repute'. An advantage will be unfair, in particular, if it is the result of prospective buyers being led to believe that there is a connection between the trade mark proprietor and the undertaking that produced the product<sup>20</sup>.

75. But as the referring court itself, the United Kingdom government and the Commission suggest, useful guidance is provided not only by the case law but also by the Community provisions on misleading and comparative advertising, in particular Directive 84/450 as amended by Directive 97/55.

76. Recitals (13) to (15) of the latter directive indicate that the exclusive right  
g conferred on the proprietor of a trade mark by art 5 of Directive 89/104 is not infringed where a third party uses the trade mark in compliance with the conditions laid down by Directive 97/55.

77. It follows that, if the message conveyed through the use of the trade mark is lawful for the purposes of the provisions on misleading and  
h comparative advertising, the 'honest practices' referred to in art 6(1) of Directive 89/104 can be regarded as having been observed.

78. In fact the conditions that are laid down by art 3a of Directive 84/450 as amended (inserted by art 1(4) of Directive 97/55) for comparative advertising to be lawful (and which are most relevant to the present case) do not differ

i 17 See the *BMW* case (paras 61 et seq) and the opinion in that case (paras 55, 56).

18 See the *BMW* case (para 61) and the *Gerolsteiner Brunnen* case (para 24).

19 See the *BMW* case (para 64).

20 See the *BMW* case (paras 52, 53). I must point out that this reasoning concerned art 7(2) of Directive 89/104; however, in paras 62 and 63, the court stated that the same considerations 'apply mutatis mutandis' to art 6(1).



substantially from those that can be inferred from the court's case law quoted above. Those conditions are that such advertising does not create confusion in the market place between the advertiser and a competitor (see sub-para (d)) and does not seek to take unfair advantage of the reputation of a trade mark of a competitor (see sub-para (g)). a

79. It follows therefore from the case law quoted above and from the provisions of Directive 84/450 that it is clearly unlawful to use a third party's trade mark in such a way as to create confusion among prospective purchasers as to the origin of the product. In particular, prospective purchasers must not be led to believe that the product is referable to the trade mark owner and therefore possesses the same quality as its products. b

80. The Finnish and United Kingdom governments contend, however, that when an undertaking places a third party's trade mark on its own product, it does not necessarily intend to represent that its own products and those of the trade mark proprietor are of equal quality. In the *BMW* case, the court effectively acknowledged the lawfulness of the use of a third party's trade mark on the part of a trader wishing to 'lend an aura of quality to his own business'.<sup>21</sup> c

81. As described at para 59, above, however, that case, to the extent that it is relevant here, concerned the carrying out of repairs on BMW cars. The subject matter of the trader's business consisted of products lawfully bearing the BMW trade mark; the 'aura of quality' that the trader derived from the subject matter of his own business was not unlawful as it was a reflection of the fact that he had the ability to work on products whose quality was guaranteed by the presence of the BMW mark. d

82. In the present case, by contrast, LA's blade production is a process that is already complete at the point when the information is conveyed that the blades can be used with the Gillette razors. Therefore, the fact that the two products are compatible should not have any bearing on consumers' judgment of the quality of LA's blades. If however the use of the trade mark led consumers to believe that the quality of both types of blade was the same, then the conclusion would have to be that the condition of compliance with honest practices was not met. e

83. It is therefore for the national court to determine whether the use of the Gillette trade marks on LA's blade packages is aimed solely at informing prospective buyers of the fact that LA's blades can be attached to Gillette's razor handles because the fittings are compatible, or whether it also implies that LA's blades have the same cutting characteristics, and are hence of the same quality, as the Gillette blades. f

84. The examination to be conducted by the national court for this purpose must consist of a global assessment 'taking into account all factors relevant to the circumstances of the case'.<sup>22</sup> That is what the court has stipulated in relation to the manner of assessment of the likelihood of confusion in determining the scope of the exclusive right enjoyed by the trade mark proprietor under art 5(1)(b) of Directive 89/104. Since however the determination of the honest practices condition will inevitably affect the scope of that exclusive right, by making it more or less extensive, it seems to me that g

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21 See the *BMW* case (para 53).

22 See *Marca Mode CV v Adidas AG* Case C-425/98 [2000] All ER (EC) 694, [2000] ECR I-4861 (para 40).

a the assessment to be conducted by the national court as to whether that condition is satisfied must also obey the criterion stated above<sup>23</sup>.

85. On the basis of the foregoing, I therefore propose that the court answer the fourth question to the effect that a trader complies with 'honest practices in industrial or commercial matters' if by using a third party's trade mark it does not create the impression that there is a commercial connection between itself and the trade mark proprietor and does not take unfair advantage of the trade mark's distinctive character or repute. The fact that a trader also sells those products and places the third party's trade mark on them does not necessarily mean that it represents that its products are equal in quality to those of the trade mark proprietor. The trader's conduct must therefore be considered on the basis of a global assessment of all the relevant factors.

*The fifth question*

86. By its fifth question, the national court asks in substance whether the assessment of the lawfulness of the use of a third party's trade mark is affected by the fact that the trader who places a third party's trade mark on its own product also sells the type of product that the former is intended to be used with.

87. It seems to me that in order to answer that question there are two different aspects to consider separately, one concerning the requirement of necessity and the other concerning compliance with 'honest practices', which were considered in the analysis of the third and fourth questions respectively.

e 88. As regards the first aspect, I must say that if the economic approach to the condition of necessity advocated by Gillette had been accepted then the fact that, as well as the blades, LA also sells a razor handle that constitutes one of their possible intended purposes could have cast doubt on whether the condition was satisfied, since even without using the Gillette trade marks there would still be demand for LA's blades on the part of owners of LA's razor handle.

f 89. Since however, for the reasons given, I have come to the conclusion that the necessity condition is met if the use of a third party's trade mark on a product constitutes the only means of providing consumers with complete information as to the possible uses of the product in question, the assessment of the lawfulness of the use of the trade mark does not seem to me to be affected by the fact that the trader also sells a product which constitutes one of the possible intended purposes of the product on which it places the third party's trade mark.

g 90. As regards the aspect concerning 'honest practices', I will simply note, along with the United Kingdom, Finland and the Commission, that what is described in this question is just one of the factors, albeit an important one, that the national court has to take into account in assessing whether the use of the trade mark by the third party is in accordance with honest practices.

h 91. I therefore propose that the fifth question be answered to the effect that the fact that a trader who places a third party's trade mark on its own product also sells the type of product that the former is intended to be used with is an

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23 I would note as a preliminary point that the same approach was adopted by the court to determining whether the conditions set out by Directive 84/450, as amended, are met, when it stated that 'account should be taken of the overall presentation of the advertising at issue' (see *Toshiba Europe GmbH v Katun Germany GmbH* Case C-112/99 [2002] All ER (EC) 325, [2001] ECR I-7945 (para 60)).

important factor in assessing the lawfulness of the use of the trade mark but does not alter the criteria applicable to that assessment. a

#### V—CONCLUSION

92. In the light of the foregoing considerations I propose that the Court of Justice answer the questions of the Korkein Oikeus in the following terms: b

(1) since all that needs to be established, for the purposes of the application of art 6(1)(c) of Council Directive (EEC) 89/104 (to approximate the laws of the member states relating to trade marks), is whether the use of the third party's trade mark is necessary in order to indicate the intended purpose of the product (or service) and does not give rise to confusion as to its origin, the assessment of the lawfulness of the use of a third party's trade mark does not vary according to whether it is a main product or an accessory or spare part; c

(2) the use of a third party's trade mark is necessary to indicate the intended purpose of a product if it constitutes the only means of providing consumers with complete information as to the possible uses of the product in question; d

(3) a trader complies with 'honest practices in industrial or commercial matters' if by using a third party's trade mark it does not create the impression that there is a commercial connection between itself and the trade mark proprietor and does not take unfair advantage of the trade mark's distinctive character or repute. The fact that a trader also sells those products and places the third party's trade mark on them does not necessarily mean that it represents that its products are equal in quality to those of the trade mark proprietor. The trader's conduct must therefore be considered on the basis of a global assessment of all the relevant factors; e

(4) the fact that a trader who places a third party's trade mark on its own product also sells the type of product that the former is intended to be used with is an important factor in assessing the lawfulness of the use of the trade mark but does not alter the criteria applicable to that assessment. f

17 March 2005. **THE COURT OF JUSTICE (Third Chamber)** delivered the following judgment.

1. This reference for a preliminary ruling concerns the interpretation of art 6(1)(c) of First Council Directive (EEC) 89/104 (to approximate the laws of the member states relating to trade marks) (OJ 1989 L40 p 1). g

2. The reference was made in a dispute between, on the one hand, the Gillette Company and Gillette Group Finland Oy (Gillette Co, Gillette Group Finland and, collectively, the Gillette companies) and, on the other, LA-Laboratories Ltd Oy (LA-Laboratories), concerning the latter's use of the Gillette and Sensor marks on the packaging of its products. h

#### LEGAL BACKGROUND

##### *Community provisions*

3. According to the first recital in the preamble to Directive 89/104, the trade mark laws at present applicable in the member states contain disparities which may impede the free movement of goods and freedom to provide services and may distort competition within the common market. According to that recital, it is therefore necessary, in view of the establishment and functioning of the internal market, to approximate the laws of member states. The third i



- a recital states that it does not appear to be necessary at present to undertake full-scale approximation of the trade mark laws of the member states.
4. The tenth recital of the directive states, *inter alia*, that the aim of the protection conferred by the registered trade mark is in particular to guarantee the trade mark as an indication of origin.
- b 5. Article 5(1) of the directive provides:
- ‘The registered trade mark shall confer on the proprietor exclusive rights therein. The proprietor shall be entitled to prevent all third parties not having his consent from using in the course of trade:
- c (a) any sign which is identical with the trade mark in relation to goods or services which are identical with those for which the trade mark is registered;
- (b) any sign where, because of its identity with, or similarity to, the trade mark and the identity or similarity of the goods or services covered by the trade mark and the sign, there exists a likelihood of confusion on the part of the public, which includes the likelihood of association between the sign and the trade mark.’
- d 6. Article 5(3)(a) and (b) of Directive 89/104 provide:
- ‘The following, *inter alia*, may be prohibited under paragraphs 1 and 2:
- (a) affixing the sign to the goods or to the packaging thereof;
- (b) offering the goods, or putting them on the market or stocking them
- e for these purposes ...’
7. Article 6 of that directive, headed ‘Limitation of the effects of a trade mark’ provides:
- ‘1. The trade mark shall not entitle the proprietor to prohibit a third party from using, in the course of trade ...
- f (c) the trade mark where it is necessary to indicate the intended purpose of a product or service, in particular as accessories or spare parts; provided he uses them in accordance with honest practices in industrial or commercial matters ...’
- g 8. Council Directive (EEC) 84/450 (relating to the approximation of the laws, regulations and administrative provisions of the member states concerning misleading advertising) (OJ 1984 L250 p 17), as amended by European Parliament and Council Directive (EC) 97/55 (OJ 1997 L290 p 18) is designed, according to art 1 thereof, to protect consumers, persons carrying on a trade or business or practising a craft or profession and the interests of the public in
- h general against misleading advertising and the unfair consequences thereof and to lay down the conditions under which comparative advertising is permitted.
9. According to art 3a(1) of that directive:
- ‘Comparative advertising shall, as far as the comparison is concerned, be permitted when the following conditions are met ...
- i (d) it does not create confusion in the market place between the advertiser and a competitor or between the advertiser’s trade marks, trade names, other distinguishing marks, goods or services and those of a competitor;
- (e) it does not discredit or denigrate the trade marks, trade names, other distinguishing marks, goods, services, activities, or circumstances of a competitor ...

- (g) it does not take unfair advantage of the reputation of a trade mark, trade name or other distinguishing marks of a competitor or of the designation of origin of competing products; a
- (h) it does not present goods or services as imitations or replicas of goods or services bearing a protected trade mark or trade name.'

### *National provisions*

10. In Finland, trade mark law is governed by the Tavaramerkkilaki (Law on Trade Marks) (Law No 7/1964 of 10 January 1964), as amended by Law No 39/1993 of 25 January 1993 (the Tavaramerkkilaki).

11. Article 4(1) of the Tavaramerkkilaki, concerning the content of the exclusive rights of the trade mark owner, provides: b

'The right under Articles 1 to 3 of this law to affix a distinctive sign on one's goods means that no one other than the proprietor of the sign may, in the course of trade, use as a sign for his products references which could create confusion, whether on the goods or their packaging, in advertising or business documents or otherwise, including by word of mouth ...' c

12. According to art 4(2): d

'It is regarded as unauthorised use for the purposes of the first subparagraph *inter alia* if a person, when putting on the market spare parts, accessories or the like which are suited to a third party's product, refers to that party's sign in a manner that is liable to create the impression that the product put on the market originates from the proprietor of the sign or that the proprietor has agreed to the use of the sign.' e

### THE DISPUTE IN THE MAIN PROCEEDINGS AND THE QUESTIONS REFERRED

13. Gillette Co secured the registration in Finland of the trade marks Gillette and Sensor for products falling within Class 8 of the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks (Nice, 15 June 1957; UKTS 71 (1970); Cmnd 3466), as revised and amended, namely: hand tools and implements (hand-operated); cutlery; side arms; razors. Gillette Group Finland, which holds the exclusive right to use those marks in Finland, has been marketing razors in that member state, particularly razors composed of a handle and a replaceable blade and such blades on their own. f

14. LA-Laboratories also sells razors in Finland that are composed of a handle and a replaceable blade and blades on their own similar to those marketed by Gillette Group Finland. Those blades are sold under the mark Parason Flexor and their packaging has affixed to it a sticker with the words: 'All Parason Flexor and Gillette Sensor handles are compatible with this blade.' g

15. The order for reference shows that LA-Laboratories was not authorised by a trade mark licence or any other contract to use the marks of which Gillette Co is the proprietor. h

16. The Gillette companies brought an action before the Helsingin Käräjäoikeus, Finland (Court of First Instance of Helsinki) arguing that LA-Laboratories had infringed the registered marks Gillette and Sensor. According to them, the practices of LA-Laboratories created a link in the mind of consumers between the products marketed by the latter and those of the Gillette companies, or gave the impression that that company was authorised, by virtue of a licence or for another reason, to use the Gillette and Sensor marks, which was not the case. i

a 17. In its judgment of 30 March 2000, the Helsingin Käräjäoikeus held that, under art 4(1) of the Tavaramerkkilaki, the Gillette companies held the exclusive right to affix the Gillette and Sensor marks to their products and their packaging, and to use those marks in advertising. Therefore, by mentioning those marks in an eye-catching manner on the packaging of its products, LA-Laboratories had infringed that exclusive right. The Helsingin Käräjäoikeus b further held that art 4(2) of the Tavaramerkkilaki, which provides for an exception to that principle of exclusivity, must be interpreted narrowly in the light of art 6(1)(c) of Directive 89/104. In its view, that provision does not relate to the essential parts of a product but only to spare parts, accessories and other similar parts, which are compatible with the manufactured product or c marketed by another person.

18. That court held that both the handle and the blade were to be regarded as essential parts of the razor and not as spare parts or accessories. It therefore held that the exception under art 4(2) of the Tavaramerkkilaki did not apply. On those grounds, that court decided to prohibit LA-Laboratories from pursuing or renewing the infringement of the Gillette companies' rights over d the Gillette and Sensor marks, and ordered that company, first, to remove and destroy the stickers used in Finland referring to those trade marks, and, second, to pay the Gillette companies a total of FIM 30,000 in damages for the harm suffered by them.

19. On appeal, the Helsingin Hovioikeus (Court of Appeal of Helsinki), by a decision of 17 May 2001, held, first, that, where a razor of the type currently at e issue in the main proceedings was composed of a handle and a blade, the consumer could replace that latter part by a new blade, sold separately. The latter, being in substitution for a former part of the razor, could therefore be regarded as a spare part within the meaning of art 4(2) of the Tavaramerkkilaki.

f 20. Secondly, that court held that the indication on the sticker affixed to the packaging of the razor blades marketed by LA-Laboratories, to the effect that, besides being compatible with handles of the Parason Flexor type, those blades were also compatible with handles marketed by the Gillette companies, could be useful to the consumer and that LA-Laboratories might therefore be able to demonstrate the need to mention the Gillette and Sensor trade marks on that g sticker.

21. Thirdly, the Helsingin Hovioikeus held that the packaging of razor blades marketed by LA-Laboratories visibly bore the Parason and Flexor signs, unequivocally indicating the origin of the product. It further held that the reference to the Gillette and Sensor marks in small standard lettering on h stickers of a relatively modest size affixed to the exterior of that packaging could not in any way have given the impression that there was a commercial connection between the Gillette companies and LA-Laboratories, and that the latter had therefore referred to those marks in circumstances allowed by art 4(2) of the Tavaramerkkilaki. The Helsingin Hovioikeus therefore annulled the judgment of the Helsingin Käräjäoikeus and dismissed the action brought by the Gillette companies.

i 22. The Gillette companies appealed to the Korkein Oikeus, which took the view that the case raised questions as to the interpretation of art 6(1)(c) of Directive 89/104 in relation to the criteria for determining whether, by its nature, a product is or is not comparable to a spare part or an accessory, in relation to the requirement that use of a mark belonging to another person must be necessary in order to indicate the intended purpose of a product, and



in relation to the concept of honest practices in industrial or commercial matters, the interpretation of those provisions also having to take account of Directive 84/450. a

23. In those circumstances, the *Korkein Oikeus* decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'When applying Article 6(1)(c) of the First Council Directive 89/104/EEC to approximate the laws of the Member States relating to trade marks;

(1) What are the criteria b

(a) on the basis of which the question of regarding a product as a spare part or accessory is to be decided, and c

(b) on the basis of which those products to be regarded as other than spare parts and accessories which can also fall within the scope of the said subparagraph are to be determined?

(2) Is the permissibility of the use of a third party's trade mark to be assessed differently, depending on whether the product is like a spare part or accessory or whether it is a product which can fall within the scope of the said subparagraph on another basis? d

(3) How should the requirement that the use must be "necessary" to indicate the intended purpose of a product be interpreted? Can the criterion of necessity be satisfied even though it would in itself be possible to state the intended purpose without an express reference to the third party's trade mark, by merely mentioning only for instance the technical principle of functioning of the product? What significance does it have in that case that the statement may be more difficult for consumers to understand if there is no express reference to the third party's trade mark? e

(4) What factors should be taken into account when assessing use in accordance with honest commercial practice? Does mentioning a third party's trade mark in connection with the marketing of one's own product constitute a reference to the fact that the marketer's own product corresponds, in quality and technically or as regards its other properties, to the product designated by the third party's trade mark? f

(5) Does it affect the permissibility of the use of a third party's trade mark that the economic operator who refers to the third party's trade mark also markets, in addition to a spare part or accessory, a product of his own with which that spare part or accessory is intended to be used with? g

#### THE FIRST, SECOND AND THIRD QUESTIONS

24. In its first, second and third questions, which it will be convenient to examine together, the national court essentially asks what criteria must be used in interpreting the requirement that use by a third party of a trade mark of which he is not the owner must be necessary in order to indicate the intended purpose of a product, within the meaning of art 6(1)(c) of Directive 89/104. The court also asks, first, according to what criteria products must be regarded as accessories or spare parts within the meaning of that provision and, second, whether the criteria for assessing the lawfulness of the use of the trade mark in relation to those latter products are different from those applicable to other products. h

25. It should be noted as a preliminary point that trade mark rights are an essential element in the system of undistorted competition which the i

- a EC Treaty seeks to establish and maintain. Under such a system, an undertaking must be in a position to keep its customers by virtue of the quality of its products and services, something which is possible only if there are distinctive marks which enable customers to identify them (see, in particular, *SA CNL-SUCAL NV v HAG GF AG* Case C-10/89 [1990] ECR I-3711 (para 13), *Merz & Krell GmbH & Co v Deutsches Patent- und Markenamt* Case C-517/99 [2002] All ER (EC) 441, [2001] ECR I-6959 (para 21) and *Arsenal Football Club plc v Reed* Case C-206/01 [2003] All ER (EC) 1, [2002] ECR I-10273 (para 47)).

- b 26. In that context, the essential function of a trade mark is to guarantee the identity of origin of the marked goods or services to the consumer or end user by enabling him, without any possibility of confusion, to distinguish the goods or services from others which have another origin. For the trade mark to be able to fulfil its essential role in the system of undistorted competition which the Treaty seeks to establish and maintain, it must offer a guarantee that all the goods or services bearing it have been manufactured or supplied under the control of a single undertaking which is responsible for their quality (see, in particular, *Hoffman-La Roche & Co AG v Centrafarm Vertriebsgesellschaft Pharmazeutischer Erzeugnisse mbH* Case 102/77 [1978] ECR 1139 (para 7), *Philips Electronics NV v Remington Consumer Products Ltd* Case C-299/99 [2002] All ER (EC) 634, [2002] ECR I-5475 (para 30) and the *Arsenal Football Club* case (para 48)).

- c 27. Article 5 of Directive 89/104 defines the 'rights conferred by a trade mark', while art 6 contains rules on the 'limitation of the effects of a trade mark'.

- d 28. According to the first sentence of art 5(1) of Directive 89/104, the registered trade mark confers an exclusive right on its owner. In accordance with art 5(1)(a), the holder of that exclusive right shall be entitled to prevent all third parties not having his consent from using in the course of trade any sign which is identical with the trade mark in relation to goods or services which are identical with those for which the trade mark is registered. Article 5(3) of that directive sets out in a non-exhaustive way the types of use which the owner may prohibit under art 5(1).

- e 29. It is important to note that, by limiting the effects of the rights which a trade mark owner derives from art 5 of Directive 89/104, art 6 seeks to reconcile the fundamental interests of trade mark protection with those of free movement of goods and freedom to provide services in the common market in such a way that trade mark rights are able to fulfil their essential role in the system of undistorted competition which the Treaty seeks to establish and maintain (see, in particular, *Bayerische Motorenwerke AG (BMW) v Deenik* Case C-63/97 [1999] All ER (EC) 235, [1999] ECR I-905 (para 62) and *Gerolsteiner Brunnen GmbH & Co v Putsch GmbH* Case C-100/02 [2004] ECR I-691 (para 16)).

- f 30. Firstly, according to art 6(1)(c) of Directive 89/104, the trade mark owner may not prohibit a third party from using the mark in trade where it is necessary to indicate the intended purpose of a product or service, in particular as accessories or spare parts.

- g 31. It should be noted that that provision does not lay down criteria for determining whether a given intended purpose of a product falls within its scope, but merely requires that use of the trade mark be necessary in order to indicate such a purpose.

- h 32. Moreover, since the intended purpose of the products as accessories or spare parts is cited only by way of example, those doubtless being the usual situations in which it is necessary to use a trade mark in order to indicate the

intended purpose of a product, the application of art 6(1)(c) of Directive 89/104 is, as the United Kingdom government and the Commission of the European Communities have rightly pointed out in their observations, not limited to those situations. Therefore, in the circumstances of the main proceedings, it is not necessary to determine whether a product must be regarded as an accessory or a spare part.

33. Secondly, it should be noted, on the one hand, that the court has already held that use of a trade mark to inform the public that the advertiser is specialised in the sale, or that he carries out the repair and maintenance, of products bearing that trade mark which have been marketed under that mark by its owner or with his consent, constitutes a use indicating the intended purpose of a product within the meaning of art 6(1)(c) of Directive 89/104 (see the *BMW* case (paras 54, 58–63)). That information is necessary in order to preserve the system of undistorted competition in the market for that product or service.

34. The same applies to the case in the main proceedings, the marks of which the Gillette Co is the owner being used by a third party in order to provide the public with comprehensible and complete information as to the intended purpose of the product which it markets, that is to say as to its compatibility with the product which bears those trade marks.

35. In addition, it is sufficient to note that such use of a trade mark is necessary in cases where that information cannot in practice be communicated to the public by a third party without use being made of the trade mark of which the latter is not the owner (see, to that effect, the *BMW* case (para 60)). As Advocate General Tizzano has pointed out in paras 64 and 71 of his opinion, that use must in practice be the only means of providing such information.

36. In that respect, in order to determine whether other means of providing such information may be used, it is necessary to take into consideration, for example, the possible existence of technical standards or norms generally used for the type of product marketed by the third party and known to the public for which that type of product is intended. Those norms, or other characteristics, must be capable of providing that public with comprehensible and full information on the intended purpose of the product marketed by that third party in order to preserve the system of undistorted competition on the market for that product.

37. It is for the national court to determine whether, in the circumstances of the case in the main proceedings, use of the trade mark is necessary, taking account of the requirements referred to in paras 33–36 of this judgment and of the nature of the public for which the product marketed by LA-Laboratories is intended.

38. Thirdly, art 6(1)(c) of Directive 89/104 makes no distinction between the possible intended purposes of products when assessing the lawfulness of the use of a trade mark. The criteria for assessing the lawfulness of the use of a trade mark with accessories or spare parts in particular are thus no different from those applicable to other categories of possible intended purposes.

39. Having regard to the above considerations, the answer to the first, second and third questions must be that the lawfulness or otherwise of the use of the trade mark under art 6(1)(c) of Directive 89/104 depends on whether that use is necessary to indicate the intended purpose of a product.

Use of the trade mark by a third party who is not its owner is necessary in order to indicate the intended purpose of a product marketed by that third



a party where such use in practice constitutes the only means of providing the public with comprehensible and complete information on that intended purpose in order to preserve the undistorted system of competition in the market for that product.

b It is for the national court to determine whether, in the case in the main proceedings, such use is necessary, taking account of the nature of the public for which the product marketed by the third party in question is intended.

c Since art 6(1)(c) of Directive 89/104 makes no distinction between the possible intended purposes of products when assessing the lawfulness of the use of the trade mark, the criteria for assessing the lawfulness of the use of a trade mark with accessories or spare parts in particular are thus no different from those applicable to other categories of possible intended purposes of the products.

#### THE FOURTH QUESTION

d 40. In the first part of its fourth question, the national court seeks interpretation of the requirement in art 6(1)(c) of Directive 89/104 that use of the trade mark by a third party within the meaning of that provision must be in accordance with honest practices in industrial or commercial matters. In the second part of that question, the national court asks whether use of the trade mark by a third party constitutes an indication that the products marketed by the latter are equivalent, both in their quality and their technical or other characteristics, to the products bearing that trade mark.

e 41. As regards the first part of that question, the Court of Justice has consistently held that the condition of 'honest use' within the meaning of art 6(1) of Directive 89/104 constitutes in substance the expression of a duty to act fairly in relation to the legitimate interests of the trade mark owner (see the *BMW* case (para 61) and the *Gerolsteiner Brunnen* case (para 24)). Such an obligation is similar to that imposed on the reseller where he uses another's trade mark to advertise the resale of products covered by that mark (see *Parfums Christian Dior SA v Evora BV* Case C-337/95 [1997] ECR I-6013 (para 45) and the *BMW* case (para 61)).

f 42. In that regard, use of the trade mark will not comply with honest practices in industrial or commercial matters where, first, it is done in such a manner that it may give the impression that there is a commercial connection between the reseller and the trade mark proprietor (see the *BMW* case (para 51)).

g 43. Nor may such use affect the value of the trade mark by taking unfair advantage of its distinctive character or repute (see the *BMW* case (para 52)).

h 44. In addition, as the United Kingdom government and the Commission have rightly pointed out in their observations, use of the trade mark will not be in accordance with art 6(1)(c) of Directive 89/104 if it discredits or denigrates that mark.

i 45. Finally, where the third party presents its product as an imitation or replica of the product bearing the trade mark of which it is not the owner, such use of that mark does not comply with honest practices within the meaning of art 6(1)(c).

46. It is for the national court to determine whether, in the case in the main proceedings, the use made of the trade marks owned by Gillette Co has been made in accordance with honest practices, taking account, in particular, of the conditions referred to in paras 42–45 of this judgment. In that regard, account should be taken of the overall presentation of the product marketed by the

third party, particularly the circumstances in which the mark of which the third party is not the owner is displayed in that presentation, the circumstances in which a distinction is made between that mark and the mark or sign of the third party, and the effort made by that third party to ensure that consumers distinguish its products from those of which it is not the trade mark owner. a

47. Concerning the second part of that question, as the United Kingdom government has rightly pointed out in its observations, the fact that a third party uses a trade mark of which it is not the owner in order to indicate the intended purpose of its product does not necessarily mean that it is presenting that product as being of the same quality as, or having equivalent properties to, those of the product bearing the trade mark. Whether there has been such a presentation depends on the facts of the case, and it is for the referring court to determine whether it has taken place by reference to the circumstances. b

48. Moreover, whether the product marketed by the third party has been represented as being of the same quality as, or having equivalent properties to, the product whose trade mark is being used is a factor which the referring court must take into consideration when it verifies that such use is made in accordance with honest practices in industrial or commercial matters. c

49. Having regard to the above considerations, the answer to the fourth question must be that the condition of 'honest use' within the meaning of art 6(1)(c) of Directive 89/104, constitutes in substance the expression of a duty to act fairly in relation to the legitimate interests of the trade mark owner. d

Use of the trade mark will not be in accordance with honest practices in industrial and commercial matters if, for example: e

—it is done in such a manner as to give the impression that there is a commercial connection between the third party and the trade mark owner;

—it affects the value of the trade mark by taking unfair advantage of its distinctive character or repute;

—it entails the discrediting or denigration of that mark;

—or where the third party presents its product as an imitation or replica of the product bearing the trade mark of which it is not the owner. f

The fact that a third party uses a trade mark of which it is not the owner in order to indicate the intended purpose of the product which it markets does not necessarily mean that it is presenting it as being of the same quality as, or having equivalent properties to, those of the product bearing the trade mark. Whether there has been such a presentation depends on the facts of the case, and it is for the referring court to determine whether it has taken place by reference to the circumstances. g

Whether the product marketed by the third party has been presented as being of the same quality as, or having equivalent properties to, the product whose trade mark is being used is a factor which the referring court must take into consideration when it verifies that such use is made in accordance with honest practices in industrial or commercial matters. h

#### THE FIFTH QUESTION

50. By its fifth question, the referring court asks whether a trade mark owner's inability, pursuant to art 6(1)(c) of Directive 89/104, to prohibit a third party from using the trade mark applies where that third party markets not only a spare part or accessory but also the product itself with which the spare part or accessory is intended to be used. i

51. As the Finnish and United Kingdom governments have pointed out in their observations, there is nothing in the directive to prevent a third party

a from relying on art 6(1)(c) in such a case. However, that third party's use of the trade mark must be necessary in order to indicate the intended purpose of the product which it markets and must be made in accordance with honest practices in industrial and commercial matters.

b 52. Whether use of a trade mark by a third party in the circumstances described above is necessary in order to indicate the intended purpose of the product which it markets and whether it is made in accordance with honest practices in industrial and commercial matters is a question of fact which it is for the national court to assess by reference to the individual circumstances of each case.

c 53. Having regard to the above considerations, the answer to the fifth question must be that, where a third party that uses a trade mark of which it is not the owner markets not only a spare part or an accessory but also the product itself with which the spare part or accessory is intended to be used, such use falls within the scope of art 6(1)(c) of Directive 89/104 in so far as it is necessary to indicate the intended purpose of the product marketed by the latter and is made in accordance with honest practices in industrial and commercial matters.

#### COSTS

e 54. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. The costs incurred in submitting observations to the Court of Justice, other than those of the said parties, are not recoverable.

On those grounds, the Court of Justice (Third Chamber) hereby rules:

f (1) The lawfulness or otherwise of the use of the trade mark under art 6(1)(c) of First Council Directive (EEC) 89/104 (to approximate the laws of the member states relating to trade marks) depends on whether that use is necessary to indicate the intended purpose of a product.

g Use of the trade mark by a third party who is not its owner is necessary in order to indicate the intended purpose of a product marketed by that third party where such use in practice constitutes the only means of providing the public with comprehensible and complete information on that intended purpose in order to preserve the undistorted system of competition in the market for that product.

It is for the national court to determine whether, in the case in the main proceedings, such use is necessary, taking account of the nature of the public for which the product marketed by the third party in question is intended.

h Since art 6(1)(c) of Directive 89/104 makes no distinction between the possible intended purposes of products when assessing the lawfulness of the use of the trade mark, the criteria for assessing the lawfulness of the use of the trade mark with accessories or spare parts in particular are thus no different from those applicable to other categories of possible intended purposes for the products.

i (2) The condition of 'honest use' within the meaning of art 6(1)(c) of Directive 89/104, constitutes in substance the expression of a duty to act fairly in relation to the legitimate interests of the trade mark owner.

The use of the trade mark will not be in accordance with honest practices in industrial and commercial matters if, for example:

—it is done in such a manner as to give the impression that there is a commercial connection between the third party and the trade mark owner;



—it affects the value of the trade mark by taking unfair advantage of its distinctive character or repute; a

—it entails the discrediting or denigration of that mark;

—or where the third party presents its product as an imitation or replica of the product bearing the trade mark of which it is not the owner.

The fact that a third party uses a trade mark of which it is not the owner in order to indicate the intended purpose of the product which it markets does not necessarily mean that it is presenting it as being of the same quality as, or having equivalent properties to, those of the product bearing the trade mark. Whether there has been such presentation depends on the facts of the case, and it is for the referring court to determine whether it has taken place by reference to the circumstances. b

Whether the product marketed by the third party has been presented as being of the same quality as, or having equivalent properties to, the product whose trade mark is being used is a factor which the referring court must take into consideration when it verifies that that use is made in accordance with honest practices in industrial or commercial matters. c

(3) Where a third party that uses a trade mark of which it is not the owner markets not only a spare part or an accessory but also the product itself with which the spare part or accessory is intended to be used, such use falls within the scope of art 6(1)(c) of Directive 89/104 in so far as it is necessary to indicate the intended purpose of the product marketed by the latter and is made in accordance with honest practices in industrial and commercial matters. d

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**EU-Wood-Trading GmbH v  
Sonderabfall-Management-  
Gesellschaft Rheinland-Pfalz mbH**

(Case C-277/02)

COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES (FIRST CHAMBER)

JUDGES JANN (PRESIDENT OF THE CHAMBER) ROSAS, SILVA DE LAPUERTA, LENAERTS  
AND SCHIEMANN (RAPPORTEUR)

ADVOCATE GENERAL LÉGER

27 MAY, 23 SEPTEMBER, 16 DECEMBER 2004

*European Community – Environment – Waste – Shipment of waste – Member state of dispatch objecting to planned shipment of waste on basis that recovery operation in member state of destination not capable of being carried out without endangering human health and environment – Member state of destination raising no objections to planned shipment – Concept of ‘shipment’ of waste – Whether member state of dispatch entitled to raise objections based on considerations relating not to transport of waste but to its recovery in another member state – Council Regulation (EEC) 259/93, art 7(4)(a), indents 1, 2.*

The claimant undertaking notified the German competent authorities of its intention to ship a quantity of waste to an undertaking established in Italy, where the waste was to be recovered. The documents annexed to the notification included, inter alia, statements certifying that the Italian competent authorities had no objections to the import of the waste. However, on the basis that the proposed recovery operation could not be carried out without endangering human health and the environment, the competent authority of dispatch objected to the planned shipment under art 7(4)(a)<sup>a</sup> of Council Regulation (EEC) 259/93 (on the supervision and control of shipments of waste within, into and out of the European Community). Reliance was placed on: (i) the first indent of that provision, which provided that an objection might be raised in ‘accordance with [Council Directive (EEC) 75/442 (on waste)], in particular Article 7 thereof’; and (ii) the second indent of that provision, which provided that an objection might be raised because the planned shipment was ‘not in accordance with national laws and regulations relating to environmental protection, public order, public safety or health protection’. On appeal in proceedings brought by the claimant challenging the decision, issues arose concerning whether the competent authority of dispatch could raise objections based on the first and second indents of art 7(4)(a) of the regulation which related not to the transport of the waste, but to its recovery in another member state. Taking the view that the outcome of the action before it depended on an interpretation of Community law, the national court decided to stay the proceedings and refer a number of questions for preliminary ruling under art 234 EC (formerly art 177 of the EC Treaty) to the Court of Justice of the European Communities.

<sup>a</sup> Article 7(4)(a) is set out at judgment para 16, below

**Held** – (1) A competent authority of dispatch or destination could rely on the first indent of art 7(4)(a) of the regulation to raise objections to a shipment of waste for recovery based on considerations connected not only to the actual transport of the waste in each competent authority's area of jurisdiction, but also to the recovery planned for that shipment. Interpreted according to the framework of the environmental policy pursued by the Community and in the light of the notification procedures established by other provisions of the regulation (which enabled member states to be duly informed not only of the type and movements of the waste, but also of its disposal or recovery), the concept of a 'shipment' of waste was to be perceived in its entirety, from the point of departure in the member state of dispatch to the end of its processing in the member state of destination. Accordingly, it was clear that the regulation, taken as a whole, permitted all the competent authorities responsible for the control of shipments of waste to take account of matters connected not only to the transport of that waste, but also to the conditions in which the waste was recovered. Further, the first indent of art 7(4)(a) of the regulation was to be interpreted as enabling the competent authorities of dispatch and destination to raise objections under the directive not only based on art 7 thereof, but also on the basis of the directive's other provisions. Therefore, the competent authorities of dispatch and destination might raise objections to a shipment of waste for recovery on the ground that the planned recovery disregarded the requirement to ensure that the waste was recovered or disposed of without endangering human health and without the use of processes or methods capable of harming the environment (see judgment paras 31–43, below). a  
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(2) For the purposes of the first indent of art 7(4)(a) of the regulation, provided that it complied with the principle of proportionality, a competent authority of dispatch might, in assessing the effects on health and the environment of the recovery envisaged at the destination, rely on its own criteria concerning the recovery of waste even where those criteria were stricter than those in force in the state of destination. Such an interpretation was evident from the fact that the regulation formed part of the environmental policy of the Community, the objectives of which might be undermined if a competent authority of dispatch was to be prevented from relying on its own high standards of environmental protection to oppose a shipment of waste where its recovery in another member state might harm human health or the environment. Any conflict between positions taken by the competent authorities of dispatch and destination was inherent in the system established by the regulation, and any such divergence was not contrary to the principle of co-operation. However, having regard to the principle that waste for recovery was to be able to move freely between the member states for processing, opposition by the competent authority of dispatch on the basis of the application of its national waste recovery standards had to comply with the principle of proportionality. In that regard, the risks had to be measured on the basis of relevant scientific research. It was for the national court seised of an action challenging the opposition of the competent authority of dispatch to assess whether those national standards had been applied in circumstances contrary to the principle of proportionality (see judgment paras 45–53, below). f  
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(3) A competent authority of dispatch could not rely on the second indent of art 7(4)(a) of the regulation to raise an objection to a shipment of waste based on the fact that the planned recovery in the member state of destination did not comply with the national laws and regulations for the protection of the



- a* environment, public order, public safety or health protection. Having regard to the other provisions of art 7(4), which did not permit the competent authorities of transit of a shipment of waste to rely on the first indent of art 7(4)(a) and, accordingly, to check that the waste would be processed in compliance with the directive, by providing in the second indent of art 7(4)(a) of the regulation that the competent authorities might raise objections to a planned shipment if it did not comply with national laws and regulations, the Community legislature had sought to safeguard, at each stage of the shipment, the efficacy of each member state's own provisions with regard to waste which was within the territory of that state. Therefore, those provisions which governed shipment covered only operations relating to that shipment which occurred during that time when it was within the respective territory of each of the competent authorities concerned (see judgment paras 56–60, below).

### Notes

- d* For the European legislation on the transport of waste, see 38 *Halsbury's Laws* (4th edn reissue) para 39.

### Cases cited

- Abfall Service AG (ASA) v Bundesminister für Umwelt, Jugend und Familie* Case C-6/00 [2002] QB 1073, [2002] 3 WLR 665, [2002] ECR I-1961, ECJ.
- e* *ADM Ölmühlen v Bundesanstalt für landwirtschaftliche Marktordnung (BALM)* Case C-339/92 [1993] ECR I-6473, ECJ.
- Chemische Afvalstoffen Dusseldorp BV v Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer* Case C-203/96 [1999] All ER (EC) 25, [1998] ECR I-4075, ECJ.
- f* *DaimlerChrysler AG v Land Baden-Württemberg* Case C-324/99 [2002] QB 1102, [2002] 3 WLR 694, [2001] ECR I-9897, ECJ.
- Deutsche Paracelsus Schulen für Naturheilverfahren GmbH v Grabner* Case C-294/00 [2002] ECR I-6515, ECJ.
- European Commission v Denmark* Case C-192/01 [2003] ECR I-9693, ECJ.
- European Commission v Germany* Case C-228/00 [2003] ECR I-1439, ECJ.
- g* *European Commission v Germany* Case C-389/00 [2003] ECR I-2001, ECJ.
- European Commission v Italy* Case C-365/97 [1999] ECR I-7773, ECJ.
- European Commission v Luxembourg* Case C-458/00 [2003] ECR I-1553, ECJ.
- European Parliament v EU Council* Case C-187/93 [1994] ECR I-2857, ECJ.
- Hahn (Criminal proceedings against)* Case C-121/00 [2002] ECR I-9193, ECJ.
- h* *Käserer Champignon Hofmeister GmbH & Co KG v Hauptzollamt Hamburg-Jonas* Case C-210/00 [2002] ECR I-6453, ECJ.
- Maizena Gesellschaft mbH v Bundesanstalt für landwirtschaftliche Marktordnung (BALM)* Case 137/85 [1987] ECR 4587, ECJ.
- Oliehandel Koewit BV v Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer* Joined cases C-307–311/00 [2003] ECR I-1821, ECJ.
- i* *Procureur de la République v Association de Défense des Brûleurs d'Huiles Usagées* Case 240/83 [1985] ECR 531, ECJ.
- Questore di Verona v Zenatti* Case C-67/98 [1999] ECR I-7289, ECJ.
- R (on the application of British American Tobacco (Investments) Ltd (supported by Japan Tobacco Inc and anor intervening)) v Secretary of State for Health* Case C-491/01 [2002] ECR I-11453, ECJ.

*R v Ministry of Agriculture, Fisheries and Food, ex p National Farmers' Union* **a**  
Case C-157/96 [1998] ECR I-2211, ECJ.

*Siomab SA v Institut bruxellois pour la gestion de l'environnement* Case C-472/02  
(2004) Transcript (opinion), 15 July, (2004) Transcript (judgment), 19 October,  
ECJ.

*Snellers Autos BV v Algemeen Directeur van de Dienst Wegverkeer* Case C-314/98 **b**  
[2000] ECR I-8633, ECJ.

*Van der Veldt (Criminal proceedings against)* Case C-17/93 [1994] ECR I-3537, ECJ.

## Reference

By decision of 3 July 2002, the Oberverwaltungsgericht Rheinland-Pfalz, Germany referred to the Court of Justice of the European Communities for **c**  
a preliminary ruling under art 234 EC (formerly art 177 of the EC Treaty) five questions (set out at judgment para 29, below) concerning the interpretation of the first and second indents of art 7(4)(a) of Council Regulation (EEC) 259/93 (on the supervision and control of shipments of waste within, into and out of the European Community), as amended by Commission Decisions (EC) 98/368 and (EC) 1999/816. Those questions were submitted in the course of **d**  
an action between EU-Wood-Trading GmbH, established in Bürstadt, Germany (hereinafter EU-Wood-Trading) against Sonderabfall-Management-Gesellschaft Rheinland-Pfalz mbH, regarding objections raised by the latter against the shipment of 3,500 tonnes of wood waste which EU-Wood-Trading was envisaging making to Italy. Observations were submitted on behalf of: **e**  
EU-Wood-Trading GmbH, by T Pschera and B Enderle, Rechtsanwälte; Sonderabfall-Management-Gesellschaft Rheinland-Pfalz mbH, by C v der Lühe, Rechtsanwalt; the Danish government, by J Molde, acting as agent; the Austrian government, by E Riedl, acting as agent; the Commission of the European Communities, by U Wölker and M Konstantinidis, acting as **f**  
agents. The language of the case was German. The facts are set out in the opinion of the Advocate General.

23 September 2004. **The Advocate General (P Léger)** delivered the following opinion<sup>1</sup>.

1. The present case is one that again concerns interpretation of Council Regulation (EEC) 259/93<sup>2</sup>, which lays down the conditions and procedural **g**  
rules to which shipments of waste between member states are subject. The matter at issue is whether and to what extent the competent administrative authority of the country from which the shipment of waste is to be effected, called 'the competent authority of dispatch', is entitled to object to such a shipment where the conditions in which the waste in question is to be **h**  
recovered in the country of destination do not satisfy the standards or national legislation applicable in its own state, which are more stringent than those applicable in the member state of destination.

2. This case should therefore lead the court to define the powers of the competent authority of dispatch in the context of the waste shipment procedure and, perhaps, whether the free movement of waste for recovery, provided for by the regulation, precludes that authority from applying the **i**

<sup>1</sup> Original language: French.

<sup>2</sup> On the supervision and control of shipments of waste within, into and out of the European Community (OJ 1993 L30 p 1), as amended by Commission Decision (EC) 98/368 (OJ 1998 L165 p 20) (the regulation).

a health and environmental protection standards in force in its own state where they are higher than those in force in the member state of destination.

3. Before setting out the factual background to the dispute in the main proceedings, I will briefly summarise the development and principles of Community environmental policy and the provisions of secondary legislation which are most relevant for the purposes of answering the questions referred by the national court.

# I—COMMUNITY LAW

## A—Community environmental policy

c 4. Environmental protection has recently been progressively enshrined in Community law. Indeed, that concept was absent, or largely so, from the original treaties<sup>3</sup>. It was a judicial creation of the court, which in its judgment in *Procureur de la République v Association de Défense des Brûleurs d'Huiles Usagées* of 7 February 1985<sup>4</sup> held that it constituted 'one of the Community's essential objectives', thereby conferring upon it the status of an imperative requirement that could justify national measures detrimental to the free movement of goods. In 1987, with the entry into force of the Single European Act 1986 (EC 12 (1986); Cmnd 9578; OJ 1987 L169 p 1), Community activity in the field of environmental protection was given a legal basis in primary law, when arts 130r, 130s and 130t were inserted into the EC Treaty<sup>5</sup>. The Treaty on European Union, signed at Maastricht on 7 February 1992, elevated that activity to the status of a policy in its own right. The Treaty of Amsterdam, which entered into force on 1 May 1999, further strengthened the position of that policy as a priority by including in art 6 EC (formerly art 3c of the EC Treaty) the principle that environmental requirements should be integrated into other Community policies. That article was created for that purpose and was incorporated into the part of the Treaty containing the principles on which the Community is based.

f 5. Community policy on the environment must contribute to the pursuit of four objectives, which are listed in art 174 EC. The first relates to the quality of the environment from three aspects: namely preserving, protecting and improving it. The second objective is the protection of human health. The third is the prudent and rational utilisation of natural resources. The fourth is the promotion of measures at international level to deal with regional or worldwide environmental problems.

g 6. The policy is based on the following four principles: the precautionary principle, which allows immediate measures to be adopted where there is a serious and irreversible threat of harm to the environment; the principle of preventive action, which recommends that the creation of pollution or damage should be prevented, from the outset, by the adoption of measures that will eradicate a known risk; the principle that environmental damage should as a priority be rectified at source, meaning that action must be taken in respect of the actual object that is having a direct or indirect impact on the environment, which is in Community legislation on shipments of waste expressed in the

i 3 Of the Treaties of Rome, the EC Treaty included no provision specific to the environment and the Euratom Treaty contained a chapter on the protection of the health of workers and the general public against the dangers arising from ionising radiations. The ECSC Treaty included, for its part, art 55 relating to occupational safety.

4 Case 240/83 [1985] ECR 531 (para 13).

5 Articles 130r and 130s of the EC Treaty became, after amendment, arts 174 and 175 EC respectively, and art 130t of the EC Treaty became art 176 EC.



principles of 'self-sufficiency and proximity'; and the 'polluter pays' principle, which requires the person who creates a pollution risk or causes pollution to bear the costs of prevention or compensation. a

7. It should also be pointed out that Community activities in the environmental field must aim at a high level of protection. That requirement, contained in art 2 EC (formerly art 2 of the EC Treaty) since the Treaty of Amsterdam, is restated in several articles of the EC Treaty<sup>6</sup>. b

8. Finally, Community powers in the environmental field are not exclusive. Firstly, they are subject to the subsidiarity principle. Secondly, the member states and the Community have joint powers. Accordingly, under art 176 EC, where the Community has adopted environmental protection measures, the member states may maintain and even adopt more stringent protective measures. Those joint powers are also to be seen in the safeguard clauses, which allow a member state, where the Community has adopted harmonisation measures relating to the establishment and functioning of the internal market, to maintain derogating national provisions justified by the requirements referred to in art 30 EC (formerly art 36 of the EC Treaty) or relating to environmental protection, or even to adopt derogating national provisions, provided that the latter are based on new scientific evidence<sup>7</sup>. c

9. In future, the principles framing environmental law could be accorded increased importance, since the Draft Treaty establishing a Constitution for Europe, adopted by the heads of state and government of the member states on 18 June 2004, lays down among the objectives of the European Union the sustainable development of Europe, and even of the earth, as well as a high level of protection and improvement of the quality of the environment<sup>8</sup>. The Charter of Fundamental Rights of the European Union (OJ 2000 C364 p 1), proclaimed on 7 December 2000 at Nice and reproduced in Pt II of the aforementioned Draft Treaty, provides, for its part, that— d

[a] high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.<sup>9</sup> e

It is also appropriate to point out that environmental protection is a feature of the constitutions of several member states<sup>10</sup>. f

## *B—Community legislation on shipments of waste* g

### *1. The directive*

10. Council Directive (EEC) 75/442<sup>11</sup>, the applicable provisions of which were adopted on the basis of art 130s of the Treaty, which enables the Council of the European Union to adopt measures to implement Community policy on h

6 Article 2 EC, art 95(3) EC (formerly art 100a(3) of the EC Treaty), and art 174(2) EC.

7 See art 95(4) and (5) EC. See also the safeguard clause provided for in the second paragraph of art 174(2) EC.

8 See arts 3 and 4.

9 See art 37. i

10 See, in particular, the Kingdom of Belgium, the Hellenic Republic, the Kingdom of Spain, the Republic of Finland and the Republic of Hungary. I would also add that the French National Assembly has just approved the attachment of a charter for the environment to its constitution.

11 On waste (OJ 1975 L194 p 39), as amended by Council Directive (EEC) 91/156 (OJ 1991 L78 p 32) and by Commission Decision (EC) 96/350 (adapting Annexes IIA and IIB to Council Directive (EEC) 75/442 on waste) (OJ 1996 L135 p 32) (the directive).

a the environment, seeks to ensure a high level of environmental protection<sup>12</sup>. It states that in order to achieve that aim the member states must, in addition to taking action to ensure the responsible removal and recovery of waste, take measures to restrict the production of waste particularly by promoting clean technologies and products which can be recycled and re-used<sup>13</sup>. It is also designed to reduce movements of waste by establishing an integrated and adequate disposal network to enable the Community to become self-sufficient in disposing of the waste it produces and the member states to move towards that aim too.

b 11. The first paragraph of art 4 provides:

c 'Member States shall take the necessary measures to ensure that waste is recovered or disposed of without endangering human health and without using processes or methods which could harm the environment ...'

12. Article 7 states that in order to attain the objectives referred to in art 4 in particular the member states are to be required to draw up as soon as possible one or more waste management plans.

d 13. It also provides that the undertakings which carry out waste disposal and recovery must be authorised and inspected<sup>14</sup>.

## 2. The regulation

e 14. The regulation was also adopted on the basis of art 130s of the Treaty. It replaces Council Directive (EEC) 84/631<sup>15</sup> in order to implement within the Community, in particular, the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal of 22 March 1989<sup>16</sup>. Its purpose is to establish a harmonised set of procedures whereby movements of waste can be limited in order to secure protection of the environment<sup>17</sup>.

f 15. Title II of the regulation lays down the procedure applicable to shipments of waste between member states. Chapter A of Title II, containing arts 3 to 5, covers waste for disposal and Chapter B of the same title, containing arts 6 to 11, deals with waste for recovery. The rules applicable to shipments for the purposes of recovery are less restrictive than those relating to shipments for the purposes of disposal. That difference in the rules governing waste for disposal and waste for recovery is explained by the Community legislature's

12 See the first and fourth recitals in the preamble to Directive 91/156.

h 13 See the fourth recital in the preamble to Directive 91/156.

14 See the ninth recital in the preamble to, and arts 9 to 14 of, Directive 91/156.

15 On the supervision and control within the European Community of the transfrontier shipment of hazardous waste (OJ 1984 L326 p 31).

i 16 Hereinafter the Basel Convention. That convention, to which the member states are also parties, was drawn up in the context of the United Nations Environment Programme. It was approved on behalf of the Community by Council Decision (EEC) 93/98 (OJ 1993 L39 p 1). The text of that convention is attached to the decision. The Basel Convention is based on the following principles: firstly, reducing the generation of wastes to a minimum (see art 4(2)(a)), secondly, reducing transboundary movement of wastes to a minimum (see art 4(2)(d)), thirdly, self-sufficiency, each party undertaking to dispose of wastes in the state in which they were generated (see art 4(2)(b)), and, fourthly, the sound management of wastes, that is to say ensuring the protection of human health and the environment (see art 2(8)).

17 See the judgment in *European Parliament v EU Council* Case C-187/93 [1994] ECR I-2857 (para 26).

wish to ensure priority for recovery<sup>18</sup>. Moreover, the control procedures relating to waste for recovery are not applicable, in principle, to waste falling within the scope of the green list, included as Annex II to the regulation, which is regarded as not presenting a risk to the environment. The concepts of waste disposal and recovery are defined by the directive, to which the regulation expressly refers<sup>19</sup>.

16. The regulation requires any natural or legal person who wishes to ship waste from one member state to another for the purposes of disposing of or recovering it, called 'the notifier', to give notice of his planned shipment to the competent authority of destination, the competent authorities of dispatch and of transit, and the consignee of the waste<sup>20</sup>. However, each member state may provide that it is for the competent authority of dispatch to make that notification in the place of the notifier<sup>21</sup>.

17. According to the ninth recital in the preamble to the regulation, the purpose of such notification is to enable the various competent authorities—

'to be duly informed in particular of the type, movement and disposal or recovery of the waste, so that these authorities may take all necessary measures for the protection of human health and the environment, including the possibility of raising reasoned objections to the shipment.'

To that effect, art 7(4) of the regulation, which, it should be borne in mind, is one of the provisions relating to shipments for the purposes of recovery, provides:

'(a) The competent authorities of destination and dispatch may raise reasoned objections to the planned shipment:

—in accordance with Directive 75/442/EEC, in particular Article 7 thereof, or

—if it is not in accordance with national laws and regulations relating to environmental protection, public order, public safety or health protection, or

—if the notifier or the consignee has previously been guilty of illegal trafficking ... or—

if the shipment conflicts with obligations resulting from international conventions concluded by the Member State or Member States concerned, or—

if the ratio of the recoverable and non-recoverable waste, the estimated value of the materials to be finally recovered or the cost of the recovery and the cost of the disposal of the non-recoverable fraction do not justify the recovery under economic and environmental considerations.

(b) The competent authorities of transit may raise reasoned objections to the planned shipment based on the second, third and fourth indents of (a).'

<sup>18</sup> See the judgment of the court in *Chemische Afvalstoffen Dusseldorp BV v Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer* Case C-203/96 [1999] All ER (EC) 25, [1998] ECR I-4075 (para 33).

<sup>19</sup> See art 2(i) and (k).

<sup>20</sup> See arts 3(1) and 6(1).

<sup>21</sup> See arts 3(8) and 6(8).



## a II—FACTS AND PROCEDURE IN THE MAIN PROCEEDINGS

18. On 23 November 1999, EU-Wood-Trading GmbH<sup>22</sup>, established in Frankfurt am Main, Germany, notified the Sonderabfall-Management-Gesellschaft Rheinland-Pfalz mbH, the competent authority of dispatch, of its plan to ship 3,500 tonnes of wood waste to Italy: in particular, painted and treated wood from demolitions, furniture wood and carpenters' waste. The planned shipment of the waste was for the purposes of recovery, and the waste was to be transformed into chipboard. According to an analysis carried out in mid-November 1999, the lead content of the wood waste was 47 mg per kilogram of dry material<sup>23</sup>.

19. The competent authority of dispatch, which was required under its national law to forward notifications of planned shipments, notified the competent authority of destination of the plan at issue on 1 February 2000. The latter raised no objection to that plan. However, the competent authority of dispatch itself raised an objection to it on 17 January 2000. That objection was based on the provisions of the first indent of art 7(4)(a) of the regulation, on the one hand, and the second indent thereof, on the other.

20. On the basis, initially, of that first indent, the competent authority of dispatch took the view that the planned shipment contravened art 4 of the directive, which states that waste must be recovered or eliminated without endangering human health, on the ground that the lead content of that waste exceeded the guide value laid down in the guidelines issued by the Rheinland-Pfalz Ministry of the Environment relating to operations involving recovery. The use of such wood waste in the manufacture of chipboard would thus lead to an increase of lead in the closed substance cycle and endanger the health of workers responsible for carrying out operations involving recovery and users of that chipboard.

21. Then on the basis of the second indent of art 7(4)(a) of the regulation, the competent authority of dispatch took the view that the planned shipment contravened a provision of national law relating to environmental and health protection<sup>24</sup>, which prohibits any recovery of waste which leads to an increase in the concentration of pollutants in the closed substance cycle.

22. Wood Trading formally opposed that objection, relying on its submission of another analysis of the waste in question in which the lead content was calculated to be 23 mg per kilogram of dry material and the arsenic content to be 3.4 mg per kilogram of dry material. The competent authority of dispatch stood by its objection, taking the view that the two grounds for refusal of the shipment of wood waste at issue still applied on account of the arsenic content of the waste.

23. Following dismissal of the action by the Verwaltungsgericht (Administrative Court) Mainz, Wood Trading appealed to the referring court, seeking a declaration that the objection raised by the competent authority of dispatch was unlawful. It argued that art 7(4)(a) of the regulation allows that authority to raise objections only on grounds based on the conditions of transportation of the waste and not on the conditions of its recovery in the

<sup>22</sup> Hereinafter Wood Trading.

<sup>23</sup> At the material time, that type of waste was included in the amber list, attached as Annex III to the regulation, under the heading AC 170, with the result that its shipment for the purposes of recovery was subject to the mandatory control procedure provided for by the regulation.

<sup>24</sup> That is, according to the decision for reference, art 5(3) of the Gesetz zur Förderung der Kreislaufwirtschaft und Sicherung der umweltverträglichen Beseitigung von Abfällen of 27 September 1994 (BGB1 I, p 2705).

state of destination. According to Wood Trading, to accept the contrary would be to allow one member state to assume the position of guardian of the environment in another member state, thereby contravening the principle of mutual trust among member states. Only the competent authority of destination is therefore entitled to raise objections based on the part of the shipment which affects its state. Furthermore, such an objection by the competent authority of dispatch, in so far as it goes beyond the exhaustive provisions of the regulation, constitutes an unlawful restriction on the free movement of goods. Wood Trading also argued that neither may such an objection be based on the provisions of art 176 EC, under which measures adopted by the Council pursuant to art 175 EC are not to prevent any member state from maintaining or introducing more stringent protective measures, since such measures may be adopted only in order to protect national interests.

24. The competent authority of dispatch contends in defence that the term 'shipment' referred to in art 7(4)(a) of the regulation covers not only the transportation of the waste but also each stage in its shipment until its final destination, so that all the relevant authorities have the power to ensure that the recovery poses no risk for health or the environment. It also argues that the transformation of such waste into chipboard poses a health and environmental risk in Germany on the ground that the chipboard could be imported into that country. Furthermore, that authority argues that it follows from case law, in particular the judgment in *Abfall Service AG (ASA) v Bundesminister für Umwelt, Jugend und Familie*<sup>25</sup>, that the procedure for recovery is also subject to control by the competent authorities of dispatch.

### III—THE QUESTIONS REFERRED

25. It is in the light of the above considerations that the Oberverwaltungsgericht (Higher Administrative Court) Rheinland-Pfalz, Germany decided to stay proceedings and refer the following five questions to the Court of Justice:

'(1) Under the first indent of Article 7(4)(a) of [the r]egulation ... can an objection to the shipment of waste for recovery be raised on the ground that the planned recovery contravenes the requirement arising from the first paragraph of Article 4 of [the d]irective ... for waste to be recovered in a manner which is compatible with health and environmental imperatives?

(2) If so, can such an objection be raised not only by the [competent] authority of destination but also by the [competent] authority of dispatch?

(3) If so, is the [competent] authority of dispatch entitled to base its assessment of whether the planned recovery of the waste at the place of destination is compatible with health and environmental imperatives on the standards applicable in the State of dispatch even where they are higher than the standards applicable in the State of destination?

(4) Under the second indent of Article 7(4)(a) of [the r]egulation ... can an objection to the shipment of waste for recovery be raised on the ground that the planned recovery contravenes national laws and regulations relating to environmental protection, public order, public safety or health protection?

(5) If so, can the [competent] authority of dispatch raise such an objection on the ground that the recovery contravenes national laws and regulations in force at the place of dispatch?

<sup>25</sup> Case C-6/00 [2002] QB 1073, [2002] ECR I-1961.

## a IV—ASSESSMENT

26. Three questions are encompassed by the five referred by the national court, which all relate to the interpretation of the provisions of the first and second indents of art 7(4)(a). They are, firstly, whether those provisions allow objections to be raised to a shipment of waste based on the planned recovery in the state of destination (first and second questions referred), secondly, whether the competent authority of dispatch is entitled to raise such objections (second question and first part of the fifth question referred) and, thirdly, whether that authority is entitled to raise such objections under the rules applicable in its own state, even where they are stricter than those applicable in the state of destination (third question and last part of the fifth question referred).

c 27. I shall begin by considering the first and fourth questions referred, which relate to whether it is possible to raise objections based on the recovery.

## A—Whether it is possible to raise objections based on the recovery

d 28. By its first and fourth questions, the national court asks essentially whether art 7(4)(a) of the regulation is to be interpreted as meaning that objections to a shipment of waste for recovery relating to the conditions in which that recovery is to be effected may be based, on the one hand, on the first indent of that provision, on the ground that the planned recovery contravenes the requirement arising from the first sentence of art 4 of the directive, which states that waste must be recovered without endangering human health and without harming the environment and, on the other hand, on the second indent of that provision, on the ground that the planned recovery contravenes national laws and regulations relating to environmental protection, public order, public safety or health protection.

f 29. With regard to the first indent of art 7(4)(a) of the regulation, the national court raises that question because that provision refers specifically only to art 7 of the directive, which requires the member states to draw up waste management plans and which itself refers to movements of waste.

g 30. With regard to the second indent of art 7(4)(a) of the regulation, it explains that its doubts are based on the wording of that provision, from which it may be inferred that objections may be based only on the transportation of waste. It also points out that art 7(4)(b) of the regulation authorises the competent authorities of transit to raise objections only on the basis of the second, third and fourth indents of art 7(4)(a). That could mean that the second indent does not allow objections to be raised on the basis of the conditions of recovery of waste, since those authorities would on the face of it have no interest in raising such objections.

h 31. The national court also points out that, in the *Dusseldorp* case<sup>26</sup>, cited above, the court held, with regard to a shipment of waste for the purposes of recovery, that—

i '[i]t was in order to encourage such recovery in the Community as a whole, in particular by eliciting the best technologies, that the Community legislature stipulated that waste of that type should be able to move freely between member states for processing, *provided that transport poses no threat to the environment.*'<sup>27</sup>

26 Paragraph 33.

27 National court's emphasis.



32. First of all, it seems appropriate to state my position on the interpretation of that paragraph of the judgment in the *Dusseldorp* case, cited above. I do not take the view that in that paragraph the court meant to state that an objection to a shipment of waste for recovery could be raised only on grounds relating to the conditions in which that waste is to be transported. The case in the main proceedings which gave rise to that judgment was concerned with a provision in a Netherlands waste management plan stipulating that exports of oil filters to another member state for recovery there were prohibited if the processing of those filters abroad was not of a higher quality than that performed in the Netherlands. For the purposes of ascertaining whether such a rule was compatible with Community law, the Raad van State (Council of State) (Netherlands) asked the court whether the principles of self-sufficiency and proximity, as contained in that waste management plan, could be applied to shipments of waste for recovery. Following an examination of the relevant provisions of the directive and the regulation, the court held that those principles were applicable only to shipments of waste for the purposes of disposal. It explained the grounds for that difference in the rules governing waste for disposal and waste for recovery, pointing out in particular that the principle of priority for recovery applies only to the latter. It is in that context that it made the point referred to by the national court with regard to the Community legislature's reason for wishing to encourage the movement of waste for recovery.

33. It seems to me that by adding the sentence stating that such movement could be encouraged only 'provided that transport poses no threat to the environment' the court simply wished to point out that such free movement was not unconditional and that it was subject to safety requirements. It would not be justified, in my view, to infer from the fact that that sentence mentions only the safety of 'transport' that the relevant competent authorities are precluded from raising objections to a planned shipment of waste on the basis of the conditions in which its recovery is planned, although that was not the question referred by the Raad van State.

34. I shall now consider the two provisions at issue.

*1. First indent of art 7(4)(a)*

35. Like all the interveners, with the exception of Wood Trading, I take the view that the first indent of art 7(4)(a) of the regulation must be interpreted as meaning that that provision allows objections to be raised relating to the conditions in which the recovery is to be effected in the state of destination. That interpretation follows, in my view, from the wording of that provision and is supported by both the structure and the objectives of the regulation of which it forms a part.

36. With regard to the wording of that provision, it must be borne in mind that the first indent of art 7(4)(a) of the regulation states that the competent authorities of destination and dispatch may raise reasoned objections to the planned shipment 'in accordance with [the d]irective ... in particular Article 7 thereof'. Admittedly, the expression 'in accordance with [the d]irective' is not, in the present case, very explicit and it is true that only art 7 of the directive is referred to specifically. Nevertheless, it seems to me that the most logical interpretation of that provision is that objections may be raised 'on the basis of the directive'. Moreover, use of the adverbial phrase 'in particular' before referring to art 7 means that the reference to that article is purely for guidance and that such objections may also be based on the other provisions of the

a directive. In other words, the provision to be interpreted ought to be understood, in my view, as meaning that objections to a planned shipment may be raised if such a shipment does not comply with the requirements of the directive. That analysis is also supported by most of the other language versions of that provision<sup>28</sup>.

b 37. Moreover, we have seen that art 4 of the directive provides:

‘Member States shall take the necessary measures to ensure that waste is recovered or disposed of without endangering human health and without using processes or methods which could harm the environment ...’

c The inference to be drawn from a reading of that article of the directive in conjunction with the first indent of art 7(4)(a) of the regulation is therefore that the latter provision allows objections to be raised to a planned shipment if the conditions in which the waste is to be recovered are capable of harming human health or the environment.

d 38. That interpretation is supported by the structure of the regulation. For example, we have seen that any planned shipment of waste for recovery, with the exception, in principle, of waste falling within the scope of the green list included as Annex II to the regulation, must be the subject matter of a notification to the competent authorities of dispatch, destination and transit. We also know that it is on the basis of that notification that those authorities may raise an objection to such a shipment on the grounds exhaustively listed in art 7(4) of the regulation<sup>29</sup>. Consideration of art 6 of the regulation, para (5) of which sets out the information which must be contained in the consignment note supporting that notification, shows that, in addition to information relating to the composition and amount of waste to be recovered<sup>30</sup>, and the arrangements for transporting it<sup>31</sup>, the notifier must furnish certain details relating to the conditions in which that waste is to be recovered<sup>32</sup>. That information therefore covers the entire waste treatment process planned by the notifier until such time as the waste no longer poses a threat to health or to the environment. The Community legislature therefore intended that prior to carrying out the planned shipment all the competent authorities should be informed of the planned recovery process up until its completion<sup>33</sup>. I can see no use for such information other than to allow the competent authorities to assess the conditions in which the recovery is to be effected and, where

g 28 For example, ‘conformément à la directive 75/442/CEE et notamment à son article 7’ in French; ‘gemäß der Richtlinie 75/442/EWG, insbesondere auf Artikel 7’ in German; ‘con arreglo a lo dispuesto en la Directiva [75]/442/CEE, en particular su artículo 7’ in Spanish; ‘conformemente alla direttiva 75/442/CEE, in particolare all’articolo 7, oppure’ in Italian, etc.

h 29 See the judgment of the court in *DaimlerChrysler AG v Land Baden-Württemberg* Case C-324/99 [2002] QB 1102, [2001] ECR I-9897 (para 50).

30 See the first indent of art 6(5).

31 See footnote above (second and third indents).

i 32 Those details are set out in the fourth to the eighth indents of art 6(5) of the regulation. The notifier must state the identity of the consignee of the waste, the location of the recovery centre and the type and duration of the authorisation under which the centre operates; the recovery operations in Annex IIB to the directive; the planned method of disposal for the residual waste after recycling has taken place, and the amount of the recycled material in relation to the residual waste, as well as the estimated value of the recycled material. Moreover, the fourth indent states that ‘[t]he centre must have adequate technical capacity for the recovery of the waste in question under conditions presenting no danger to human health or to the environment’.

33 For the purposes of ensuring that the waste treatment process will be completed without harming health or the environment, art 27 of the regulation provides that all shipments of waste falling within the scope of that regulation are to be subject to the provision of a financial guarantee or

necessary, to object to such a shipment if they take the view that the conditions of its recovery could harm human health or the environment. a

39. In support of that analysis, it must also be pointed out that the regulation contains several provisions which unambiguously confirm that the competent authorities are entitled to review the conditions in which waste is to be recovered and to object to a planned shipment on grounds relating to the planned recovery<sup>34</sup>. Accordingly, the fifth indent of art 7(4)(a) itself contains a ground for objection which expressly relates to the recovery of waste<sup>35</sup>. Similarly, art 26(1)(e) provides that any shipment of waste which results in disposal or recovery in contravention of Community or international rules constitutes illegal traffic<sup>36</sup>. b

40. Finally, it is appropriate to refer to the objectives of the regulation, set out in the ninth recital in the preamble thereof. According to that recital, the purpose of notification of a planned shipment is to inform the competent authorities not only of movements of waste, but also of the disposal and recovery of it, so that those authorities may take all necessary measures for the protection of human health and the environment. That recital thereby confirms that the Community legislature, by harmonising the conditions and procedural rules to which transboundary movements of waste in the Community are subject, did not aim to ensure the protection of health and the environment solely in the context of the transportation of waste, but also aimed to attain that objective in the context of the treatment of waste by disposal or recovery. Pursuit of that objective would thus be compromised if the competent authorities were precluded from raising an objection to a shipment of waste for recovery where they establish, following notification of a planned shipment, that the planned recovery may harm human health or the environment. c

## 2. Second indent of art 7(4)(a) d

41. Interpretation of this provision raises more difficulties. Like Wood Trading, the Commission of the European Communities shares the doubts e

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insurance covering costs for disposal and recovery, that guarantee being returned when proof has been furnished that the waste has reached its destination and has been disposed of or recovered in an environmentally sound manner. f

<sup>34</sup> For example, art 9 of the regulation provides that the competent authorities having jurisdiction over specific recovery facilities may decide, notwithstanding art 7, that they will not raise objections concerning shipments of certain types of waste to a specific recovery facility. See also art 34 of the regulation. g

<sup>35</sup> According to that provision, an objection may be raised 'if the ratio of the recoverable and non-recoverable waste, the estimated value of the materials to be finally recovered or the cost of the recovery and the cost of the disposal of the non-recoverable fraction do not justify the recovery under economic and environmental considerations'. h

<sup>36</sup> At the hearing, the parties were invited to give their views on the issue of whether the provisions of art 26(1)(e) of the regulation are also applicable in circumstances such as those in the main proceedings. Like the majority of them, with the exception of *Sonderabfall-Management-Gesellschaft Rheinland-Pfalz mbH*, I take the view that that is not so. In the judgment in the *ASA* case, cited above, the court held that art 26 of the regulation is one basis on which the competent authorities may be required to raise an objection to a planned shipment on the ground of an incorrect classification (para 41). In the light of the order of 27 February 2003 in *Oliehandel Koeweit BV v Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer* Joined cases C-307-311/00 [2003] ECR I-1821, the same art 26 must also be applied where the treatment of waste at issue was covered by a measure of secondary legislation. However, where the objection of the competent authority of dispatch is based on the grounds for refusal expressly referred to by art 7(4) of the regulation, as in the present case, or on art 4(3) thereof, I take the view that the provisions of art 26 of the regulation are irrelevant. i



a expressed by the national court and takes the view that, in the light of the wording of the second indent of art 7(4)(a) and the content of art 7(4)(b) of the regulation, the second indent of art 7(4)(a) cannot serve as the legal basis for an objection to the planned recovery in the state of destination. That is not my view. Like the Danish and Austrian governments and Sonderabfall-Management-Gesellschaft Rheinland-Pfalz mbH, I consider that the second  
b indent of art 7(4)(a) of the regulation also allows the competent authorities to raise an objection to a shipment of waste for recovery, that is to say, where the planned recovery contravenes national laws and regulations relating to environmental protection, public order, public safety or health protection.

42. Firstly, in my view there is nothing in the wording of that provision  
c which makes it possible to exclude that interpretation. It should be borne in mind that the second indent of art 7(4)(a) of the regulation states that—

[t]he competent authorities of destination and dispatch may raise  
d reasoned objections to the planned shipment ... if it is not in accordance with national laws and regulations relating to environmental protection, public order, public safety or health protection.'

With regard, firstly, to the term 'shipment', I have already pointed out, in my assessment of the first indent of art 7(4)(a) of the regulation, why, in my view, that provision must not be interpreted as meaning that the objections listed in that article should relate solely to the transportation of waste. I then pointed  
e out that the second indent of art 7(4)(a) of the regulation refers in very general terms to national laws and regulations relating to environmental protection, public order, public safety or health protection, without specifying that those national laws and regulations could be applied only to the transportation of waste and not to its recovery.

43. Secondly, it seems to me that the argument based on art 7(4)(b) of the  
f regulation, which, it should be borne in mind, states that the competent authorities of destination and dispatch may raise reasoned objections to a planned shipment of waste only on the basis of the provisions of the second, third and fourth indents of art 7(4)(a), and therefore not the first and fifth indents thereof, is not conclusive. Admittedly, we have seen that the fifth indent includes a ground for objection expressly relating to the recovery of waste and  
g I have pointed out how the first indent also allowed an objection to be raised based on the planned recovery. Nevertheless, for the following reasons I am not convinced that art 7(4)(b) of the regulation demonstrates that the provisions of the second indent of art 7(4)(a) of the regulation do not also allow objections to be raised to the planned recovery.

44. Firstly, I do not concur with the view that the competent authorities  
h of transit do not have the same interest as the other competent authorities in raising objections based on the conditions of recovery. Pollution recognises no frontiers. Any air or water pollution resulting from the recovery of waste effected in the state of destination in conditions harmful to the environment could therefore affect the state or states through which the waste is to be  
i transported as much as the state of dispatch, possibly more so in view of their closer geographical proximity to the state of destination. That is why I take the view that limiting, in art 7(4)(b) of the regulation, the grounds for objection which may be raised by the competent authorities of transit may be the result not of the fact that those authorities have less interest in the recovery being effected in a way which is not harmful to human health or the environment,

but rather of the Community legislature's aim to give those authorities less responsibility for monitoring the carrying out of that recovery.

45. In other words, under art 7(4)(b) of the regulation the states of transit should have less responsibility for monitoring shipments of waste for recovery than the competent authorities of dispatch and destination<sup>37</sup>. The fact that the grounds for objection which may be raised by the authorities of transit do not include those referred to in the first and fifth indents of art 7(4)(a) could therefore mean that the authorities of transit, unlike the competent authorities of dispatch and destination, are not bound to ensure that the waste will be treated in accordance with the directive in the state of destination (first indent) or that the recovery is actually justified under economic and environmental considerations (fifth indent). Nevertheless, that does not necessarily mean that the states of transit are precluded from raising an objection to a shipment of waste for recovery if the planned recovery is not in accordance with national laws and regulations relating to environmental protection, public order, public safety or health protection. To that extent, the second indent of art 7(4)(a) of the regulation thus allows the competent authorities of dispatch, destination and transit to raise objections to a shipment of waste on the basis of the planned recovery.

46. Moreover, it is common ground that the system established by the regulation provides that before any planned shipment of waste for recovery falling within its scope is carried out all the competent authorities of the relevant states, including the competent authorities of transit, must be notified thereof and that all those authorities must receive the same information<sup>38</sup>. By establishing such a system, the Community legislature intended to enable each of those authorities to assess the entire operation and not only that part which takes place within their own states. In other words, it is for each authority to ensure that the planned shipment of waste, taken as a whole, that is to say from the point of departure of the waste in the state of dispatch until the completion of its treatment in the state of destination, will not harm health or the environment. Therefore, it is only logical that the competent authorities of transit also should be able to raise an objection to a shipment of waste relating to the planned recovery on the basis of the second indent of art 7(4)(a).

47. For that reason, I take the view that an objection to a planned shipment of waste relating to its recovery may also be raised on the basis of the second indent of art 7(4)(a) of the regulation.

48. In the light of the foregoing, I propose that the court should answer the first and fourth questions referred to the effect that art 7(4)(a) of the regulation must be interpreted as meaning that objections to a shipment of waste for recovery relating to the conditions in which that recovery is to be effected may be based, on the one hand, on the first indent of that provision, on the ground that the planned recovery contravenes the requirement arising from art 4 of the directive that waste must be recovered without endangering human health and without harming the environment and, on the other hand, on the second indent of that provision, on the ground that the planned recovery contravenes national laws and regulations relating to environmental protection, public order, public safety or health protection.

<sup>37</sup> The responsibility of the competent authority of destination stems logically from the fact that recovery takes place within its territorial jurisdiction. That of the competent authority of dispatch stems from the fact that the waste was produced within its jurisdiction. I will return to that point under heading B of this opinion.

<sup>38</sup> See art 6 of the regulation.

a B—Whether it is possible for the competent authority of dispatch to raise objections relating to the planned recovery

49. By its second question and the first part of the fifth question referred, the national court asks whether the provisions of the first and second indents of art 7(4)(a) of the regulation are to be interpreted as meaning that the competent authority of dispatch may raise an objection to a shipment of waste relating to the conditions in which that recovery is to be effected.

b 50. In contrast to Wood Trading, but like the other interveners, I take the view that the competent authority of dispatch has the power to raise an objection relating to the planned recovery in the state of destination. That view is supported, firstly, by the wording of art 7(4)(a) of the regulation which expressly provides that '[t]he competent authorities of destination and dispatch may raise reasoned objections to the planned shipment' on the grounds set out in that provision. The above wording thus confers on those two authorities, without drawing any distinction between them and in unequivocal terms, the power to raise objections to a planned shipment of waste on the grounds set out in that provision and, in particular, on those provided for in the first and second indents thereof.

c 51. That literal interpretation is also supported by the system established by the regulation. We have seen that the regulation lays down that all the relevant competent authorities must assess each planned shipment as a whole, from the departure of the waste from the state of dispatch to the completion of its treatment in the state of destination. In order to ensure the protection of human health and the environment, the Community legislature preferred to establish a system in which all the competent authorities are involved in the supervision of the planned shipment, thereby running the risk that those authorities may make different assessments of the same planned shipment<sup>39</sup>, rather than to limit the control to be effected by each of them to the part of the shipment which is to take place in its own national territory. According to the logic underlying the system established by the regulation, any transboundary movement of waste within the Community which falls within its scope is a matter for all of the relevant competent authorities. It is therefore inherent in that system that the competent authority of a member state must assess whether the planned shipment could harm health and the environment in the territory of another member state. The competent authority of dispatch is therefore entitled to object to a shipment of waste where the planned recovery is capable of adversely affecting the protection of health or the environment, even though that recovery is to take place in the territory of the member state of destination.

f 52. The competent authority of dispatch's power is also supported within the system established by the regulation, if support were needed, by the fact that the state in whose territory the waste is generated has special responsibility with regard to its treatment. That special responsibility may be the corollary of the obligation imposed on the member states both by international conventions and by Community rules designed to reduce the generation of waste to a minimum<sup>40</sup>. That responsibility is, for example, reflected in the principle of self-sufficiency with regard to waste for disposal. It is not

39 The court held that the risk of different assessments regarding classification of the planned shipment is inherent in the system established by the regulation (see the judgment in the ASA case, cited above (para 44) and the order in the *Oliehandel Koeweit* case, cited above (para 102)).

40 See art 4(2)(a) of the Basel Convention and the fourth recital in the preamble to the directive.



discharged until the waste has been treated in accordance with the requirements for protecting human health and the environment. Accordingly, the state dispatching the waste is required to take the waste back where it cannot be disposed of or recovered in the state of destination in accordance with the prescribed conditions<sup>41</sup>. Responsibility is also expressly laid down by the regulation in respect of shipments of waste to destinations outside the Community for the purposes of disposal or recovery there<sup>42</sup>. a

53. Furthermore, I am inclined to consider that the competent authority of dispatch is not merely able but rather obliged to raise such an objection where it takes the view that the planned recovery in the state of destination could harm human health or the environment. Indeed, I do not take the view that, by stating in art 7(4)(a) of the regulation that the competent authorities of destination and dispatch 'may raise reasoned objections' to the planned shipment as provided for by that provision, the legislature intended to confer on those authorities power merely to be exercised by them at their discretion in particular cases in which the planned shipment may harm human health or the environment. I must say that it would be difficult to justify the obligatory nature of a refusal in some of the situations set out in the five indents of that provision in the light of the objectives of the regulation<sup>43</sup>. b

54. However, the regulation includes other provisions which make it possible to take the view that the obligation for the competent authorities to object to a shipment of waste which could harm human health or the environment is mandatory in nature. For example, leaving aside art 26 of the regulation, art 30 thereof provides: 'Member States shall take the measures needed to ensure that waste is shipped in accordance with the provisions of this Regulation.' Similarly, art 34(1) provides that irrespective of the point of disposal or recovery of the waste, the producer of that waste is to take all the necessary steps to dispose of or recover or to arrange for disposal or recovery of the waste so as to protect the environment, and art 34(2) provides that it is for the member states to take all necessary steps to ensure that the obligations laid down in para (1) are carried out. It therefore seems logical to me, in the light of those provisions, which are drafted in mandatory terms, to take the view that the competent authorities of dispatch and destination are actually required to object to a shipment of waste on the basis of the provisions of the first and second indents of art 7(4)(a) where they take the view that the planned shipment could harm human health or the environment. c

55. That interpretation is also supported by the objective of the regulation. We have seen that, as follows from the ninth recital in its preamble and as the court has stated several times, the fundamental objective of the regulation is to ensure compliance with the requirements for protecting human health and the environment<sup>44</sup>. The court did not adopt a different position in the judgment in the *Dusseldorp* case, cited above, since it held that waste for recovery should be able to move within the Community provided that it poses no threat to the d

41 See art 25 of the regulation. e

42 See arts 14(2)(b) and 16(3)(b) of the regulation. f

43 For example, the third indent refers to cases where the notifier or the consignee has previously been found guilty of illegal trafficking; similarly, the fifth indent refers to cases where the planned recovery is not justified under economic and environmental considerations. g

44 See the judgments in *Parliament v Council*, cited above (para 18) and in *European Commission v Germany* Case C-389/00 [2003] ECR I-2001 (para 34). h

a environment<sup>45</sup>. The regulation therefore seeks to ensure that no shipment of waste is carried out which might jeopardise the pursuit of those objectives. The obligation thereby imposed on the competent authorities to object to a shipment of waste which could harm human health or the environment also corresponds to that laid down in art 4 of the directive, which is binding on the member states as to that same objective<sup>46</sup>. It is not logical, in my view, in the light of the fact that art 4 of the directive requires the member states to take the necessary measures to ensure that waste is recovered or disposed of without harming human health or the environment, to interpret the contested provisions of the regulation as granting the competent authorities of dispatch and destination a mere power, free of any obligation.

c 56. Moreover, as we shall see under heading C of this opinion, national rules which may legitimately serve as the basis for an objection by the competent authority of dispatch to a planned shipment of waste for recovery must, in my view, respect the principle of proportionality, and must therefore not go beyond what is necessary for the protection of human health and the environment. Furthermore, any risk assessment should be made on a scientific rather than an arbitrary basis. It is also in the light of those conditions that I take the view that a competent authority of dispatch which establishes on the basis of such rules that a planned recovery could harm human health or the environment should be required to object to it under the provisions of the first and second indents of art 7(4)(a) of the regulation.

e 57. Requiring the competent authority of dispatch and the competent authority of destination to do so would also be in line with the court's body of case law relating to compliance with the requirements of the regulation. Indeed, it follows from that case law that, where the general scheme of the regulation is infringed because the classification of the planned shipment is incorrectly classified, it falls to each competent authority, in particular the competent authority of dispatch, to object to that shipment<sup>47</sup>. Similarly, the court has held that where a shipment of waste results in disposal or recovery in contravention of specific Community rules laying down the conditions of disposal of a hazardous product, the member states have circumscribed powers, that is to say they are required under art 26 of the regulation to take any appropriate legal action to prohibit and punish such traffic<sup>48</sup>.

g 58. I therefore propose that the answer to the second question and the first part of the fifth question referred for a preliminary ruling should be that the provisions of the first and second indents of art 7(4)(a) of the regulation must be interpreted as meaning that the competent authority of dispatch must raise an objection to a shipment of waste relating to the conditions in which that recovery is to be effected where it takes the view that the planned recovery in the state of destination could harm human health or the environment.

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45 See para 33.

46 See the judgment in *European Commission v Italy* Case C-365/97 [1999] ECR I-7773 (para 67).

47 See the judgments in the *ASA* case, cited above (para 40), *European Commission v Germany* Case C-228/00 [2003] ECR I-1439 (para 33) and in *European Commission v Luxembourg* Case C-458/00 [2003] ECR I-1553 (para 21).

48 See the order in the *Oliehandel Koeweit* case, cited above (para 117).

*C—The right of the competent authority of dispatch to base such objections on the rules applicable in its own state* a

59. By its third question and the last part of the fifth question referred, the national court essentially asks whether the first and second indents of art 7(4)(a) of the regulation are to be interpreted as meaning that the competent authority of dispatch may base its objection to the planned recovery in the state of destination on the standards or on the national laws and regulations applicable in its own state, even where they are stricter than those applicable in the state of destination. b

60. As the starting point for my reasoning, I shall work on the assumption that, as in the circumstances of this case, the conditions of recovery of the waste in question have not been harmonised at Community level. In such a situation, each member state must, under art 4 of the directive, take the necessary measures under national law to ensure that waste is recovered without endangering human health and without using processes or methods which could harm the environment. Although it is binding on the member states as to the objective to be achieved, that article does not specify the actual content of the measures which must be taken and it leaves to the member states a margin of discretion in assessing the need for such measures<sup>49</sup>. c  
Furthermore, under their original powers in the field of environmental protection, member states may have adopted rules or legislation concerning the conditions in which particular kinds of waste are to be recovered. The questions referred by the national court therefore seek to ascertain whether the competent authority of dispatch is entitled to base an objection to a planned shipment on its national rules, even where they are stricter than those applicable in the state of destination. d

61. In the light of the arguments put forward in the context of examining the preceding questions and the answers which I have proposed to the court, I take the view that it is in fact where the standards of protection applicable in the member state of dispatch are higher than those applicable in the state of destination that the competent authority of dispatch must be able to raise an objection to the planned shipment on the basis of its national rules. It is actually in such circumstances that the power thus granted to the competent authority of dispatch is most useful, since if the planned recovery also proved to be contrary to the rules applicable in the state of destination, the competent authority of that state would itself have to object to it. It is therefore where, as in the present case, the recovery of the waste at issue would be authorised under the rules of the state of destination but is prohibited by those applicable in the state of dispatch that the regulation should allow the highest standards of protection to prevail. e

62. Such an interpretation of the provisions of art 7(4)(a) of the regulation is also supported by the objectives of Community environmental policy, of which the regulation forms part<sup>50</sup>. We have seen that that policy aims to achieve a high level of protection. The importance of that objective is reflected, on the one hand, by the fact that it is set out in art 2 EC, and in later articles of the Treaty, as well as in the directive which constitutes the basic text relating to waste management, and even in the fifth recital in the preamble to the regulation. It is also included in the provisions of art 176 EC, which confers on the member states, even following the adoption of Community measures, the f  
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49 See the judgment in *Commission v Italy*, cited above (para 67).

50 See the judgment in *Parliament v Council*, cited above (para 23).



a right to adopt more stringent protective measures, and measures providing for a safeguard clause. The fact that the planned recovery is authorised in the state of destination cannot therefore prevent the competent authority of dispatch from objecting to it where the latter takes the view that such recovery is contrary to its national rules. The fact that the regulation seeks to attain a high level of protection justifies, on the contrary, allowing the competent authority  
 b of dispatch to rely on its stricter national rules for the purposes of assessing whether the planned recovery could harm human health or the environment. I concur, in that respect, with the position of the Danish and Austrian governments that were this not so it would encourage shipments of waste to be made the treatment centres subject to the least stringent rules, thereby  
 c leading to a downward trend in the conditions of recovery of the waste in question.

63. Nevertheless, as I have pointed out, that right of the competent authority of dispatch cannot be unconditional. It must be taken into account that the regulation provides that waste must be able to move freely within the Community<sup>51</sup>. Such freedom of movement is intended to give effect to the principle laid down in the regulation of giving priority to the recovery of waste. The difference in arrangements thus established in the regulation between waste for disposal, which in principle must be disposed of near to where it is produced, and waste for recovery is justified by the fact that the latter serves a useful purpose. It may replace other materials and provide, for example, the raw material for certain industries, thereby making it possible to  
 d conserve natural resources<sup>52</sup>.

64. Moreover, as the national court points out, the court has held that the regulation lays down all the conditions and the procedural rules to which shipments of waste in the Community are subject, so that any national measure relating to such shipments must be assessed in the light of the provisions of the regulation and not the provisions of arts 28 to 30 EC (formerly arts 30 to 36 of the EC Treaty)<sup>53</sup>. Under the general principle of proportionality, it is therefore important that national measures adopted on the basis of the provisions of the first and second indents of art 7(4)(a) of the regulation are appropriate to achieve the objectives of protection pursued and do not go beyond what is necessary to achieve them<sup>54</sup>. It follows that that condition would not be satisfied if the protection of human health and the  
 f environment could be as effectively ensured by less restrictive measures. It is for the national court before which the action to challenge the objection raised by the competent authority of dispatch is heard to ascertain whether the principle of proportionality is respected<sup>55</sup>.

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51 See the judgment in the *Dusseldorp* case, cited above (para 33).

52 See the order in the *Oliehandel Koeweit* case, cited above (para 97).

53 See the judgment in the *DaimlerChrysler* case, cited above (paras 41–43).

54 See, to that effect, the judgments in *Maizena Gesellschaft mbH v Bundesanstalt für landwirtschaftliche Marktordnung* (BALM) Case 137/85 [1987] ECR 4587 (para 15), *ADM Ölmühlen v Bundesanstalt für landwirtschaftliche Marktordnung* (BALM) Case C-339/92 [1993] ECR I-6473 (para 15), *Käserer Champignon Hofmeister GmbH & Co KG v Hauptzollamt Hamburg-Jonas* Case C-210/00 [2002] ECR I-6453 (para 59) and *R (on the application of British American Tobacco (Investments) Ltd (supported by Japan Tobacco Inc and anor intervening)) v Secretary of State for Health* Case C-491/01 [2002] ECR I-11453 (para 122).

55 See the judgment in *Snellers Autos BV v Algemeen Directeur van de Dienst Wegverkeer* Case C-314/98 [2000] ECR I-8633 (para 59).

65. In the present case, the national court has not raised any question on that point. Nor has it supplied a great deal of information on the provisions of national law on the basis of which the competent authority of dispatch objected to the shipment at issue or on the reasons leading to the adoption of those provisions. None the less, I take the view that providing the following information will also help to resolve the dispute in the main proceedings.

66. Firstly, as the Commission has stated, it would seem to be essential that the rules applied by the competent authority of dispatch should be based on a scientific assessment of the risk. It would be contrary to the regulation for the competent authority of dispatch to prevent a shipment of waste which could be effectively recovered in the state of destination in accordance with its law on the basis of general considerations or a purely hypothetical risk assessment<sup>56</sup>. With regard to the recovery of waste, whether there is any risk to human health or the environment should be assessed, as in matters relating to the free movement of foodstuffs<sup>57</sup>, in the light of international scientific research and the work of the Community's scientific committees<sup>58</sup>. Nevertheless, that requirement cannot preclude the application of the precautionary principle, which also constitutes one of the principles upon which environmental law is based. Accordingly, in the event that such an assessment reveals that there remains scientific uncertainty as to the existence or extent of genuine risks to public health, a member state must be able, in accordance with the precautionary principle, to take protective measures without having to wait until the reality and seriousness of those risks become fully apparent<sup>59</sup>.

67. Secondly, in order to check compliance with the principle of proportionality, the competent authority of dispatch must assess, in every case, whether the planned recovery in the state of destination, although regulated by more flexible rules, is none the less capable of providing protection comparable to that pursued by its national rules. That could be so, in the circumstances at issue, if, for example, the methods of producing chipboard used by the undertaking which was to be the consignee of the waste in Italy were as effective in protecting the workers responsible for that recovery and removing the arsenic from that chipboard or reducing the arsenic content below the threshold set by the German rules.

68. Unlike *Wood Trading*, I do not take the view that such an assessment is unfeasible in practice. We have seen that the consignment note which supports the notification and which must be forwarded to the competent authority of dispatch and the other competent authorities must contain a number of details relating to the recovery arrangements. Furthermore, under art 6(4) and (6) of the regulation, the competent authority of dispatch may ask the notifier for additional information and documents, and the contract concluded with the undertaking which is to be the consignee for recovery of the waste. Moreover,

<sup>56</sup> See, to that effect, the judgment in *European Commission v Denmark* Case C-192/01 [2003] ECR I-9693 (para 48).

<sup>57</sup> See the judgment in *Criminal proceedings against Hahn* Case C-121/00 [2002] ECR I-9193 (para 40).

<sup>58</sup> In that regard, it is appropriate to point out that the conditions governing the use of arsenic for preserving wood are, following a risk assessment referred to the Scientific Committee on Toxicity, Ecotoxicity and the Environment, the subject matter of very restrictive measures in Commission Directive (EC) 2003/2 (relating to restrictions on the marketing and use of arsenic (tenth adaptation to technical progress of Council Directive (EEC) 76/769)) (OJ 2003 L4 p 9).

<sup>59</sup> See, to that effect, the judgments in *R v Ministry of Agriculture, Fisheries and Food, ex p National Farmers' Union* Case C-157/96 [1998] ECR I-2211 (para 63) and *Commission v Denmark*, cited above (para 49).

a the notifier, who must have concluded that contract, should logically be able to demonstrate that the planned recovery fulfils the requirements laid down by the rules applicable in the state of dispatch. In that regard, it should be possible, where necessary, for an exchange of views to take place between the competent authority of dispatch and the notifier. Such checks and an exchange of views could take place all the more easily where, as in the present case, the state of dispatch has provided, under arts 3(8) and 6(8) of the regulation, that notification of the planned shipment to the other relevant authorities and the consignee is to be made by the competent authority of dispatch, since in that case the authority would have an additional period of time in which to forward it<sup>60</sup>.

c 69. At the end of this analysis, it is again appropriate to add that the answer which I propose to provide to the questions examined would not, on the face of it, be any different if the recovery of the waste in question had been the subject matter of a harmonisation measure at Community level and if, under art 176 EC, the member state of dispatch had maintained or adopted more stringent protective measures. In such a situation, the competent authority of dispatch could also, in my view, raise an objection to a planned shipment which contravened its national rules provided, in that case too, that it respected the principle of proportionality.

d 70. In the light of all those considerations, I propose that the answer to the third question and the last part of the fifth question referred should be that the first and second indents of art 7(4)(a) of the regulation must be interpreted as meaning that the competent authority of dispatch may base its objection to the planned recovery in the state of destination on the standards or on the national laws and regulations applicable in its own state, even where they are stricter than those applicable in the state of destination, provided that it respects the principle of proportionality.

## f V—CONCLUSION

71. In the light of the foregoing considerations, I propose that the Court of Justice should give the following answers to the questions referred by the Oberverwaltungsgericht Rheinland-Pfalz:

g ‘(1) Article 7(4)(a) of Council Regulation (EEC) No 259/93 of 1 February 1993 on the supervision and control of shipments of waste within, into and out of the European Community, as amended by Commission Decision 98/368/EC of 18 May 1998, must be interpreted as meaning that objections to a shipment of waste for recovery relating to the conditions in which that recovery is to be effected may be based, on the one hand, on the first indent of that provision, on the ground that the planned recovery contravenes the requirement arising from Article 4 of Council Directive 75/442/EEC on waste of 15 July 1975, as amended by Council Directive 91/156/EEC of 18 March 1991, and by Commission Decision

i <sup>60</sup> In the present case, the competent authority of dispatch received the consignment note on 23 November 1999 but did not forward it to the competent authority of destination until 1 February 2000. I have not found in the order for reference any explanation for the delay by the competent authority of dispatch in making that notification. As stated in my opinion of 15 July 2004 in *Siomab SA v Institut bruxellois pour la gestion de l’environnement* Case C-472/02 (2004) Transcript (opinion), 15 July, (2004) Transcript (judgment), 19 October, the period within which the competent authority of dispatch must forward the notification to the other competent authorities and the consignee should not exceed the period allotted to the competent authority of destination by art 7(2) of the regulation.



96/350/EC of 24 May 1996, that waste must be recovered without endangering human health and without harming the environment and, on the other hand, on the second indent of that provision, on the ground that the planned recovery contravenes national laws and regulations relating to environmental protection, public order, public safety or health protection. a

(2) The competent authority of dispatch must raise an objection to a shipment of waste relating to the conditions in which that recovery is to be effected where it takes the view that the planned recovery in the State of destination could harm human health or the environment. b

(3) The competent authority of dispatch may base that objection on the standards or on the national laws and regulations applicable in its own State, even where they are stricter than those applicable in the State of destination, provided that it respects the principle of proportionality.' c

16 December 2004. **The COURT OF JUSTICE (First Chamber)** delivered the following judgment.

1. The request for a preliminary ruling concerns the interpretation of the first and second indents of art 7(4)(a) of Council Regulation (EEC) 259/93 (on the supervision and control of shipments of waste within, into and out of the European Community) (OJ 1993 L30 p 1), as amended by Commission Decisions (EC) 98/368 (OJ 1998 L165 p 20) and (EC) 1999/816 (OJ 1999 L316 p 45) (hereinafter the regulation). d

2. That request was submitted in the course of an action between EU-Wood-Trading GmbH, established in Bürstadt, Germany (hereinafter EU-Wood-Trading) against Sonderabfall-Management-Gesellschaft Rheinland-Pfalz mbH, regarding objections raised by the latter against the shipment of 3,500 tonnes of wood waste which EU-Wood-Trading was envisaging making to Italy. e

## LEGAL FRAMEWORK

### *Community legislation*

3. The essential objective of Council Directive (EEC) 75/442 (on waste) (OJ 1975 L194 p 39), as amended by Council Directive (EEC) 91/156 (OJ 1991 L78 p 32) and by Commission Decision (EC) 96/350 (OJ 1996 L135 p 32) (hereinafter the directive) is the protection of human health and the environment against harmful effects caused by the collection, transport, treatment, storage and tipping of waste. In particular, the fourth recital in the preamble to that directive states that the recovery of waste and the use of recovered materials should be encouraged in order to conserve natural resources. f

4. Article 1(e) of the directive defines 'disposal' as 'any of the operations provided for in Annex II, A' and art 1(f) defines 'recovery' as 'any of the operations provided for in Annex II, B'.

5. The first subparagraph of art 4 of the directive provides:

'Member States shall take the necessary measures to ensure that waste is recovered or disposed of without endangering human health and without using processes or methods which could harm the environment, and in particular: i

- without risk to water, air, soil and plants and animals,
- without causing a nuisance through noise or odours,

a —without adversely affecting the countryside or places of special interest.’

6. Under art 7(1) of the directive the competent authorities designated by the member states must, in order to attain the objectives referred to in, among others, art 4, draw up as soon as possible one or more waste management plans. Under art 7(3) member states may take the measures necessary to prevent movements of waste which are not in accordance with their waste management plans.

b 7. The regulation governs, in particular, the supervision and control of shipments of waste between member states.

8. The ninth recital in the preamble to the regulation states:

c ‘... shipments of waste must be subject to prior notification to the competent authorities enabling them to be duly informed in particular of the type, movement and disposal or recovery of the waste, so that these authorities may take all necessary measures for the protection of human health and the environment, including the possibility of raising reasoned objections to the shipment ...’

d 9. Article 2 of the regulation provides:

‘For the purposes of this Regulation ...

e (b) *competent authorities* means the competent authorities designated by either the Member States in accordance with Article 36 or non-Member States;

(c) *competent authority of dispatch* means the competent authority, designated by the Member States in accordance with Article 36, for the area from which the shipment is dispatched ...

f (d) *competent authority of destination* means the competent authority, designated by the Member States in accordance with Article 36, for the area in which the shipment is received ...

(e) *competent authority of transit* means the single authority designated by Member States in accordance with Article 36 for the State through which the shipment is in transit ...

g (g) *notifier* means any natural person or corporate body to whom or to which the duty to notify is assigned, that is to say the person ... who proposes to ship waste or have waste shipped ...

(i) *disposal* is as defined in Article 1(e) of Directive 75/442/EEC ...

(k) *recovery* is as defined in Article 1(f) of Directive 75/442/EEC ...’

h 10. Title II of the regulation, entitled ‘Shipments of waste between Member States’, contains, among other things, two separate chapters, one dealing with the procedure which applies to shipments of waste for disposal (Chapter A, arts 3 to 5) and the other dealing with the procedure which applies to shipments of waste for recovery (Chapter B, arts 6 to 11).

i 11. Under the provisions of art 6(1) of the regulation, where the waste producer or holder intends to ship waste for recovery listed in Annex III to the regulation (amber waste list) from one member state to another and/or pass it in transit through one or several other member states, he shall notify the competent authority of destination and send copies of the notification to the competent authorities of dispatch and transit and to the consignee.

12. Under art 6(3) of the regulation, notification is to be effected by means of the consignment note which is to be issued by the competent authority

of dispatch. Article 6(5) specifies the information which the notifier must supply on the consignment note, among which is information concerning the operations involving recovery as contained in Annex IIB to the directive. a

13. Under art 6(6) of the regulation, the notifier must conclude a contract with the consignee for the recovery of the waste and a copy of this contract must be supplied to the competent authority at its request.

14. Under art 6(8) of the regulation, a competent authority of dispatch may, in accordance with national legislation, decide to transmit the notification itself instead of the notifier to the competent authority of destination, with copies to the consignee and to the competent authority of transit. b

15. Article 7(2) of the regulation lays down the time limit and the rules and procedures with which the competent authorities of destination, dispatch and transit must comply to object to notified planned shipments of waste for recovery. That provision provides, in particular, that objections must be based on art 7(4). c

16. Article 7(4) of the regulation provides:

‘(a) The competent authorities of destination and dispatch may raise reasoned objections to the planned shipment: d

—in accordance with Directive 75/442/EEC, in particular Article 7 thereof, or

—if it is not in accordance with national laws and regulations relating to environmental protection, public order, public safety or health protection, or

—if the notifier or the consignee has previously been guilty of illegal trafficking. In this case, the competent authority of dispatch may refuse all shipments involving the person in question in accordance with national legislation, or e

—if the shipment conflicts with obligations resulting from international conventions concluded by the Member State or Member States concerned, or f

—if the ratio of the recoverable and non recoverable waste, the estimated value of the materials to be finally recovered or the cost of the recovery and the cost of the disposal of the non recoverable fraction do not justify the recovery under economic and environmental considerations.

(b) The competent authorities of transit may raise reasoned objections to the planned shipment based on the second, third and fourth indents of (a).’ g

17. Article 26 of the regulation provides:

‘1. Any shipment of waste effected ...

(c) with consent obtained from the competent authorities concerned through falsification, misrepresentation or fraud; or ... h

(e) which results in disposal or recovery in contravention of Community or international rules ...

shall be deemed to be illegal traffic.’

18. Under art 30(1) of the regulation: i

‘Member States shall take the measures needed to ensure that waste is shipped in accordance with the provisions of this Regulation. Such measures may include inspections of establishments and undertakings, in accordance with Article 13 of Directive 75/442/EEC, and spot checks of shipments.’



a 19. Article 34 of the regulation provides:

‘1. Without prejudice to the provisions of Article 26 and to Community and national provisions concerning civil liability and irrespective of the point of disposal or recovery of the waste, the producer of that waste shall take all the necessary steps to dispose of or recover or to arrange for disposal or recovery of the waste so as to protect the quality of the environment ...

b 2. Member States shall take all necessary steps to ensure that the obligations laid down in paragraph 1 are carried out.’

20. Article 36 of the regulation provides:

c ‘Member States shall designate the competent authority or authorities for the implementation of this Regulation. A single competent authority of transit shall be designated by each Member State.’

#### *National legislation*

d 21. Paragraph 5(3) of the Gesetz zur Förderung der Kreislaufwirtschaft und Sicherung der umweltverträglichen Beseitigung von Abfällen (Law to promote recycling and to ensure environmentally friendly waste disposal) of 27 September 1994 (BGBl 1994 I, p 2705) (hereinafter the Law of 27 September 1994) prohibits any recovery of waste which leads to an increase in the concentration of pollutants in the closed substance cycle.

e 22. For the Land Rhineland-Palatinate, Sonderabfall-Management-Gesellschaft Rheinland-Pfalz mbH is responsible for organising the disposal of toxic waste.

#### THE MAIN PROCEEDINGS AND THE QUESTIONS REFERRED FOR A PRELIMINARY RULING

f 23. On 23 November 1999, EU-Wood-Trading notified Sonderabfall-Management-Gesellschaft Rheinland-Pfalz mbH, as competent authority of dispatch, of its intention to transport 3,500 tonnes of wood waste to the undertaking Frati Luigi de Pomponesco, established in Italy.

g 24. According to that notification, the waste in question consisted, particularly, of treated or painted wood from demolitions, from furniture or from joinery off-cuts. It was intended that it be recovered for the production of chipboard panels.

h 25. The documents annexed to the notification included a description of the recovery operation, statements certifying that the Italian authorities of destination had no objections to the import of that used wood and a laboratory report in which an analysis of the waste showed a lead content of 47 mg per kilogram of dry material.

i 26. By decision of 17 January 2000, the competent authority of dispatch objected to that shipment under the first and second indents of art 7(4)(a) of the regulation. The objection was based on the fact that, in view of the lead content of the waste in question, which exceeded a reference value fixed in a guideline of the Environment Ministry of the Land Rhineland-Palatinate, the recovery of that waste could not be carried out without endangering human health and harming the environment, contrary to the requirements both of the Directive and of the Law of 27 September 1994.

27. EU-Wood-Trading lodged an opposition with the competent authority of dispatch against those objections and produced another analysis of the waste

showing, per kilogram of dry material, a lead content of 23 mg and an arsenic content of 3.4 mg. That opposition was rejected on 5 July 2000. a

28. The action brought against that decision by EU-Wood-Trading before the Verwaltungsgericht (Administrative Court) Mainz, Germany was dismissed by judgment of 16 October 2001. EU-Wood-Trading appealed against that judgment to the Oberverwaltungsgericht (Higher Administrative Court) Rheinland-Pfalz. It claimed, in essence, that the competent authority of dispatch could not raise, against a shipment of waste for recovery, objections which relate, not to the transport of that waste, but to its recovery in another member state. b

29. In those circumstances, the Oberverwaltungsgericht Rheinland-Pfalz, considering that the outcome of the action before it depended on an interpretation of Community law, decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling: c

‘(1) Under the first indent of Article 7(4)(a) of Council Regulation (EEC) No 259/93 ... can an objection to the shipment of waste for recovery be raised on the ground that the planned recovery contravenes the requirement arising from the first paragraph of Article 4 of Directive 75/442 ... for waste to be recovered in a manner which is compatible with health and environmental imperatives? d

(2) If so, can such an objection be raised not only by the authority of destination but also by the authority of dispatch?

(3) If so, is the authority of dispatch entitled to base its assessment of whether the planned recovery of the waste at the place of destination is compatible with health and environmental imperatives on the standards applicable in the State of dispatch even where they are higher than the standards applicable in the State of destination? e

(4) Under the second indent of Article 7(4)(a) of Regulation No 259/93, can an objection to the shipment of waste for recovery be raised on the ground that the planned recovery contravenes national laws and regulations relating to environmental protection, public order, public safety or health protection? f

(5) If so, can the authority of dispatch raise such an objection on the ground that the recovery contravenes national laws and regulations in force at the place of dispatch?’ g

## THE QUESTIONS REFERRED FOR A PRELIMINARY RULING

### *The first and second questions*

30. By its first and second questions, which it is appropriate to consider together, the referring court is asking, in essence, whether the objections to a shipment of waste which the competent authorities of dispatch and destination are entitled to raise under the first indent of art 7(4)(a) of the regulation can be based on considerations connected not only to the actual transport of the waste in each competent authority's area of jurisdiction, but also to the recovery planned for that shipment. h

31. It must be noted at the outset that the regulation does not define the term ‘shipment’. Since other provisions of the regulation, particularly art 7(3), use the expression ‘transport of waste’, the term ‘shipment’ in art 7(4) of the regulation cannot necessarily be confined to the transport of the waste. i

32. It is appropriate, therefore, to place the term ‘shipment’ in its context and to interpret it according to the spirit and purpose of the provisions in question

a in order to determine whether they permit the raising of objections to a shipment of waste based on the recovery planned in the state of destination.

33. It must be observed, as a preliminary point, that the question of shipments of waste is regulated by harmonisation at Community level by the regulation, in order to ensure the protection of the environment (see *DaimlerChrysler AG v Land Baden-Württemberg* Case C-324/99 [2002] QB 1102, b [2001] ECR I-9897 (para 42)).

34. The conditions and procedures laid down by the regulation were adopted with a view to ensuring the protection of the environment, taking account of objectives falling within the scope of environmental policy such as the principles of proximity, priority for recovery and self-sufficiency at Community and national levels. In particular, they enable the member states, for the c purposes of implementing those principles, to take measures to prohibit generally or partially or to object systematically to and oppose shipments of waste which are not in conformity with the directive. The regulation falls within the framework of the environmental policy pursued by the Community and cannot be regarded as seeking to implement the free movement of waste d within the Community (see *European Parliament v EU Council* Case C-187/93 [1994] ECR I-2857 (paras 22, 23)).

35. In the Community system thus established by the regulation, it is clear that the objectives with which the Community legislature invested it seeking the protection of health and the environment could be compromised if, having regard to its purpose, the shipment of waste between member states was not e perceived in its entirety, that is to say from the point of departure of the waste in the state of dispatch to the end of its processing in the state of destination.

36. In that regard, it is clear from the ninth recital in the preamble that the regulation establishes a procedure of prior notification of shipments of waste to the competent authorities enabling them to be duly informed not only of the type and movements of the waste but also of its disposal or recovery, so f that those authorities may take all necessary measures for the protection of human health and the environment, including the possibility of raising reasoned objections.

37. For that purpose, the notifier must, under art 6(5) of the regulation, supply in the consignment note in support of the notification information relating not only to the composition and quantity of the waste for recovery and g the details of its transport, but also to the conditions in which that waste is to be recovered. The Community legislature therefore intended that all the competent authorities be informed of the whole process of treatment of the waste up to the point when it no longer poses a risk to health or the environment.

h 38. Moreover, the regulation contains provisions, other than those at issue in the main action, the implementation of which implies that the authorities with power to control the shipment of waste for recovery may take into account factors relating to its recovery. Thus, the fifth indent of art 7(4)(a) of the regulation gives lack of justification of the recovery by economic and environmental considerations as a ground of objection to such a shipment.

i Likewise, the combined provisions of arts 26(1)(e) and (5) of the regulation provide that the member states are to take all appropriate legal action to prohibit and penalise the illegal traffic constituted by any waste shipment which results in disposal or recovery in contravention of Community or international rules.



39. From those considerations, it is clear that the regulation, taken as a whole, permits all the competent authorities responsible for the control of shipments of waste to take account of matters connected not only to the transport of that waste but also to the conditions in which the waste is recovered. a

40. As regards the first indent of art 7(4)(a) of the regulation, it is appropriate, first, to observe, as did Advocate General Léger in para 36 of his opinion, that those provisions, which provide that the competent authorities of destination and of dispatch may raise reasoned objections to the planned shipment 'in accordance with Directive (EEC) 75/442, in particular Article 7 thereof', must be interpreted as enabling those authorities to raise such objections on the basis of the directive and, in particular, art 7 thereof. b

41. The use of the words 'in particular' before the mention of art 7 of the directive implies that the reference to that article is purely as an example, so that objections may also be raised on the basis of the directive's other provisions. Therefore, the fact that art 7(3) of the directive provides that the member states may take the measures necessary to prevent 'movements' of waste which are not in accordance with their waste management plans cannot limit to the transport alone of such waste the considerations on which the competent authorities may base objections which they raise under the first indent of art 7(4)(a) of the regulation. c

42. Finally, since under art 4 of the directive the member states are to take the measures necessary to ensure that waste is recovered or disposed of without endangering human health and without the use of processes or methods capable of harming the environment, the provisions of the first indent of art 7(4)(a) of the regulation must be interpreted as authorising the competent authorities of destination and of dispatch to raise objections to a shipment of waste for recovery on the ground that the planned recovery disregards the requirements arising from art 4 of the directive. d

43. In view of the foregoing, the reply to the first and second questions must be that the first indent of art 7(4)(a) of the regulation is to be interpreted as meaning that the objections to a shipment of waste for recovery which the competent authorities of dispatch and of destination are empowered to raise may be based on considerations connected not only to the actual transport of the waste in each competent authority's area of jurisdiction but also on the recovery planned for that shipment. e

### *The third question*

44. By its third question, the referring court is asking, in essence, whether the first indent of art 7(4)(a) of the regulation must be interpreted as meaning that the competent authority of dispatch, for the purposes of an objection to a shipment of waste, may, in assessing the effects on health and the environment of the recovery envisaged at the destination, rely on the criteria to which, in order to avoid such effects, the recovery of waste is subject in the state of dispatch, even where those criteria are stricter than those in force in the state of destination. f

45. In that regard, as was stated in para 33 of this judgment, the regulation harmonised the question of shipments of waste in order to ensure the protection of the environment. On the other hand, as Advocate General Léger states in para 60 of his opinion, the requirements governing the recovery of waste have not been the object of harmonisation measures. Therefore, under the first paragraph of art 4 of the directive, the member states must take the g

a necessary measures to ensure that waste is recovered without endangering human health and without using processes or methods which could harm the environment and, in particular, without risk to water, air, soil, plants and animals, without causing a nuisance through noise or odours, and without adversely affecting the countryside or places of special interest. Whilst that provision does not specify the actual content of the measures which must be taken, it is binding on the member states as to the objective to be achieved, whilst leaving to the member states a margin of discretion in assessing the need for such measures (see *European Commission v Italy* Case C-365/97 [1999] ECR I-7773 (paras 66, 67)).

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f 46. In exercising that discretion, the member states may, in setting their waste recovery standards, be led to adopt national measures whose requirement levels with regard to the objectives of protection of human health and the environment laid down by the directive may differ substantially from one state to another. It is precisely in those circumstances that the questions referred by the national court arise and particularly the question whether, where the standards set by the member state of dispatch to attain the above-mentioned objectives are higher than those applicable in the state of destination, the competent authority of dispatch may, on the basis of the regulation, raise an objection to the envisaged shipment by invoking the higher level of protection under its national standards. Since it must be accepted that the competent authorities of dispatch are empowered to raise objections to the shipment taking account of matters connected to the conditions in which the recovery of waste is carried out in the state of destination, the provisions of the first indent of art 7(4)(a) of the regulation imply that those authorities, in assessing the risks which such recovery would entail for human health and the environment, may take account of all relevant criteria in that regard, including those which are in force in the state of dispatch, even if they are stricter than those of the state of destination, and provided they are intended to avoid those risks. The competent authorities of dispatch cannot, however, be bound by the criteria of their state if such criteria are no more apt to avoid those risks than those of the state of destination.

g 47. That interpretation of the regulation is evident, since it forms part of the environment policy of the Community, one of whose tasks is, according to art 2 EC (formerly art 2 of the EC Treaty), to promote a high level of protection and improvement of the quality of the environment. That objective might be undermined if the competent authority of dispatch were prevented from relying on its own standards, representing a high level of environmental protection, and from opposing consequently a shipment of waste the conditions of recovery for which in the state of destination could harm human health or the environment.

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i 48. It is true that such opposition may, as in the main proceedings, conflict with the position taken by the competent authority of destination where that authority, taking the view that the recovery meets the requirements of its own national standards, raises no objection to the envisaged shipment of waste. However, such a situation is inherent in the system established by the regulation, which confers simultaneously on all the competent authorities the responsibility of ensuring that shipments are carried out in accordance with the regulation (see *Abfall Service AG (ASA) v Bundesminister für Umwelt, Jugend und Familie* Case C-6/00 [2002] QB 1073, [2002] 3 WLR 665, [2002] ECR I-1961 (para 44)). That divergence in the assessments of the different competent authorities cannot therefore be validly invoked, as being contrary to the

principle of co-operation expressed in art 10 EC (formerly art 5 of the EC Treaty), in order to require a different interpretation of the regulation. a

49. However, since the Community legislature stipulated that waste for recovery should be able to move freely between member states for processing (see *Chemische Afvalstoffen Dusseldorp BV v Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer* Case C-203/96 [1999] All ER (EC) 25, [1998] ECR I-4075 (para 33)), opposition by the competent authority of dispatch on the basis of its national waste recovery standards to a shipment can only be lawful in so far as those standards, in compliance with the principle of proportionality, are apt to attain the objectives pursued which are intended to prevent risks for human health and the environment, and do not go beyond what is necessary to attain them. b

50. In that regard, the risks must be measured, not by the yardstick of general considerations, but on the basis of relevant scientific research (see to that effect, in particular, *Criminal proceedings against Van der Veldt* Case C-17/93 [1994] ECR I-3537 (para 17)). c

51. Furthermore, the fact that one member state imposes less strict rules than another member state does not necessarily mean that the stricter rules are disproportionate and hence incompatible with Community law (see *Deutsche Paracelsus Schulen für Naturheilverfahren GmbH v Grabner* Case C-294/00 [2002] ECR I-6515 (para 46)). d

52. The mere fact that a member state has chosen a system of protection different from that adopted by another member state cannot affect the appraisal as to the need for and proportionality of the provisions adopted (see *Questore di Verona v Zenatti* Case C-67/98 [1999] ECR I-7289 (para 34) and the *Deutsche Paracelsus* case (para 47)). e

53. It is for the national court seised of an action challenging the opposition of the competent authority of dispatch to assess whether those national standards have been used in circumstances contrary to the principle of proportionality (see to that effect *Snellers Autos BV v Algemeen Directeur van de Dienst Wegverkeer* Case C-314/98 [2000] ECR I-8633 (para 59)). f

54. In view of the foregoing, the reply to the third question must be that the first indent of art 7(4)(a) of the regulation is to be interpreted as meaning that for the purposes of an objection to a shipment of waste the competent authority of dispatch may, in assessing the effects on health and the environment of the recovery envisaged at the destination, provided it complies with the principle of proportionality, rely on the criteria to which, in order to avoid such effects, the recovery of waste is subject in the state of dispatch, even where those criteria are stricter than those in force in the state of destination. g

#### *The fourth and fifth questions* h

55. By its fourth and fifth questions, which it is appropriate to consider together, the referring court is asking, in essence, whether the second indent of art 7(4)(a) of the regulation, under which reasoned objections may be raised against a planned shipment if it is not in accordance with the national laws and regulations relating to environmental protection, public order, public safety or health protection, enables the competent authority of dispatch to raise an objection based on the fact that the recovery envisaged does not comply with the national provisions. i

56. As was said in para 39 of this judgment, the regulation, taken as a whole, permits all the competent authorities responsible for the control of shipments of waste to take account of matters connected not only to the transport of that



a waste but also to the conditions in which the waste is recovered. However, consideration of all the provisions of art 7(4) of the regulation cannot lead to such a conclusion as regards the application of the second indent of art 7(4)(a) of the regulation without undermining the cohesion of that article.

b 57. It is important to note that art 7(4)(b) of the regulation enables competent authorities of transit to raise reasoned objections against the planned shipment based on the second, third and fourth indents of sub-para (a) of that article, but not on the first and fifth indents thereof.

c 58. Thus the regulation does not permit the competent authorities of transit, in contrast to the competent authorities of dispatch and of destination, to check that the waste will be processed in compliance with the directive or that the recovery is properly justified from the economic and environmental point of view.

d 59. In that context, by providing in the second indent of art 7(4)(a) of the regulation that the competent authorities may raise objections to the planned shipment if it does not comply with national laws and regulations, the Community legislature sought to safeguard, at each stage of the shipment, the efficacy of each member state's own provisions with regard to waste which is within the territory of that state. Thus, those provisions which govern shipment cover only operations relating to that shipment which occur during the time when it is within the respective territory of each of the competent authorities concerned. It follows that the competent authorities of dispatch cannot rely on those provisions to raise an objection to a recovery operation in the state of destination.

e 60. In those circumstances, the reply to the fourth and fifth questions must be that the second indent of art 7(4)(a) of the regulation is to be interpreted as meaning that a competent authority of dispatch cannot rely on those provisions to raise an objection to a shipment of waste based on the fact that the planned recovery does not comply with the national laws and regulations for the protection of the environment, public order, public safety or health protection.

#### COSTS

f 61. Since these proceedings are, for the parties to the main action, a step in the proceedings before the referring court, it is for that court to decide as to the costs. Costs incurred in submitting observations to the court, other than those of the said parties, cannot be recovered.

On those grounds, the Court of Justice (First Chamber) hereby rules:

h (1) The first indent of art 7(4)(a) of Council Regulation (EEC) 259/93 (on the supervision and control of shipments of waste within, into and out of the European Community, as amended by Commission Decisions (EC) 98/368 and (EC) 1999/816, is to be interpreted as meaning that the objections to a shipment of waste for recovery which the competent authorities of dispatch and of destination are empowered to raise may be based on considerations connected not only to the actual transport of the waste in each competent authority's area of jurisdiction but also on the recovery planned for that shipment.

i (2) The first indent of art 7(4)(a) of Regulation 259/93, as amended by Decisions 98/368 and 1999/816, is to be interpreted as meaning that for the purposes of an objection to a shipment of waste the competent authority of dispatch may, in assessing the effects on health and the environment of the

recovery envisaged at the destination, provided it complies with the principle of proportionality, rely on the criteria to which, to avoid such effects, the recovery of waste is subject in the state of dispatch, even where those criteria are stricter than those in force in the state of destination. a

(3) The second indent of art 7(4)(a) of Regulation 259/93, as amended by Decisions 98/368 and 1999/816, is to be interpreted as meaning that a competent authority of dispatch may not rely on those provisions to raise an objection to a shipment of waste based on the fact that the planned recovery does not comply with the national laws and regulations for protection of the environment, public order, public safety or health protection. b

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# Radlberger Getränkegesellschaft mbH & Co and another v Land Baden-Württemberg

b

(Case C-309/02)

COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES (GRAND CHAMBER)

JUDGES SKOURIS (PRESIDENT), JANN AND LENAERTS (RAPPORTEUR) (PRESIDENTS OF CHAMBERS), GULMANN, PUISOCHET, SCHINTGEN, COLNERIC, VON BAHR AND CUNHA RODRIGUES

c

ADVOCATE GENERAL RUIZ-JARABO COLOMER

2 MARCH, 6 MAY, 14 DECEMBER 2004

d

*European Community – Freedom of movement – Goods – Packaging and packaging waste – Claimant companies members of global collection system – Introduction of mandatory deposit and return system – Transition between systems – Whether member state precluded from introducing deposit and return system – Article 28 EC (formerly EC Treaty, art 30), European Parliament and Council Directive (EC) 94/62, arts 1(2), 7, 18.*

e

The claimant companies exported drinks, including table water and fruit juices, to Germany, using non-reusable recoverable packaging. They had joined a global waste collection system and therefore were exempted from the obligation to charge their customers the deposit prescribed by para 8(1) of the national regulation on the avoidance and recovery of packaging waste (the national regulation). In 1999 the German government announced that for the first time the proportion of reusable drinks packaging had fallen below 72%. The proportion remained below 72% over two further periods, and, consequently, on 2 July 2002, the government announced that from 1 January 2003 a mandatory deposit would be charged on mineral water, beer and soft drinks. The claimants brought an action against the respondent Land before the Administrative Court, Stuttgart, contending that the rules laid down in the national regulation on quotas for reusable packaging and the related deposit and return obligations were contrary to arts 1(1), (2), 5, 7, and 18<sup>a</sup> of European Parliament and Council Directive (EC) 94/62 (on packaging and packaging waste) (the directive), and art 28 EC<sup>b</sup> (formerly art 30 of the EC Treaty). The court stayed the proceedings and referred a number of questions to the Court of Justice of the European Communities for a preliminary ruling which related to the construction of arts 1(2), 7 and 18 of the directive, and art 28 EC.

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**Held** — (1) Article 1(2) of the directive did not preclude the member states from introducing measures designed to promote systems for the re-use of packaging. Although the directive did not establish a hierarchy between the re-use and the recovery of packaging waste, art 5 of the directive allowed member states to take measures to encourage systems for the re-use of

a Articles 1(1), (2), 5, 7 and 18, so far as material, are set out at judgment paras 3–7, below

b Article 28 EC provides: 'Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States.'



packaging waste. Such measures had to comply not only with requirements which flowed from the directive's other provisions, but also with the Treaty, in particular, art 28 EC (see judgment paras 33–37, below).

(2) While art 7 of the directive did not confer on the producers and distributors concerned any right to continue to participate in a given packaging waste management system, it precluded the replacement of a global system for the collection of packaging waste with a deposit and return system where the new system was not equally appropriate for the purpose of attaining the objectives of that directive or where the changeover to the new system did not take place without a break and without jeopardising the ability of economic operators in the sectors concerned actually to participate in the new system as soon as it entered into force. In particular, where the new system was a deposit and return system, the member state concerned had to ensure that there were a sufficient number of return points so that consumers who had been charged a deposit when buying goods in non-reusable packaging could recover the deposit even if they did not go back to the place of purchase. Article 7(1) of the directive obliged each member state to ensure that the producers and distributors concerned had access to a packaging waste management system at all times and without discrimination. Therefore, when replacing the existing system the member state had to ensure that the producers and distributors concerned had a reasonable period for the transition of the new system so that they could adapt their production methods and chains of distribution to the requirements of the new system (see judgment paras 43, 46, 48–50, below).

(3) Article 28 EC precluded national rules, such as those laid down in paras 8(1) and 9(2) of the national regulation, when they announced that a global packaging waste collection system was to be replaced by a deposit and return system without the producers and distributors concerned having a reasonable transitional period to adapt thereto and being assured that, at the time when the packaging waste management system changes, they could actually participate in an operational system. Although paras 8(1) and 9(2) of the national regulation applied to all producers and distributors operating within the national territory, they did not affect the marketing of drinks produced in Germany and that of drinks from other member states in the same manner. Recourse to reusable packaging normally caused a drinks producer established in another member state to incur costs higher than those borne by a German producer, given that the costs linked to the organisation of a deposit system and to transport were greater if the producer was established at a certain distance from the points of sale. It followed that the replacement of the global packaging collection system with a deposit and return system hindered the placing on the German market of drinks imported from other member states. Given that the national law did not affect the marketing of drinks produced in Germany and that of drinks from other member states in the same manner, they could not fall outside the scope of art 28 EC. Compliance with the principle of proportionality required there to be a reasonable transitional period which enabled the producers and distributors concerned to adapt and ensured participation in the scheme (see judgment paras 63, 66, 67, 73, 81–83, below).

## Notes

For the European legislation on packaging and packaging waste, see 38 *Halsbury's Laws* (4th edn reissue) para 34.

**a Cases cited**

Aher-Waggon GmbH v Germany Case C-389/96 [1998] ECR I-4473, ECJ.  
Banchemo (Criminal proceedings against) Case C-387/93 [1995] ECR I-4663, ECJ.  
Colim NV v Bigg's Continent Noord NV Case C-33/97 [1999] ECR I-3175, ECJ.  
DaimlerChrysler AG v Land Baden-Württemberg Case C-324/99 [2001] ECR I-9897, ECJ.

**b** Deutsche Post AG v Sievers Joined cases C-270/97 and C-271/97 [2000] ECR I-929, ECJ.

Deutsche SiSi-Werke GmbH & Co Betriebs KG v Office for Harmonisation in the Internal Market (Trade Marks and Designs) Joined cases T-146-153/02 (2004) Transcript (judgment), 28 January, CFI.

**c** Deutscher Apothekerverband eV v 0800 DocMorris NV Case C-322/01 [2003] ECR I-14887, ECJ.

EC Commission v Denmark Case 302/86 [1988] ECR 4607, ECJ.

Eurico Italia Srl v Ente Nazionale Risi Joined cases C-332/92, 333/92 and C-335/92 [1994] ECR I-711, ECJ.

**d** European Commission v Denmark Case C-246/99 [2002] ECR I-6943, ECJ.

European Commission v Germany Case C-102/96 [1998] ECR I-6871, ECJ.

European Commission v Germany Case C-463/01 (2004) Transcript (opinion), 6 May, (2004) Transcript (judgment), 14 December, ECJ.

European Commission v Greece Case C-391/92 [1995] ECR I-1621, ECJ.

European Commission v Spain Case C-12/00 [2003] ECR I-459, ECJ.

**e** Franzén (Criminal proceedings against) Case C-189/95 [1997] ECR I-5909, ECJ.

Gozza v Università degli Studi di Padova Case C-371/97 [2000] ECR I-7881, ECJ.

Groupement National des Négociants en Pommes de Terre de Belgique (Belgapom) v ITM Belgium SA Case C-63/94 [1995] ECR I-2467, ECJ.

Henkel KGaA Case C-218/01 (2003) Transcript (opinion), 14 January, (2004) Transcript (judgment), 12 February, ECJ.

**f** Hünermund v Landesapothekerkammer Baden-Württemberg Case C-292/92 [1993] ECR I-6787, ECJ.

Keck (Criminal proceedings against) Joined cases C-267/91 and C-268/91 [1993] ECR I-6097, ECJ.

Konsumentombudsmannen (KO) v De Agostini (Svenska) Förlag AB, Konsumentombudsmannen (KO) v TV-Shop i Sverige AB Joined cases C-34-36/95 [1997] All ER (EC) 687, [1997] ECR I-3843, ECJ.

**g** Konsumentombudsmannen (KO) v Gourmet International Products AB Case C-405/98 [2001] All ER (EC) 308, [2001] ECR I-1795, ECJ.

Morellato v Comune di Padova Case C-416/00 [2003] ECR I-9343, ECJ.

**h** Netherlands v Tankstation 't Heukske vof Joined cases C-401/92 and C-402/92 [1994] ECR I-2199, ECJ.

Philips Electronics NV v Remington Consumer Products Ltd Case C-299/99 [2002] All ER (EC) 634, [2003] Ch 159, [2003] 2 WLR 294, [2002] ECR I-5475, ECJ.

Procureur de la République v Association de Défense des Brûleurs d'Huiles Usagées Case 240/83 [1985] ECR 531, ECJ.

**i** Procureur du Roi v Dassonville Case 8/74 [1974] ECR 837, ECJ.

Punto Casa SpA v Sindaco del Comune di Capena and Comune di Capena Joined cases C-69/93 and C-258/93 [1994] ECR I-2355, ECJ.

R v Ministry of Agriculture, Fisheries and Food, ex p Hedley Lomas (Ireland) Ltd Case C-5/94 [1996] All ER (EC) 493, [1996] ECR I-2553, ECJ.

Reina v Landeskreditbank Baden-Württemberg Case 65/81 [1982] ECR 33, ECJ.

- Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* Case 120/78 [1979] ECR 649, ECJ. a
- Safety Hi-Tech Srl v S & T Srl* Case C-284/95 [1998] ECR I-4301, ECJ.
- Schutzverband gegen Unlauteren Wettbewerb v TK-Heimdienst Sass GmbH* Case C-254/98 [2000] ECR I-151, ECJ.
- Sieckmann v Deutsches Patent- und Markenamt* Case C-273/00 [2004] All ER (EC) 253, [2003] Ch 487, [2003] 3 WLR 424, [2002] ECR I-11737, ECJ. b
- Société d'importation Édouard Leclerc-Siplec v TF1 Publicité SA* Case C-412/93 [1995] All ER (EC) 343, [1995] ECR I-179, ECJ.
- Van de Haar (Criminal proceedings against)* Joined cases 177/82 and 178/82 [1984] ECR 1797, ECJ.
- Vanacker (Criminal proceedings against)* Case C-37/92 [1993] ECR I-4947, ECJ. c
- World Wildlife Fund (WWF) v Autonome Provinz Bozen* Case C-435/97 [1999] ECR I-5613, ECJ.
- Wouters v Algemene Raad van de Nederlandse Orde van Advocaten (Raad van de Balies van de Europese Gemeenschap intervening)* Case C-309/99 [2002] All ER (EC) 193, [2002] ECR I-1577, ECJ. d

## Reference

By order of 21 August 2002, the Verwaltungsgericht (Administrative Court) Stuttgart, Germany referred to the Court of Justice of the European Communities for a preliminary ruling under art 234 EC (formerly art 177 of the EC Treaty) four questions (set out at judgment para 19, below) on the interpretation of European Parliament and Council Directive (EC) 94/62 (on packaging and packaging waste) (OJ 1994 L365 p 10) and art 28 EC (formerly art 30 of the EC Treaty). The reference was submitted in proceedings brought by Radlberger Getränkegesellschaft mbH & Co and S Spitz KG, which are Austrian drinks producers, against Land Baden-Württemberg. Observations were submitted on behalf of: Radlberger Getränkegesellschaft mbH & Co and S Spitz KG, by R Karpenstein, Rechtsanwalt; Land Baden-Württemberg, by L-A Versteyl, Rechtsanwalt; the German government, by W-D Plessing and A Tiemann, acting as agents, assisted by D Sellner, Rechtsanwalt; the Austrian government, by E Riedl, acting as agent; the French government, by G de Bergues and D Petrusch, acting as agents; the Italian government, by I M Braguglia, acting as agent, assisted by M Fiorilli, avvocato dello Stato; the Netherlands government, by S Terstal and C Wissels, acting as agents; the Commission of the European Communities, by J Grunwald and M Konstantinidis, acting as agents. The language of the case was German. The facts are set out in the opinion of the Advocate General. e  
f  
g

6 May 2004. **The Advocate General (D Ruiz-Jarabo Colomer)** delivered the following opinion<sup>1</sup>. h

1. The Verwaltungsgericht Stuttgart (Administrative Court, Stuttgart, Germany) has referred four questions to the Court of Justice of the European Communities for a preliminary ruling on the interpretation of arts 1(2), 7 and 18 of European Parliament and Council Directive (EC) 94/62 (on packaging and packaging waste)<sup>2</sup> and of art 28 EC (formerly art 30 of the EC Treaty). i

<sup>1</sup> Language of the case: Spanish.

<sup>2</sup> OJ 1994 L365 p 10. It has been significantly amended by European Parliament and Council Directive (EC) 2004/12 (OJ 2004 L47 p 26), but the amendments have not affected the provisions whose interpretation is sought in this case.



*a* The questions focus on whether the aforementioned provisions prohibit member states from favouring re-usable drinks packaging over recoverable drinks packaging or from impeding the sale of soft drinks in recoverable packaging, in specific circumstances.

*b* I—THE NATIONAL LEGISLATION

2. The Verordnung über die Vermeidung und Verwertung von Verpackungsabfällen (Regulation on the Avoidance and Recovery of Packaging Waste) (hereinafter the Packaging Regulation) of 21 August 1998<sup>3</sup>, promotes various measures for achieving the objective of avoiding or reducing the impact of packaging waste on the environment. This legislation, which replaced the legislation of 12 June 1991<sup>4</sup>, is intended to incorporate Directive 94/62 into national law; it defines re-usable packaging as packaging designed to be used several times for the same purpose.

According to its provisions, producers and distributors of drinks bottled in non-reusable packaging are to charge a deposit on each item at every stage in the chain of distribution, although they may be released from that obligation, which includes the duty to take back and recover the empty bottles, by participating in a comprehensive system for managing packaging and packaging waste. However, if the overall proportion of drinks sold in Germany in re-usable packaging falls below 72% and, at the same time, the proportion of re-usable packaging achieved in 1991 in the specific soft drinks sectors in which they operate<sup>5</sup> is not reached, the economic operators lose that option, and must begin to charge a deposit and assume responsibility for recovering the bottles.

3. Paragraph 6 of the Packaging Regulation provides:

‘1. Distributors shall accept the return of used empty sales packaging from final consumers, free of charge, at, or in the immediate vicinity of, the actual point of delivery, recover the packaging in accordance with the requirements of point 1 of Annex I and fulfil the requirements of point 2 of Annex I ...

2. Producers and distributors shall accept free of charge at the place of actual delivery packaging returned to distributors under subparagraph 1.

3. The obligations under subparagraphs 1 and 2 shall not apply to packaging [covered by] a system which ... ensures that used sales packaging is ... collected from the private final consumer or in his vicinity, throughout the whole sales territory of the distributor ... [The] system ... shall recover packaging delivered to it, in accordance with the requirements of point 1 of Annex I ... Proof of participation in [such] a system shall be provided to the competent authority ... Coordination shall be arranged by the system operator and the public waste management authority in writing ...

4. The competent authority may revoke its determination ... immediately where it establishes that there is a failure to comply with the

*i* 3 BGBI I, p 2379.

4 BGBI I, p 1234. That legislation contained similar provisions concerning the compulsory deposit on non-reusable drinks packaging.

5 According to the information supplied by the claimants in the main proceedings in their written observations, the proportion of reusable packaging that year per type of drink, taken as a reference, was: mineral water, 91.33%; non-carbonated soft drinks, 34.56%; carbonated soft drinks, 73.72%; beer, 82.16%; and wine, 28.63%.

requirements ... Where the recovery quotas specified in Annex I to this regulation have not been achieved in respect only of packaging made out of particular materials, the revocation shall apply only to such packaging. Subparagraphs 1 and 2 shall apply with effect from the first day of the sixth calendar month following publication of the revocation ...'

4. Paragraph 8(1) of the Packaging Regulation states in the following terms the rule that a deposit is compulsory for non-reusable drinks packaging:

'1. Distributors who put liquids for consumption into circulation in non-reusable drinks packaging shall charge the purchaser a deposit of at least EUR 0.25 including turnover tax per item of packaging; where the net volume exceeds 1.5 litres, the deposit shall be at least EUR 0.50 including turnover tax. The deposit shall be charged by each further distributor at every stage in the chain of distribution until delivery to the final consumer. The deposit shall be repaid when the packaging is returned under Paragraph 6(1) and (2).'

5. Paragraph 9 regulates the exemption from the obligation to charge a deposit and the protection afforded to ecologically sound drinks packaging as follows:

'1. Paragraph 8 shall not apply to packaging in respect of which the producer or distributor participates in a [comprehensive] system under Paragraph 6(3). Paragraph 6(4) shall apply *mutatis mutandis*.

2. If, for beer, mineral water (including spring water, table water and spa water), carbonated soft drinks, fruit juices (including fruit syrups, vegetable juices and other non-carbonated drinks) and wine (except pearl wine, sparkling wine, vermouth and dessert wine), the combined proportion of drinks in reusable packaging falls below 72% in the calendar year in the geographical area to which this regulation applies, a new survey of the relevant proportions of reusable packaging shall be carried out for the 12 months following publication of the failure to achieve the required proportions. If this shows that the proportion of reusable packaging in Federal territory is below the proportion laid down under the first sentence, the decision under Paragraph 6(3) shall be deemed to be revoked throughout Federal territory in respect of the drinks categories for which the reusable proportion determined in 1991 is not achieved, with effect from the first day of the sixth calendar month following publication in accordance with subparagraph 3. The first and second sentences shall apply *mutatis mutandis* in respect of pasteurised milk for human consumption when the proportion of reusable packaging and polyethylene bag packaging falls below 20% in the calendar year in the geographical area to which this regulation applies.

3. Each year, the Federal Government shall publish in the *Bundesanzeiger* [Federal Gazette] the relevant proportions, for the purposes of subparagraph 2, of drinks sold in ecologically sound packaging.

4. Where the relevant proportion, for the purposes of subparagraph 2, of drinks packaged in ecologically sound drinks packaging is achieved again after a revocation, the competent authority shall make a new determination under Paragraph 6(3) on application or on its own initiative.'

## a II—THE FACTS IN THE MAIN ACTION

6. The claimants are medium-sized firms established in Austria which produce drinks. They export carbonated and non-carbonated soft drinks, fruit juices and table water in recoverable non-reusable packaging to Germany.

b 7. They participate, as licensees, in the system operated by 'Duales System Deutschland AG' (Grüner Punkt); according to a determination by the Baden-Württemberg Environment Ministry<sup>6</sup>, this is a comprehensive system for managing used packaging and packaging waste, which operates throughout the territory within the meaning of para 6(3) of the Packaging Regulation. They were therefore exempt from charging their customers a sum by way of deposit on each drink.

c 8. On 2 July 2002 the German government published in the Bundesanzeiger the results of a national survey of the overall proportion of packaging that was reusable, in accordance with para 9(3) of the Packaging Regulation. The data showed that, for all drinks except milk, the proportion, for the period between May 2000 and April 2001, was below 72%.

d 9. At the same time, it announced that, from the first day of the sixth calendar month following publication, the exemption would be revoked in respect of the mineral water, beer and carbonated soft drinks sectors, the categories for which the specific proportions achieved in 1991 had not been reached.

e Consequently, the undertakings concerned were required, from January 2003, to charge the deposit provided for in para 8(1) of the Packaging Regulation on most of the packaging for the drinks sold by them in Germany, and to accept the return of the used packaging and recover it.

10. The claimants consider that this measure constitutes a restriction on their exports to Germany, in breach of Community law.

## f III—THE QUESTIONS REFERRED FOR A PRELIMINARY RULING

11. Before giving judgment on the merits of the case, the Verwaltungsgericht Stuttgart decided to stay proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

g '(1) On a proper construction of Article 1(2) of ... Directive 94/62 ... are Member States prohibited from favouring systems for reusing drinks packaging over recoverable non-reusable packaging by removing, where a Federal target for reusable packaging of 72% is not reached, the possibility of exemption from a return, management and deposit obligation laid down in respect of empty non-reusable drinks packaging by participation in a return and management system, so far as concerns drinks sectors in which the proportion of reusable packaging has fallen below the level determined in 1991?

h (2) On a proper construction of Article 18 of ... Directive 94/62 ... are Member States prohibited from impeding the placing of drinks in recoverable non-reusable packaging on the market by removing, where a Federal target for reusable packaging of 72% is not reached, the possibility of exemption from a return, management and deposit obligation laid down in respect of empty non-reusable drinks packaging by participation in a return and management system, so far as concerns drinks sectors in which the proportion of reusable packaging has fallen below the level determined in 1991?



(3) On a proper construction of Article 7 of... Directive 94/62 do producers and distributors of drinks in recoverable non-reusable packaging have a right to participate in an existing return and management system for used drinks packaging, in order to meet a statutory obligation to charge a deposit on non-reusable drinks packaging and accept the return of used drinks packaging?

(4) On a proper construction of Article 28 EC are the Member States prohibited from adopting rules providing that where a Federal target for reusable drinks packaging of 72% is not reached, the possibility of exemption from a return, management and deposit obligation laid down in respect of empty non-reusable drinks packaging by participation in a return and management system is removed so far as concerns drinks sectors in which the proportion of reusable packaging has fallen below the level determined in 1991?

#### IV—THE COMMUNITY LEGISLATION

12. The provisions of secondary legislation of which the German court seeks an interpretation are arts 1(2), 7 and 18 of Directive 94/62.

13. Article 1 provides:

‘1. This Directive aims to harmonize national measures concerning the management of packaging and packaging waste in order, on the one hand, to prevent any impact thereof on the environment of all Member States as well as of third countries or to reduce such impact, thus providing a high level of environmental protection, and, on the other hand, to ensure the functioning of the internal market and to avoid obstacles to trade and distortion and restriction of competition within the Community.

2. To this end this Directive lays down measures aimed, as a first priority, at preventing the production of packaging waste and, as additional fundamental principles, at reusing packaging, at recycling and other forms of recovering packaging waste and, hence, at reducing the final disposal of such waste.’

14. Article 7 governs the return, collection and recovery systems. It is worded as follows:

‘1. Member States shall take the necessary measures to ensure that systems are set up to provide for:

(a) the return and/or collection of used packaging and/or packaging waste from the consumer, other final user, or from the waste stream in order to channel it to the most appropriate waste management alternatives;

(b) the reuse or recovery including recycling of the packaging and/or packaging waste collected,

in order to meet the objectives laid down in this Directive.

These systems shall be open to the participation of the economic operators of the sectors concerned and to the participation of the competent public authorities. They shall also apply to imported products under non-discriminatory conditions, including the detailed arrangements and any tariffs imposed for access to the systems, and shall be designed so as to avoid barriers to trade or distortions of competition in conformity with the Treaty.

2. ...’

a 15. Article 18 refers to the freedom to place packaging on the market in the following terms:

‘Member States shall not impede the placing on the market of their territory of packaging which satisfies the provisions of this Directive.’

b 16. Article 28 EC, the primarily legislation referred to by the national court, provides:

‘Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States.’

#### V—PROCEDURE BEFORE THE COURT OF JUSTICE

c 17. Written observations have been submitted in these proceedings, within the period prescribed by art 23 of the Statute of the Court of Justice, by the claimant companies, the authority which is the defendant in the main action<sup>7</sup>, the German, French, Italian, Netherlands and Austrian governments and the Commission of the European Communities.

d At the hearing on 2 March 2004 oral argument was presented by the claimants’ representative, the defendant’s representative, the agent of the German government, the agent of the Italian government, the agent of the Netherlands government and the agent of the Commission.

#### VI—THE FIRST QUESTION

e 18. The Verwaltungsgericht Stuttgart wishes to know, first, whether art 1(2) of Directive 94/62 precludes a member state from favouring the re-use of drinks packaging over recycling and other forms of recovery, by applying rules such as paras 8(1) and 9(2) of the Packaging Regulation.

#### f A—The observations submitted

19. According to the claimant companies, Directive 94/62 does not give preference to reusable packaging, so there must be no discrimination against other types of packaging. The Austrian government expresses the same opinion.

g 20. Land Baden-Württemberg, the defendant in the main proceedings, claims that the national legislation does not favour the use of reusable packaging but, when the percentage of that packaging is below a certain limit, merely extends to non-reusable packaging the obligation to charge a deposit to which reusable packaging is subject; all types of packaging are therefore treated in the same way. Although the Community legislature did not give priority to reusable packaging, because in 1994 there were no sufficiently advanced assessment techniques, it also did not prohibit such priority; the member states may therefore provide for it if the information available to them so justifies. In Germany, the investigations carried out show that, in order to protect the environment, reusable packaging is better than recoverable packaging<sup>8</sup>.

i <sup>7</sup> Land Baden-Württemberg. In Germany, it is the Federal Länder which have competence to implement the Packaging Regulation.

<sup>8</sup> It states that in the background document entitled ‘Ökobilanz Getränkeverpackungen für alkoholfreie Getränke und Wein II, Phase 2’, the Federal Ministry of the Environment found that, taking into account key indicators like the use of natural resources, the greenhouse effect and acidification, non-reusable glass containers and cans cause more problems than reusable packaging systems.

The German government adds that re-use systems avoid the production of waste and help to achieve the main priority of Directive 94/62. The Italian and Netherlands governments and the Commission agree with these arguments. a

21. The French government believes that, in order to answer this question, the relevant provision is art 5 of Directive 94/62, which does not prohibit member states from favouring reusable packaging systems, provided that they comply with art 28 EC. b

*B—Reply to the question*

22. On looking at the wording of art 1(2) of Directive 94/62, whose interpretation is required by the national court, it is apparent that it offers no basis for favouring re-use systems over recycling systems and other forms of recovery. The provision does not determine any hierarchical order; it gives top priority to preventing the production of packaging waste, while re-use, recycling and other forms of recovering packaging waste, which are mentioned immediately afterwards, are given equal standing. It is true that the eighth recital states that life cycle assessments should be completed as soon as possible to justify a clear hierarchy between reusable, recyclable and recoverable packaging but, in practice, the studies carried out in certain countries do not appear to have reached final conclusions yet. c

23. Nor is it possible to equate prevention and re-use, which are concepts defined in art 3 of Directive 94/62. According to art 3(4), prevention consists in reducing the quantity and the harmfulness for the environment of materials and substances contained in packaging and packaging waste, and also in reducing packaging at production process level and at the marketing, distribution, utilisation and elimination stages, in particular by developing 'clean' products and technology. Article 3(5) describes re-use as any operation by which packaging, which has been conceived and designed to accomplish within its life cycle a minimum number of trips or rotations, is refilled or used for the same purpose for which it was conceived, with or without the support of auxiliary products, the re-used packaging subsequently becoming packaging waste. d

24. The basic rule for prevention is found in para 1 of Annex II to Directive 94/62, which contains the requirements specific to the manufacturing and composition of packaging: it is to be so manufactured that the packaging volume and weight is limited to the minimum adequate amount to maintain the necessary level of safety, hygiene and acceptance for the packed product and for the consumer; that is to say, prevention concerns the design of the packaging and its manufacturing process, with the aim of reducing and avoiding at source the creation of waste. As we can see, the measures apply equally to reusable and recoverable packaging. e

25. Article 5 of Directive 94/62 authorises public authorities to encourage systems for the re-use of packaging which can be re-used in an environmentally sound manner, provided that they do so in conformity with the Treaty. I shall examine the context in which they may act, and establish whether legislation such as that at issue fulfils that requirement, when I consider the fourth question referred for a preliminary ruling. f

26. Article 1(2) of Directive 94/62 merely gives priority to the prevention of the production of packaging waste, and does not give precedence to reusable packaging, so that a member state cannot use that provision as a basis for favouring the re-use of drinks packaging over recycling and other forms of recovery. g



## a VII—THE SECOND QUESTION

27. By this question, it is sought to clarify whether art 18 of Directive 94/62, which enshrines the freedom to place on the market packaging manufactured according to the directive's rules, precludes a member state from impeding the placing on the market of drinks in non-reusable bottles, by applying provisions such as paras 8(1) and 9(2) of the Packaging Regulation.

b

A—*The observations submitted*

28. The claimants in the main action contend that the provisions of the directive, in particular Annex II, exhaustively cover the risks which packaging represents for the environment: the basic requirements for protection are not minimum clauses which may be completed by national law by means of the imposition of quotas for reusable packaging. Non-reusable packaging which is recyclable or recoverable in the form of waste-to-energy also satisfies the minimum requirements, so that it is not appropriate to restrict the sale of drinks in that kind of packaging. By taking the overall view that reusable packaging is ecologically sound and that non-reusable packaging is harmful to the environment, the German legislation discriminates against the latter and the drinks which it contains. The Austrian, French and Italian governments agree with this assessment.

29. Land Baden-Württemberg and the German government consider, as the Commission does, that the question should be answered in the negative. The Netherlands government suggests that national authorities may impede the placing on the market of products in packaging which infringes legislation relating to re-use, to recovery or to deposit, collection and recovery systems.

B—*The reply to the question*

30. I agree with the defendant, the German government and the Commission that art 18 establishes the right to place on the market throughout the Community packaging which complies with the basic requirements set out in art 9 and in Annex II, relating to the composition of packaging and its capacity to be re-used or recovered, and merely prohibits discrimination against any kind of packaging which complies with the requirements of Directive 94/62.

31. The deposit, return and recovery system governed by the contested German legislation does not impede trade in drinks in non-reusable packaging; nor does it govern the composition of packaging, only the manner of distribution. Likewise, it does not prevent packaging from entering the market because of its technical characteristics; it simply sets the conditions for its collection and recovery.

32. For these reasons, I consider that art 18 of Directive 94/62 is not the appropriate provision for analysing the effects which the application of rules such as paras 8(1) and 9(2) of the German Packaging Regulation may have on the free movement of goods.

## i VIII—THE THIRD QUESTION

33. The Verwaltungsgericht Stuttgart then asks whether art 7 of Directive 94/62 grants producers and distributors of drinks in non-reusable packaging the right to participate in an existing system for the return and management of empty packaging, in order to obtain exemption from the statutory obligation to charge a deposit, to take back the used packaging and to recover it, in which

case the national authorities would not be authorised to withdraw that option or to impose those burdens on them if the percentage of reusable packaging fell below a certain level. a

*A—The observations submitted*

33. In the opinion of the claimant companies, the directive grants economic operators the freedom to participate in comprehensive systems for managing packaging and packaging waste, and the national authorities cannot restrict that freedom. If they do so, as in Germany, a large number of drinks packaged in non-reusable packaging cease to be marketed. The Austrian, Italian and French governments express the same view. The Netherlands government has not submitted observations on this point. b

34. Land Baden-Württemberg and the German government suggest that the question should be answered in the negative. Otherwise, undertakings could refuse to participate in improved systems for collecting packaging and packaging waste, claiming that they have already joined an existing one. The Commission endorses this view. c

*B—The reply to the question* d

35. After authorising the member states, in art 5, to promote systems for the re-use of packaging, in conformity with the Treaty, Directive 94/62 sets out, in art 6, the recovery and recycling objectives, which are expressed in the obligation to achieve minimum and maximum percentages in a first five-year phase<sup>9</sup>, at the end of which the Council of the European Communities must fix, with a view to increasing them substantially, the corresponding percentages for a second five-year phase<sup>10</sup>. e

36. In order to achieve the desired results, art 7 requires the national authorities to facilitate the introduction of both systems for the return and/or collection of used packaging and packaging waste and systems for the re-use and recovery, including recycling, of the packaging collected; these measures are to form part of a policy covering all packaging. The systems must be open to the participation of the economic operators concerned and to the participation of the public authorities; they are to apply to imported products under non-discriminatory conditions, including the detailed arrangements and the tariffs for access; and they must be designed so as to avoid barriers to trade and distortions of competition, in accordance with the Treaty. f

37. I consider that, under that provision, the national authorities may choose, for non-reusable drinks packaging, between making it subject to deposit, return and recovery or allowing it to be collected, by means of a comprehensive management system, from the consumer's home or near the place in which the distributor operates. Directive 94/62 leaves it to the member states to choose one of these methods or a combination of the two, depending on the type of drink, for example, or on the amount to be charged as a deposit on each item according to the capacity of the different packaging. It should be remembered, however, that art 6 of the directive provides for harmonisation of the minimum and maximum targets for recovery and recycling; also, member g

<sup>9</sup> Greece, Ireland and Portugal were allowed, in the light of the particular circumstances of each country, to set lower targets.

<sup>10</sup> These targets are set out in Directive 2004/12. It is provided that, no later than 31 December 2007, the Parliament and the Council, acting on a proposal from the Commission, are to fix targets for the third five-year phase, from 2009 until 2014, a process which will be repeated every five years. h

a states which intend to go beyond the targets set<sup>11</sup> must, as well as informing the Commission of its intentions, have the necessary capacity and implement the system while avoiding distortions of the internal market and without preventing other member states from achieving the objectives.

b 38. Whenever a state sets itself an ambitious programme for managing non-reusable packaging waste, requiring high percentages in order to avoid uncontrolled dumping which damages the countryside, it tends to impose the obligation to charge a deposit, the formula which gives the best results because the consumers themselves return the empty packaging in order to recover the amount left as a deposit. That system is likely to increase the collection rate, to reduce the pollution caused by non-reusable packaging that is thrown away and to increase the possibilities for recycling the material collected. With the introduction of a deposit, there is a greater rate of recovery of the components of the non-reusable packaging and a corresponding reduction in the pollution caused by empty bottles and cans. Where selection and collection, based on a deposit, is entrusted to professional systems, recovery adapted to the constituents makes it possible to save raw materials and to recover the recyclable material with a level of purity higher than that which results from the selective separation of domestic waste, in which errors in sorting occur more frequently.

c 39. In states in which ecological awareness is less developed, the public authorities are inclined rather to save the consumer the inconvenience connected with deposit and return systems, leaving it to him to separate the waste, with the implicit risk of mistakes, carelessness and lack of interest, and providing that the undertakings responsible for managing the waste are to collect it from the consumer's home or in the vicinity of the place in which the distributor operates. It is clear that the consequences of the two systems for the environment are very different, but they are both covered by art 7 of Directive 94/62.

f 40. When member states decide to apply one or other of the systems to all or only certain types of packaging, they have to comply with art 7, that is to say, they have to allow all producers and distributors of drinks in non-reusable packaging, including imports, to have access, at any time and without discrimination, to collection and management systems which replace their statutory obligation to take back and recover the empty packaging. However, I do not think that, on the basis of that provision, economic operators can claim a personal right to use the services of one of those systems in particular merely because they operate in the country or to continue to participate in it, when the national authorities decide that, from a certain date, a deposit will be charged on the purchase of certain drinks bottled in non-reusable packaging.

g 41. Therefore, the answer to be given to the national court must be that art 7 of Directive 94/62 does not grant producers and distributors of drinks in non-reusable packaging a right to participate in an existing return and management system, when the national authorities replace it with a deposit system intended to ensure that the empty packaging is taken back, in order to improve selective recovery and contain uncontrolled dumping.

i IX—THE FOURTH QUESTION

42. It remains to be clarified whether art 28 EC prohibits a member state from prescribing that, where an overall proportion of reusable drinks

11 I do not know whether Germany is one of those countries.



packaging in the country of 72% is not reached, the economic operators in the sectors in which the proportion of reusable packaging is below the level set in 1991 are to lose the possibility of exemption from the obligation to charge a deposit on non-reusable bottles, to accept their return and repay the deposit and to recover them, by participating in a comprehensive packaging and packaging waste management system.

*A—The observations submitted*

43. The claimant companies maintain that the German scheme providing for a reusable packaging quota is a measure having equivalent effect to a quantitative restriction which indirectly hinders intra-Community trade and is not justified on grounds of environmental protection. The fixing of a maximum of 28% for non-reusable packaging in Germany makes it difficult for the claimants to increase their exports to that country; to this must be added the higher price of drinks in non-reusable packaging, owing to the higher amount of the deposit<sup>12</sup>, which encourages the consumption of products in reusable packaging—by definition, of national origin—and the additional labelling required because of the compulsory deposit, which constitutes partitioning of the market. The Austrian, French and Netherlands governments concur with this view.

44. Land Baden-Württemberg and the German government contend that art 28 EC does not apply in the main proceedings. First, art 5 of Directive 94/62 has exhaustively harmonised the use and promotion of reusable packaging and, second, the quota scheme in respect of reusable packaging and the deposit, return and recovery obligation are merely selling arrangements which do not affect the characteristics of the packaging and which apply equally, in fact and in law, to the sale of domestic and imported products. If the legislation under consideration were a barrier to trade, its retention would be justified by the need to satisfy overriding requirements of environmental protection. The Italian government endorses these views.

45. According to the Commission, the question turns not so much on the mere revocation of comprehensive management systems in force up to a certain time, as on the transition from the old system to the new, in the light of the circumstances of the transition and the detailed rules of the two systems<sup>13</sup>. Domestic legislation applicable without distinction to drinks produced in Germany and imported drinks is at issue, and the barriers to the free movement of goods within the Community which the disparities may create must be accepted, because they are justified by overriding requirements of environmental protection. The Commission adds that the member states have to ensure that the transition between the existing comprehensive collection and management system and the new deposit, return and recovery system does not disproportionately hinder that freedom and avoids discrimination against imported products.

<sup>12</sup> According to the information they provide, the purchase of a can of beer carries a deposit of 25 cents; if the same drink is bought in a reusable bottle, it is only necessary to leave 8 cents.

<sup>13</sup> After the end of the written procedure, the Court of Justice asked the Commission for clarification on this point. In its reply, which was lodged at the Registry on 16 January 2004, it explains that, under the second subparagraph of art 7(1) of Directive 94/62, the transition between the old system and the new must occur only when the latter is operational.

*a B—The reply to the question*

46. It is necessary to consider, first, the applicability of art 28 EC in the present instance, because this has given rise to a difference of views among the parties who have submitted observations in these proceedings for a preliminary ruling.

*b*

*1. The scope of the harmonisation effected by Directive 94/62*

47. I do not agree with the parties who claim that art 5 of Directive 94/62 has completely harmonised the use and promotion of reusable packaging.

*c*

48. In the opinion delivered in *European Commission v Denmark*<sup>14</sup>, which concerned national legislation prohibiting the importation of beer and carbonated soft drinks in cans, I had the opportunity to express my views on the scope of the harmonisation undertaken by Directive 94/62 in the field. In that case, the packaging satisfied all the basic conditions set out in Annex II to the directive, so that the prohibition was clearly contrary to art 18, which establishes the freedom to place packaging on the market in any of the member states. I argued that national measures on the management of

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packaging and packaging waste had been harmonised when the directive was adopted. In such circumstances, according to the case law, if the national legislation is compatible with the directive, it cannot be subject to a review of its compatibility with the primary legislation governing the free movement of goods<sup>15</sup>.

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49. However, art 5 of Directive 94/62, which allows member states to promote re-use systems, and requires them to do so in accordance with the Treaty, is an imprecise provision, the wording of which gives no indication as to the manner in which the national authorities are empowered to act or the direction that they may take. Re-use, that is to say, any operation by which packaging is refilled and used for the same purpose for which it was conceived, is defined in art 3(5), a provision which affords no clarification for these purposes, so that it cannot be stated that the directive has harmonised the promotion of the use of reusable packaging.

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50. It is therefore necessary—in order to judge these measures—to refer to the primary legislation as a whole, and not only to the principles governing the free movement of goods. When public authorities grant, for example, subsidies or aid to encourage research and the development of investment for converting or improving packaging plants, for manufacturing reusable packaging or for establishing activities to promote re-use, and when they adopt measures of an economic, financial or fiscal nature, they must observe the rules on state aid and competition, just as they have to comply with the Treaty provisions on tax matters.

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Furthermore, if there is evidence that the decisions made by a member state to promote re-use systems, even if they do not actually prohibit imports, constitute restrictions on the free movement of goods, they must be examined in the light of art 28 EC and art 30 EC (formerly art 36 of the EC Treaty), because it is clear that, under art 18 of Directive 94/62, member states are not to impede the placing on the market of packaging which satisfies the essential requirements set out in Annex II to the directive, which have been the subject

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<sup>14</sup> Case C-246/99 [2002] ECR I-6943 (paras 18–41). The action was ultimately abandoned.

<sup>15</sup> See *R v Ministry of Agriculture, Fisheries and Food, ex p Hedley Lomas (Ireland) Ltd* Case C-5/94 [1996] All ER (EC) 493, [1996] ECR I-2553 (para 18) and *European Commission v Germany* Case C-102/96 [1998] ECR I-6871 (paras 21, 22).

of harmonisation. There are, however, more subtle ways in which the state may act in order to bring about the same result. a

51. In support of its argument that art 28 EC is not applicable in this case, the German government also pleads<sup>16</sup> the judgment of the Court of Justice in *DaimlerChrysler AG v Land Baden-Württemberg*<sup>17</sup>, para 44 of which stated that the use in art 4(3)(a)(i) of Council Regulation (EEC) 259/93<sup>18</sup> of the expression 'in accordance with the Treaty' could not be construed as meaning that a national measure that satisfied the requirements of that provision had to be subject to a review of its compatibility with the primary legislation on the free movement of goods. b

52. There are various reasons why, in my view, this argument put forward by the defendant is unlikely to succeed. First, the court completed that finding in the following paragraph of the judgment, adding that that expression likewise does not mean that all national measures restricting the shipments of waste referred to in art 4(3)(a)(i) of Regulation 259/93 must be systematically presumed to be compatible with Community law solely because they are intended to implement one or more of the principles referred to in that provision. Instead, in addition to being compatible with the regulation, such national measures must also comply with the rules or general principles of the Treaty to which no direct reference is made in the legislation adopted in the field of waste shipments. The same assessment appears in the judgment in *Deutscher Apothekerverband eV v 0800 DocMorris NV*<sup>19</sup>, para 64 of which states that a national measure in a sphere which has been the subject of exhaustive harmonisation at Community level must be assessed in the light of the harmonising measure and not of the primary legislation<sup>20</sup>, even though the power conferred on member states by art 14(1) of European Parliament and Council Directive (EC) 97/7<sup>21</sup> must be exercised with due regard for the Treaty, as is expressly stated in that provision<sup>22</sup>. c  
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53. Secondly, in the *DaimlerChrysler* case the relevant Community legislation was a regulation which, by definition, as well as constituting a measure of general application binding in its entirety and directly applicable within the territory of the Union, is more specific than a directive, whose provisions are incorporated by the member states into their respective national legal orders. It is true that the wording used in Regulation 249/93 and in Directive 94/62 to refer to the Treaty is the same. However, there is a great difference between the content of art 4(3)(a)(i) of the regulation and art 5 of the directive; whereas the former contains the principles governing the member states and the specific measures which they may adopt, the latter merely states that such measures have to favour reusable packaging without harming the environment. f  
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16 In its written observations it refers to points 15–21 of the defence and to points 9–11 of the rejoinder in *European Commission v Germany* Case C-463/01 (2004) Transcript (opinion), 6 May, (2004) Transcript (judgment), 14 December. h

17 Case C-324/99 [2001] ECR I-9897.

18 On the supervision and control of shipments of waste within, into and out of the European Community (OJ 1993 L30 p 1).

19 Case C-322/01 [2003] ECR I-14887. i

20 See *Criminal proceedings against Vanacker* Case C-37/92 [1993] ECR I-4947 (para 9) and the *DaimlerChrysler* case, cited in footnote 17, above (para 32).

21 On the protection of consumers in respect of distance contracts (OJ 1997 L144 p 19).

22 This provision allows member states to introduce or maintain, in the area covered by the directive, more stringent provisions, compatible with the Treaty, to ensure a higher level of consumer protection.



a 54. There is no doubt that the Community legislature approves of actions of national authorities favouring packaging re-use systems which indirectly result in the avoidance of waste, provided that, whether they are of an economic, financial, fiscal or other nature, they do not interfere with the proper functioning of the internal market.

b 55. I therefore consider that art 5 of Directive 94/62, in itself, is not specific enough for it to be assessed on the basis of that provision whether provisions adopted by member states to promote packaging re-use systems that do not harm the environment are compatible with Community law, and it is not possible to complement it by referring to other provisions in the same legislation. The reference made by art 5 to the Treaty as a whole makes it possible to review the compatibility of those national provisions with the primary legislation on the free movement of goods.

2. *Nature of the contested legislation: a measure having an effect equivalent to a quantitative restriction on imports or simply selling arrangements*

d 56. The provisions at issue are: para 8(1) of the Packaging Regulation, according to which a distributor of drinks in non-reusable packaging must charge the customer a deposit and return it to him when he returns the empty packaging; and para 9(2), which suspends that measure if the undertaking responsible participates in a comprehensive management system and provided that the proportion of reusable packaging in Germany does not fall below 72%. If that threshold is crossed, the deposit, return and recovery obligation comes into effect in respect of drinks for which the percentage of reusable packaging is below that achieved in 1991. Apparently, this method of graduated control was accepted by the economic operators concerned, who were committed to ensuring that the rate of non-polluting reusable drinks packaging did not fall below the level achieved at that time.

f According to Germany, the aim of these provisions is to promote the use of reusable packaging. In my view, this legislation makes it difficult to market in Germany drinks packaged by their producers in other member states in non-reusable bottles.

57. The reasons for which I take this view are as follows.

g 58. First, art 7 of Directive 94/62 requires the member states to adopt the measures necessary to introduce systems for the return or collection of used packaging and packaging waste, and specifies that the systems have to be open to the participation of the economic operators affected. Under that provision, the national authorities may choose, for non-reusable drinks packaging, between making it subject to deposit, return and recovery or allowing it to be collected, by means of a comprehensive management system, from the consumer's home or near the place in which the distributor operates. However, the fact that in a country the continuation of the second option is made conditional on the overall volume of reusable bottles on the national market not falling below a specific proportion is, without a doubt, a source of legal uncertainty for the economic operators marketing their products in non-reusable packaging because, as long as the rate is kept above the fixed threshold, the undertakings operate year after year with the fear that they will not manage to reach that percentage, in which case, if, in the corresponding sector, the 1991 rate is not achieved either, they will have to arrange, in a very short space of time, to charge a deposit throughout the whole distribution chain.

This is a rule which, first, creates uncertainty for operators who have opted to participate in a comprehensive system to manage packaging and packaging waste, because they do not know how long they can continue under the same conditions and, second, encourages them, in order to avoid that instability, to abandon that more comfortable alternative and charge a deposit on non-reusable packaging or use reusable packaging. Furthermore, there is the dissuasive effect which the rules are likely to have on those who are thinking of introducing their mineral water in Germany. a  
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59. It must be added that undertakings excluded from the option proposed in para 9(1) of the Packaging Regulation where the proportion of reusable packaging falls below the prescribed minimum could return to that option if the use of reusable packaging rises again. If the aim of those rules is to promote reusable bottles, it does not make much sense to allow producers, when the proportion exceeds 72%, to use non-reusable bottles again, with the likely consequence that the percentage will fall again. It seems to me that the decision which undertakings take as to the type of packaging to use is sufficiently important for legislation of that kind not to make it very uncertain for undertakings which choose to enter the German market that the decision will continue to have effect. c  
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60. Secondly, art 7 of Directive 94/62 puts return and collection systems and re-use and recovery systems, including recycling systems, on an equal footing, the only proviso being that they should make it possible to achieve the objectives laid down. There is therefore no reason, if it is sought to promote one system, to prevent economic operators from participating temporarily in another because the prescribed proportion has not been reached. e

61. Thirdly, the contested German legislation, although it applies to national operators and foreign operators in the same way, has a detrimental effect on the latter in particular. Drinks undertakings which intend to export part of their production tend to bottle it in non-reusable packaging because it costs less: if the reusable bottles are made of glass, they weigh more, which means higher fuel consumption and greater tonnage for transportation; furthermore, non-reusable packaging does not have to be taken back to its country of origin and the cost is halved, because the capacity of the returning vehicle may be used to carry other goods, and there is also no need to wash and sterilise bottles. The proof lies in the fact that, in practice, drinks producers from other member states use a considerably higher proportion of plastic packaging than German producers. In that regard, the Commission refers to a survey carried out by the Gesellschaft für Verpackungsmarktforschung in June 2001 to show that, in 1999, German producers of natural mineral water bottled 90% of their water in reusable packaging and the remaining 10% in non-reusable bottles, whereas 71% of exports to Germany were in non-reusable packaging. The claimants in the main proceedings state that, in the same year, 90% of imported drinks were sold in non-reusable packaging, whereas only 26% of drinks produced in Germany were sold in such packaging. f  
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62. There is another point which I think is important: in order to reach the German market, the distance which foreign drinks have to be transported is, as a rule, greater than that of drinks produced in Germany. It is true that there are exceptions, because there are no doubt producers in other member states near the border with Germany; furthermore, some German producers cover many kilometres to reach all the distribution points, although they can avoid sending back empty packaging over long distances by participating in a re-use system, if they work with standardised bottles. I do not think it is realistic to suggest to i

a foreign undertakings that they should stop using the packaging that they use in all other countries and adopt that officially approved for German undertakings, particularly bearing in mind that, in some cases, the packaging is of a distinctive nature and its graphic representation has been registered as a trade mark<sup>23</sup>.

b 63. In short, the contested legislation establishes specific conditions concerning the marketing of drinks in Germany, which are linked to percentages fixed arbitrarily, which ultimately depend on the preferences of consumers and which the economic operators can affect only if they agree to abandon non-reusable packaging and use reusable packaging. I do not think that the fact that, between 1994 and 2000, imports from other states increased is conclusive because, had it not been for those rules, the increase might have been greater.

c 64. Nor do I agree that paras 8(1) and 9(2) of the German regulation at issue constitute merely selling arrangements, even though they apply without distinction to drinks bottled in Germany and to imported drinks. In the judgment in *Criminal proceedings against Keck*<sup>24</sup>, the court distinguishes between d the provisions relating to the characteristics of the product and those concerning the selling arrangements in order to specify those rules which, while affecting nationals and non-nationals equally, cause barriers which make them measures of equivalent effect prohibited by art 28 EC.

e In that decision, it confirmed that, in the absence of harmonisation of legislation, obstacles to free movement of goods which are the consequence of applying, to goods coming from other member states where they are lawfully manufactured and marketed, rules that lay down requirements to be met by such goods constitute measures of equivalent effect, and that this is so even if those rules apply to all products without distinction, unless their application can be justified by a public interest objective taking precedence over the free movement of goods<sup>25</sup>.

f 65. The court then stated, contrary to what it had previously decided, that national provisions restricting or prohibiting certain selling arrangements are not such as to hinder directly or indirectly, actually or potentially, trade between member states within the meaning of *Procureur du Roi v Dassonville*<sup>26</sup>, so long as those provisions apply to all traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the g marketing of domestic products and of those from other member states.

It added that, provided that those conditions are fulfilled, rules of that kind are not such as to prevent the access of products from another member state to the market or to impede access any more than they impede the access of domestic products. Such rules therefore fall outside the scope of art 28 EC.

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i 23 See the judgment in *Henkel KGaA* Case C-218/01 (2003) Transcript (opinion), 14 January, (2004) Transcript (judgment), 12 February. The Court of First Instance has given judgment in *Deutsche SiSi-Werke GmbH & Co Betriebs KG v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* Joined cases T-146-153/02 (2004) Transcript (judgment), 28 January, concerning the refusal to register as a three-dimensional mark a form of drinks packaging consisting in a stand-up pouch.

24 Joined cases C-267/91 and C-268/91 [1993] ECR I-6097. See M López Escudero 'La jurisprudencia sobre la prohibición de las medidas de efecto equivalente tras la sentencia Keck y Mithouard', in *Gaceta Jurídica de la CE y de la Competencia*, D-28, pp 47-94.

25 See *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* Case 120/78 [1979] ECR 649 (the *Cassis de Dijon* case) and *Keck's* case, cited above (para 15).

26 Case 8/74 [1974] ECR 837.



66. Since that judgment, in order to decide whether art 28 EC prevails over legislation which applies without distinction to domestic and imported products, it is necessary to distinguish rules that lay down requirements to be met by such goods (such as those relating to designation, form, size, weight, composition, presentation, labelling, packaging) from those designed to govern the arrangements for selling them. a

67. Since giving judgment in 1993 in *Keck's case*<sup>27</sup>, where it examined the prohibition in France against resale at a loss, the Court of Justice has considered the following, for example, to be selling arrangements: a rule of professional conduct, laid down by a professional body, which prohibits pharmacists from advertising outside the pharmacy quasi-pharmaceutical goods which they are authorised to sell<sup>28</sup>; the laying down of a maximum number of opening hours and periods of compulsory closure for shops<sup>29</sup>; the obligation not to open retail outlets on Sundays<sup>30</sup>; a rule which reserves the sale of processed milk for infants solely to pharmacies<sup>31</sup>; a distribution system which reserves the retail sale of tobacco products to outlets authorised by the state<sup>32</sup>; a rule prohibiting the broadcasting of televised advertisements for the distribution sector<sup>33</sup>; a prohibition against any sale which yields only a very low profit margin<sup>34</sup>; an outright ban on advertising aimed at children less than 12 years of age and on misleading advertising<sup>35</sup>; a prohibition on producers and importers of alcoholic drinks in a state directing any advertising messages at consumers<sup>36</sup>; and legislation which provides traders may not make sales on rounds in a given administrative district, unless they also pursue their commercial activity at a permanent establishment situated in that administrative district, where they offer for sale the same goods as they do on rounds<sup>37</sup>. b  
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68. In the light of these examples, it is difficult to maintain that the German provisions contain merely selling arrangements, since the pressure they put on producers is directly related to the type of packaging in which the goods are marketed and they therefore form part of the measures relating to the characteristics of the products. f

69. For the reasons given, I consider that the rules contained in paras 8(1) and 9(2) of the Packaging Regulation constitute a measure having an equivalent effect to a quantitative restriction, which is prohibited under art 28 EC. g

27 Cited in footnote 24, above.

28 See *Hünermund v Landesapothekerkammer Baden-Württemberg* Case C-292/92 [1993] ECR I-6787.

29 See *Netherlands v Tankstation 't Heukske vof* Joined cases C-401/92 and C-402/92 [1994] ECR I-2199.

30 See *Punto Casa SpA v Sindaco del Comune di Capena and Comune di Capena* Joined cases C-69/93 and C-258/93 [1994] ECR I-2355. h

31 See *European Commission v Greece* Case C-391/92 [1995] ECR I-1621.

32 See *Criminal proceedings against Banchero* Case C-387/93 [1995] ECR I-4663.

33 See *Société d'importation Édouard Leclerc-Siplec v TFI Publicité SA* Case C-412/93 [1995] All ER (EC) 343, [1995] ECR I-179.

34 See *Groupeement National des Negociants en Pommes de Terre de Belgique (Belgapom) v ITM Belgium SA* Case C-63/94 [1995] ECR I-2467.

35 See *Konsumentombudsmannen (KO) v De Agostini (Svenska) Förlag AB, Konsumentombudsmannen (KO) v TV-Shop i Sverige AB* Joined cases C-34-36/95 [1997] All ER (EC) 687, [1997] ECR I-3843. i

36 See *Konsumentombudsmannen (KO) v Gourmet International Products AB* Case C-405/98 [2001] All ER (EC) 308, [2001] ECR I-1795.

37 See *Schutzverband gegen Unlauteren Wettbewerb v TK-Heimdienst Sass GmbH* Case C-254/98 [2000] ECR I-151.

*a* 3. The protection of the environment in Germany as justification for the contested legislation

70. According to the settled case law of the Court of Justice, national legislation which restricts or is liable to restrict intra-Community trade may be justified by considerations of public health and environmental protection of the kind relied upon by the German government<sup>38</sup>. However, in that case, it must be proportionate to the objectives pursued and those objectives must not be attainable by measures which are less restrictive of such trade<sup>39</sup>.

*b* 71. I am not persuaded that it is necessary, in order to protect the environment, to impose the rule that, every time the proportion of reusable packaging in Germany falls below 72%, undertakings lose the possibility of exemption from charging a deposit on non-reusable packaging by participating in a packaging and packaging waste management system if, in the sector in which they operate, the rate of reusable packaging does not reach the 1991 level.

*c* 72. First, it is not stated why 72% of the reusable packaging in circulation in the country is preferable, from an ecological point of view, to 60%, 70% or 80%, for example. Nor do I know the reasons of environmental protection for which the results achieved in 1991 should have been crystallised for the future, without allowing for adjustment factors according to the conduct and preferences of economic operators and consumers. It must be acknowledged that, if in that year the proportion of reusable bottles of mineral water was 91·33%, the margin available to producers bottling in non-reusable containers, in order to free themselves from the obligation to charge a deposit, under a comprehensive management system, is minimal. The same may be said of beer producers, with a limit of 82·16%, and of producers of carbonated drinks, whose quota is 73·72%, since it is mainly foreign producers who use that kind of packaging.

*d* As is well known, the Court of Justice found, in the judgment in *Commission v Denmark*<sup>40</sup>, that a restriction of the quantity of products which could be marketed by importers was disproportionate to the objective pursued. In that case, the Danish legislation allowed producers to sell up to 3,000 hectolitres of beer and soft drinks a year in non-approved containers, provided that these were reusable and that a deposit was charged on each.

*e* 73. Second, if it really is a question of preventing, albeit indirectly, the production of packaging waste by promoting reusable packaging, I cannot see why it should be necessary, when the 72% rate is achieved again, to resurrect the possibility of exemption from charging a deposit on non-reusable bottles. Certainly, the charging of a deposit achieves a much higher percentage of return of empty packaging by the consumer who, furthermore, soon becomes resigned to paying it. Once that system has been put in place, which is not easy, I wonder about the advantages of going back, with the foreseeable consequence that the use of reusable packaging will go down again, causing fluctuation which may destabilise the habits of users, producers and distributors—not to mention the retrograde step that this entails for management of packaging waste and conservation of the countryside.

*f* 38 See *Procureur de la République v Association de Défense des Brûleurs d'Huiles Usagées* Case 240/83 [1985] ECR 531 and *EC Commission v Denmark* Case 302/86 [1988] ECR 4607 (para 9).

39 See the *De Agostini and TV-Shop* case, cited in footnote 35, above (para 45), *Criminal proceedings against Franzén* Case C-189/95 [1997] ECR I-5909 (para 75) and *Aher-Waggon GmbH v Germany* Case C-389/96 [1998] ECR I-4473 (paras 18–20).

40 Cited in footnote 38, above (para 21).

74. Third, in its eagerness to promote reusable bottles in order to protect the environment from the consequences of recycling and other recovery of non-reusable packaging waste, the German government does not appear to have taken account of other factors (such as the cleansing and sterilisation treatments applicable to the reusable packaging, fuel consumption, emissions into the atmosphere, and the wear and tear of communication routes, if the transport distance is over a certain number of kilometres, with the inevitable increase in traffic density and the risk of accidents) which counterbalance the alleged ecological advantages, so that non-reusable packaging may be an interesting alternative from an environmental point of view. a

75. Fourth, under art 7 of Directive 94/62, member states are to ensure that systems are set up to provide for the return or collection, and re-use or recovery, of packaging; these systems are to be open to the participation of the economic operators concerned, they are to apply to imported products under non-discriminatory conditions, and they are to be designed so as to avoid barriers to trade or distortions of competition, in conformity with the Treaty. I consider that there is no justification, once the collection systems are in place in a state, for the public authorities temporarily to prevent certain economic operators from competing, because the nationals of that state have changed their drink consumption habits and prefer to buy them in non-reusable bottles, and to continue to prevent them until the trend is reversed. This constitutes a restriction on the free movement of goods which is not in correct proportion to the insignificant advantages that it represents for the protection of the environment. In my view, Directive 94/62 contains sufficient devices to allow the German authorities to guarantee that protection by adopting sufficiently stable legislation which permits exporting undertakings to plan in the medium and long term the kind of packaging which is suitable for marketing mineral water in Germany. b  
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However, if they decide to extend the charging of a deposit to all non-reusable packaging, I agree with the Commission that an adequate number of places must be provided for returning the packaging and recovering the amount paid. Otherwise, since most imported drinks are sold in non-reusable packaging, there would be the risk of creating barriers to trade, and there would in addition be distortions of competition if, at the same time, the reusable bottles used by most domestic producers were returned under more favourable conditions. Nor would it be advisable to set up a large number of separate deposit systems, each one with its own requirements, which would not cover the whole of the territory, because that would make it difficult for foreign producers and importers of packaged drinks to enter the market, quite apart from the fact that small and medium-sized undertakings in the other member states would probably not have sufficient resources to adapt their packaging to satisfy those conditions. f  
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76. Finally, charging a deposit on non-reusable packaging does not appear to be a suitable way of promoting the use of reusable packaging. What is certainly achieved is that the buyer or any other person involved returns the empty packaging in order to recover the deposit, which is something, but, when faced with the need to pay for either kind of packaging, the consumer usually opts for the packaging he finds more convenient and not necessarily for the packaging which harms the environment less. i

77. It is clear from these arguments that the German legislation at issue cannot be justified by protection of the environment as an overriding



a requirement restricting the application of art 28 EC, because it does not comply with the principle of proportionality.

78. Article 28 EC should therefore be interpreted as prohibiting a member state from providing that, where an overall proportion of reusable drinks packaging in the country of 72% is not reached, the economic operators in the sectors in which the proportion of reusable packaging is below the level set in 1991 are to lose the possibility of exemption from the obligation to charge a deposit on non-reusable bottles, to accept their return and repay the deposit, and to recover them, by participating in a comprehensive packaging and packaging waste management system.

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X—CONCLUSION

79. In the light of the foregoing considerations, I propose that the Court of Justice give the following reply to the questions referred for a preliminary ruling by the Verwaltungsgericht Stuttgart:

d (1) Article 1(2) of European Parliament and Council Directive (EC) 94/62 (on packaging and packaging waste) merely gives priority to the prevention of the production of packaging waste, and does not give precedence to reusable packaging, so that a member state cannot use that provision as a basis for favouring the re-use of drinks packaging over recycling and other forms of recovery.

e (2) Article 18 of Directive 94/62 is not the appropriate provision for analysing the effects which the application of rules such as paras 8(1) and 9(2) of the German Packaging Regulation may have on the free movement of goods.

f (3) Article 7 of Directive 94/62 does not grant producers and distributors of drinks in non-reusable packaging a right to participate in an existing return and management system, when the national authorities replace it with a deposit system intended to ensure that the empty packaging is taken back, in order to improve selective recovery and contain uncontrolled dumping.

g (4) Article 28 EC prohibits a member state from providing that, where an overall proportion of reusable drinks packaging in the country of 72% is not reached, the economic operators in the sectors in which the proportion of reusable packaging is below the level set in 1991 are to lose the possibility of exemption from the obligation to charge a deposit on non-reusable bottles, to accept their return and repay the deposit, and to recover them, by participating in a comprehensive packaging and packaging waste management system.

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14 December 2004. **The COURT OF JUSTICE (Grand Chamber)** delivered the following judgment.

i 1. The reference for a preliminary ruling relates to the interpretation of European Parliament and Council Directive (EC) 94/62 (on packaging and packaging waste) (OJ 1994 L365 p 10) and art 28 EC (formerly art 30 of the EC Treaty).

2. The reference was submitted in proceedings brought by Radlberger Getränkegesellschaft mbH & Co and S Spitz KG, which are Austrian drinks producers, against Land Baden-Württemberg.

## LEGAL CONTEXT

*Directive 94/62*

3. According to art 1(1), Directive 94/62 aims to harmonise national measures concerning the management of packaging and packaging waste in order, on the one hand, to prevent any impact thereof on the environment of all member states as well as of third countries or to reduce such impact, thus providing a high level of environmental protection, and, on the other hand, to ensure the functioning of the internal market and to avoid obstacles to trade and distortion and restriction of competition within the Community.

4. As stated in art 1(2), the directive lays down—

‘measures aimed, as a first priority, at preventing the production of packaging waste and, as additional fundamental principles, at reusing packaging, at recycling and other forms of recovering packaging waste and, hence, at reducing the final disposal of such waste.’

5. Article 5 of the directive provides:

‘Member States may encourage reuse systems of packaging, which can be reused in an environmentally sound manner, in conformity with the Treaty.’

6. Article 7 provides:

‘1. Member States shall take the necessary measures to ensure that systems are set up to provide for:

(a) the return and/or collection of used packaging and/or packaging waste from the consumer, other final user, or from the waste stream in order to channel it to the most appropriate waste management alternatives;

(b) the reuse or recovery including recycling of the packaging and/or packaging waste collected,

in order to meet the objectives laid down in this Directive.

These systems shall be open to the participation of the economic operators of the sectors concerned and to the participation of the competent public authorities. They shall also apply to imported products under non-discriminatory conditions, including the detailed arrangements and any tariffs imposed for access to the systems, and shall be designed so as to avoid barriers to trade or distortions of competition in conformity with the Treaty.

2. The measures referred to in paragraph 1 shall form part of a policy covering all packaging and packaging waste and shall take into account, in particular, requirements regarding the protection of environmental and consumer health, safety and hygiene; the protection of the quality, the authenticity and the technical characteristics of the packed goods and materials used; and the protection of industrial and commercial property rights.’

7. Article 18 is worded as follows:

‘Member States shall not impede the placing on the market of their territory of packaging which satisfies the provisions of this Directive.’

*National legislation*

8. The Verordnung über die Vermeidung und Verwertung von Verpackungsabfällen (Regulation on the Avoidance and Recovery of Packaging

a Waste) of 21 August 1998 (BGBl 1998 I, p 2379; the VerpackV) prescribes various measures to avoid and reduce the environmental impact of packaging waste. The VerpackV was intended, in particular, to transpose Directive 94/62 and replaced the Verordnung über die Vermeidung von Verpackungsabfällen (Regulation on the Avoidance of Packaging Waste) of 12 June 1991 (BGBl 1991 I, p 1234).

b 9. Paragraph 6(1) and (2) of the VerpackV lays down the following obligations:

c '1. Distributors shall accept the return of used empty sales packaging from final consumers, free of charge, at, or in the immediate vicinity of, the actual point of delivery, recover the packaging in accordance with the requirements of point 1 of Annex I and fulfil the requirements of point 2 of Annex I. The recovery requirements may also be satisfied by reusing the packaging or passing it on to distributors or producers under subparagraph 2. The distributor must draw the attention of the private final consumer, by means of clearly visible, legible notices, to the fact that the packaging may be returned in accordance with the first sentence. The obligation under the first sentence applies only to packaging of the type, form and size and to packaging of goods that the distributor carries in his range. For distributors with a sales area of less than 200 square metres, the obligation to take back returned packaging applies only to packaging for brands which the distributor puts into circulation. In the case of a mail order business, the taking back of returned packaging shall be ensured by means of suitable return facilities within reasonable distance of the final consumer. The possibility of returning the packaging is to be referred to in the consignment and in catalogues. Where sales packaging does not come from private final consumers, the parties may make other arrangements regarding the place of return and the allocation of costs. Where distributors do not fulfil the obligations under the first sentence by accepting the return of packaging at the point of delivery, they shall ensure compliance with them by means of a system as provided for by subparagraph 3. In derogation from the first sentence, the recovery requirements in Paragraph 4(2) shall apply *mutatis mutandis* to distributors of packaging who cannot participate in a system under subparagraph 3.

g 2. Producers and distributors shall accept free of charge at the place of actual delivery packaging returned to distributors under subparagraph 1, recover the packaging in accordance with the requirements of point 1 of Annex I and fulfil the requirements of point 2 of Annex I. The recovery requirements may also be satisfied by reusing the packaging. The obligations under the first sentence apply only to packaging of the type, form and size and to packaging of goods that the particular producer or distributor puts into circulation. The eighth, ninth and tenth sentences of subparagraph 1 shall apply *mutatis mutandis*.'

i 10. Under para 6(3), those obligations to take back and recover packaging may in principle also be met by participation of the producer or distributor in a global system for the collection of used sales packaging. The competent Land authority has the task of determining that the system fulfils the conditions imposed by the VerpackV with regard to its coverage rate.

11. By virtue of para 8(1) of the VerpackV, distributors who put liquids for consumption into circulation in non-reusable drinks packaging are required to charge the purchaser a deposit of at least €0.25 including value added tax per



item of packaging. Where the net volume exceeds 1.5 litres, the deposit is to be at least €0.50 including value added tax. The deposit is to be charged by each further distributor at every stage in the chain of distribution until sale to the final consumer. The deposit is to be repaid when the packaging is returned under para 6(1) and (2) of the VerpackV. a

12. In accordance with para 9(1) of the VerpackV, this mandatory deposit is not to apply where the producer or distributor is exempt from the obligation to accept return of the packaging because he participates in a global collection system as referred to in para 6(3). b

13. However, para 9(2) of the VerpackV prescribes circumstances in which, for certain drinks, recourse to para 6(3) ceases to be possible. Paragraph 9(2) states as follows: c

‘If, for beer, mineral water (including spring water, table water and spa water), carbonated soft drinks, fruit juices ... and wine ... the combined proportion of drinks in reusable packaging falls below 72% in the calendar year in the geographical area to which this regulation applies, a new survey of the relevant proportions of reusable packaging shall be carried out for the 12 months following publication of the failure to achieve the required proportions. If this shows that the proportion of reusable packaging in Federal territory is below the proportion laid down under the first sentence, the decision under Paragraph 6(3) shall be deemed to be revoked throughout Federal territory in respect of the drinks categories for which the reusable proportion determined in 1991 is not achieved, with effect from the first day of the sixth calendar month following publication in accordance with subparagraph 3 ...’ d

14. In accordance with para 9(3) of the VerpackV, the German government is to publish each year the relevant proportions, as referred to in para 9(2), of drinks packaged in ecologically sound drinks packaging. Under para 9(4) the competent authority, following an application or on its own initiative, is to make a new determination pursuant to para 6(3) where the relevant proportion of drinks in such packaging is again achieved following a revocation. e

#### THE MAIN PROCEEDINGS AND THE QUESTIONS REFERRED FOR A PRELIMINARY RULING f

15. The claimants in the main proceedings export carbonated soft drinks, fruit juices, other non-carbonated drinks and table water to Germany, in non-reusable recoverable packaging. With a view to recovery of that packaging, they joined the global waste collection system operated by the company Der Grüne Punkt—Duales System Deutschland AG and on that basis were exempted from the obligation to charge the deposit laid down in para 8(1) of the VerpackV for drinks distributed in Germany in non-reusable packaging. g

16. The German government announced on 28 January 1999 that in 1997 the proportion of reusable drinks packaging fell below 72% for the first time, namely to 71.33%. Since over two consecutive periods, namely between February 1999 and January 2000 and between May 2000 and April 2001, this proportion remained below 72% throughout Federal territory, on 2 July 2002 the government announced pursuant to para 9(3) of the VerpackV that from 1 January 2003 a mandatory deposit would be charged on mineral water, beer and soft drinks. Under the VerpackV, the claimants in the main proceedings would therefore be required from that date to charge the deposit prescribed in h

a para 8(1) thereof on most of their packaging for drinks distributed in Germany and then to accept the return of, and recover, the empty packaging.

b 17. On 23 May 2002 the claimants in the main proceedings brought an action against Land Baden-Württemberg before the Verwaltungsgericht Stuttgart (Administrative Court, Stuttgart) in which they submit that the rules laid down in the VerpackV on quotas for reusable packaging and the related deposit and return obligations are contrary to arts 1(1) and (2), 5, 7 and 18 of Directive 94/62 and art 28 EC. The Federal Republic of Germany was joined as a party to the proceedings.

c 18. The national court states that, if one proceeds on the basis of the interpretation put forward by the claimants according to which art 1(2) of Directive 94/62 presumes that the re-use of packaging and its recovery rank equally, the question arises as to whether the system laid down in the VerpackV is compatible with the directive inasmuch as that system makes it more difficult to put non-reusable packaging into circulation when the proportion of reusable packaging falls below a certain threshold. The national court observes that producers established in another member state are exposed to higher costs than d German producers if they decide to market their drinks in reusable packaging. It points out that, in the claimants' submission, even when the obligation to charge a deposit is suspended the German legislation affects the situation of producers established in another member state because German distributors tend to exclude products with non-reusable packaging from their range of drinks in order that the proportion of reusable packaging does not fall e below 72%.

19. In those circumstances, the Verwaltungsgericht Stuttgart decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

f '(1) On a proper construction of Article 1(2) of ... Directive 94/62 ... are Member States prohibited from favouring systems for reusing drinks packaging over recoverable non-reusable packaging by removing, where a Federal target for reusable packaging of 72% is not reached, the possibility of exemption from a return, management and deposit obligation laid down in respect of empty non-reusable drinks packaging by participation in a return and management system, so far as concerns drinks sectors in g which the proportion of reusable packaging has fallen below the level determined in 1991?

h (2) On a proper construction of Article 18 of ... Directive 94/62 ... are Member States prohibited from impeding the placing of drinks in recoverable non-reusable packaging on the market by removing, where a Federal target for reusable packaging of 72% is not reached, the possibility of exemption from a return, management and deposit obligation laid down in respect of empty non-reusable drinks packaging by participation in a return and management system, so far as concerns drinks sectors in which the proportion of reusable packaging has fallen below the level determined in 1991?

i (3) On a proper construction of Article 7 of ... Directive 94/62 ... do producers and distributors of drinks in recoverable non-reusable packaging have a right to participate in an existing return and management system for used drinks packaging, in order to meet a statutory obligation to charge a deposit on non-reusable drinks packaging and accept the return of used drinks packaging?

(4) On a proper construction of Article 28 EC are the Member States prohibited from adopting rules providing that where a Federal target for reusable drinks packaging of 72% is not reached, the possibility of exemption from a return, management and deposit obligation laid down in respect of empty non-reusable drinks packaging by participation in a return and management system is removed so far as concerns drinks sectors in which the proportion of reusable packaging has fallen below the level determined in 1991? a  
b

#### THE REQUESTS TO REOPEN THE ORAL PROCEDURE

20. By letters received at the Court Registry on 14 and 17 June 2004 respectively, the German government and the defendant in the main proceedings requested the court to order the reopening of the oral procedure pursuant to art 61 of the Rules of Procedure. c

21. The German government submits in support of its request that the opinion delivered by the Advocate General on 6 May 2004 contains a series of matters which were not covered in the written or oral procedure and reveal a misappraisal of the arguments relied on by it before the court. In its request, the defendant in the main proceedings likewise maintains that the opinion broaches certain matters which were not debated and upon which the court has therefore not been sufficiently informed. d

22. The court may of its own motion, on a proposal from the Advocate General or at the request of the parties order the reopening of the oral procedure, in accordance with art 61 of its Rules of Procedure, if it considers that it lacks sufficient information or that the case must be dealt with on the basis of an argument which has not been debated between the parties (see *Deutsche Post AG v Sievers* Joined cases C-270/97 and C-271/97 [2000] ECR I-929 (para 30), *Wouters v Algemene Raad van de Nederlandse Orde van Advocaten* (Raad van de Balies van de Europese Gemeenschap intervening) Case C-309/99 [2002] All ER (EC) 193, [2002] ECR I-1577 (para 42), *Philips Electronics NV v Remington Consumer Products Ltd* Case C-299/99 [2002] All ER (EC) 634, [2002] ECR I-5475 (para 20) and *Steckmann v Deutsches Patent- und Markenamt* Case C-273/00 [2004] All ER (EC) 253, [2002] ECR I-11737 (para 22)). e  
f

23. In the circumstances of this case, however, the court, after hearing the Advocate General, considers that it is in possession of all the facts necessary for it to answer the questions referred and that those facts have been the subject of argument presented before it. g

24. The requests of the German government and the defendant in the main proceedings seeking the reopening of the oral procedure must therefore be rejected. h

#### CONSIDERATION OF THE QUESTIONS REFERRED FOR A PRELIMINARY RULING *Admissibility of the questions referred*

25. The defendant in the main proceedings submits that the court must reject the questions referred for a preliminary ruling as inadmissible, given that the main action is inadmissible as it has been brought against Land Baden-Württemberg: the latter has no power of its own to adopt primary or secondary legislation in the matter and merely implements federal rules. In the defendant's submission, the action should have been brought against the federal state before the court with jurisdiction in this regard, namely the Verwaltungsgericht Berlin. In parallel proceedings a number of German administrative courts have already found similar actions inadmissible. i



- a 26. As to those submissions, it is not for the Court of Justice, given the allocation of functions between itself and the national courts, to determine whether the decision to refer has been taken in accordance with the rules of national law governing the organisation of courts and their procedure (see *Eurico Italia Srl v Ente Nazionale Risi* Joined cases C-332/92, C-333/92 and C-335/92 [1994] ECR I-711 (para 13), *World Wildlife Fund (WWF) v Autonome Provinz Bozen* Case C-435/97 [1999] ECR I-5613 (para 33) and *Gozza v Università degli Studi di Padova* Case C-371/97 [2000] ECR I-7881 (para 30)).
- b The court must abide by the decision from a court of a member state requesting a preliminary ruling in so far as it has not been overturned in any appeal procedures provided for by national law (see *Reina v Landeskreditbank Baden-Württemberg* Case 65/81 [1982] ECR 33 (para 7)).
- c 27. In the present case, it is apparent from the order for reference that the Verwaltungsgericht Stuttgart considers that the main action is at least partially admissible.
28. Nor is it in dispute that there is a direct connection between, first, the four questions referred for a preliminary ruling, which relate to the interpretation of arts 1, 7 and 18 of Directive 94/62 and art 28 EC and have been asked in order to enable the national court to assess whether the German legislation at issue is compatible with those provisions, and second, the subject matter of the main proceedings, which seek a declaration that the claimants are not required to comply with the obligations to charge a deposit on their non-reusable packaging and accept its return.
- d 29. It follows that the reference for a preliminary ruling is admissible.
- e

#### Question 1

30. By its first question, the national court essentially asks whether art 1(2) of Directive 94/62 precludes a member state from promoting systems for the re-use of packaging, by application of a system such as that laid down in paras 8(1) and 9(2) of the VerpackV.
- f 31. While art 1(2) of Directive 94/62 envisages as a 'first priority' measures aimed at preventing the production of packaging waste, it lists, as 'additional fundamental principles', reusing packaging, recycling and other forms of recovering packaging waste.
- g 32. The eighth recital in the preamble to the directive states that—  
'until scientific and technological progress is made with regard to recovery processes, reuse and recycling should be considered preferable in terms of environmental impact ... this requires the setting up in the Member States of systems guaranteeing the return of used packaging and/or packaging waste; life-cycle assessments should be completed as soon as possible to justify a clear hierarchy between reusable, recyclable and recoverable packaging ...'
- h 33. It follows from the foregoing that Directive 96/42 does not establish a hierarchy between the re-use of packaging and the recovery of packaging waste.
- i 34. However, art 5 of Directive 94/62 allows the member states to take measures designed to encourage systems for the re-use of packaging that can be re-used in an environmentally sound manner.
35. It is clear from the very wording of art 5 that such a policy of promoting the re-use of packaging is permitted only in so far as it is consistent with the Treaty.

36. Thus, measures taken by a member state pursuant to art 5 must comply not only with requirements that flow from the directive's other provisions, in particular art 7 to which the third question referred for a preliminary ruling relates, but also with obligations resulting from the provisions of the Treaty, in particular art 28 EC to which the fourth question referred for a preliminary ruling relates. a

37. The answer to the first question must therefore be that art 1(2) of Directive 94/62 does not preclude the member states from introducing measures designed to promote systems for the re-use of packaging. b

38. In view of the foregoing, it is appropriate to answer first the third and fourth questions referred for a preliminary ruling. c

### Question 3

39. By its third question, the national court essentially asks whether art 7 of Directive 94/62 confers on producers and distributors of drinks in recoverable non-reusable packaging who are permitted to fulfil their deposit and return obligations by participating in a global packaging collection system the right to continue to participate in a global system of that kind in order to meet their legal obligations. d

40. Directive 94/62 requires the member states, in art 7(1), to take the necessary measures to ensure that systems are set up to provide for, first, the return and/or collection of used packaging and/or packaging waste and, second, the re-use or recovery of the packaging or packaging waste collected. Article 7(1) also states that those systems must be open to the participation of the economic operators of the sectors concerned and to the participation of the competent public authorities, apply to imported products under non-discriminatory conditions, and be designed so as to avoid barriers to trade or distortions of competition in conformity with the Treaty. e

41. Article 7(2) of the directive requires the measures referred to in art 7(1) to form part of a policy covering all packaging and packaging waste and states that those measures are to take into account, in particular, requirements regarding the protection of environmental and consumer health, safety and hygiene, the protection of the quality, the authenticity and the technical characteristics of the packed goods and materials used, and the protection of industrial and commercial property rights. f

42. Article 7 leaves it to the member states to choose, as regards non-reusable packaging, between a deposit and return system, on the one hand, and a global packaging collection system, on the other, or to opt for a combination of the two systems depending on the type of product, provided that the systems chosen are designed to channel packaging to the most appropriate waste management alternatives and form part of a policy covering all packaging and packaging waste. g

43. That provision does not confer on the producers and distributors concerned any right to continue to participate in a given packaging waste management system. h

44. Directive 94/62 does not prevent a member state from providing that amendments are to be made to packaging waste management systems set up in its territory so as to ensure that the most appropriate waste management alternative is adopted. i

45. While Directive 94/62 thus allows a member state to require the replacement, in the light of the circumstances, of a system for the collection of

a packaging near the homes of consumers or points of sale with a deposit and return system, such replacement must however comply with certain conditions.

b 46. First, the new system must be equally appropriate for the purpose of attaining the objectives of Directive 94/62. In particular, where the new system is, as in the present case, a deposit and return system, the member state concerned must ensure that there are a sufficient number of return points so that consumers who have been charged a deposit when buying goods in non-reusable packaging can recover the deposit even if they do not go back to the initial place of purchase.

c 47. It should be noted in this connection that the first sentence of para 6(1) of the VerpackV provides that distributors are to accept the return of sales packaging free of charge at, or in the immediate vicinity of, the actual point of delivery ('am Ort der tatsächlichen Übergabe oder in dessen unmittelbarer Nähe'). While it is true that the following sentences of para 6(1) add certain details, in particular as regards the limitations on that obligation on the basis of the characteristics of the packaging concerned and on the basis of the sales area of the distributor concerned, the fact remains that the extent of the obligation to accept return does not appear to be unambiguous.

d 48. Second, the changeover to the new system must take place without a break and without jeopardising the ability of economic operators in the sectors concerned actually to participate in the new system as soon as it enters into force. Article 7(1) of Directive 94/62 obliges each member state to ensure that the producers and distributors concerned have access to a packaging waste management system at all times and without discrimination.

e 49. Therefore, a member state which replaces the existing packaging waste management system with another has the task of ensuring that the producers and distributors concerned have a reasonable period for the transition to the new system so that they can adapt their production methods and chains of distribution to the requirements of the new system.

f 50. The answer to the third question must therefore be that while art 7 of Directive 94/62 does not confer on the producers and distributors concerned any right to continue to participate in a given packaging waste management system, it precludes the replacement of a global system for the collection of packaging waste with a deposit and return system where the new system is not equally appropriate for the purpose of attaining the objectives of that directive or where the changeover to the new system does not take place without a break and without jeopardising the ability of economic operators in the sectors concerned actually to participate in the new system as soon as it enters into force.

g  
h Question 4

i 51. By its fourth question, the national court essentially asks whether art 28 EC precludes national rules, such as those laid down in paras 8(1) and 9(2) of the VerpackV, under which the proportion of reusable packaging in the sector concerned determines whether producers and distributors using non-reusable packaging may fulfil their deposit, return and recovery obligations by participation in a global collection system.

#### *The applicability of art 28 EC*

52. In the German government's submission, there cannot be a conflict between art 28 EC and the national rules at issue given that, as regards the



re-use of packaging, Directive 94/62, in particular arts 5, 9 and 18, has the aim and effect of harmonising completely the subject in question. a

53. In view of the fact that, where a sphere has been the subject of exhaustive harmonisation at Community level, any national measure relating thereto must be assessed in the light of the provisions of the harmonising measure and not those of the Treaty (see *Criminal proceedings against Vanacker* Case C-37/92 [1993] ECR I-4947 (para 9), *DaimlerChrysler AG v Land Baden-Württemberg* Case C-324/99 [2001] ECR I-9897 (para 32) and *Deutscher Apothekerverband eV v 0800 DocMorris NV* Case C-322/01 [2003] ECR I-14887 (para 64)), it must be determined whether the harmonisation brought about by Directive 94/62 precludes the compatibility of the national rules in question with art 28 EC from being examined. b

54. As regards the re-use of packaging, art 5 of Directive 94/62 does no more than allow the member states to encourage, in conformity with the Treaty, systems for the re-use of packaging that can be re-used in an environmentally sound manner. c

55. Apart from the definition of the concept of 're-use' of packaging, certain general provisions on measures to avoid packaging waste and the provisions relating to return, collection and recovery systems, set out in arts 3(5), 4 and 7 respectively, Directive 94/62 does not regulate, as regards member states which are disposed to exercise the power granted by art 5, the organisation of systems encouraging reusable packaging. d

56. In contrast to the position in respect of the marking and identification of packaging and the requirements on the composition of packaging and its capacity to be re-used or recovered, governed by arts 8 and 11 of Directive 94/62 and Annex II thereto, the organisation of national systems intended to encourage the re-use of packaging is therefore not the subject of complete harmonisation. e

57. Such systems can consequently be assessed on the basis of the Treaty provisions relating to the free movement of goods. f

58. Furthermore, art 5 of Directive 94/62 allows the member states to encourage systems for the re-use of packaging only 'in conformity with the Treaty'.

59. Inasmuch as art 18 of Directive 94/62 does no more than guarantee the free movement, in the territory of the member states, of packaging which complies with the requirements relating to its marking, composition and capacity to be re-used or recovered, that provision likewise does not preclude national packaging waste management systems from being assessed in the light of art 28 EC if they are liable to affect the conditions for marketing the products concerned. g

#### *The existence of a barrier to trade*

h

60. It must therefore be assessed whether art 28 EC precludes national rules, such as those at issue in the main proceedings, under which the ability of producers and distributors using non-reusable packaging to fulfil their deposit and return obligations by participation in a global collection system depends on changes in the overall proportion of drinks in non-reusable packaging on the German market and the proportion of the particular drinks concerned that are placed on the same market in such packaging. i

61. It should be noted, first, that such rules apply without distinction to national products and products from other member states and lay down the

a same deposit and return requirements for producers established in other member states as for national producers.

b 62. Second, in contrast to the maximum level of drinks capable of being marketed in non-approved containers which was at issue in *EC Commission v Denmark* Case 302/86 [1988] ECR 4607, in the main proceedings the proportions do not limit the quantity of products which may be imported in a certain type of packaging. The VerpackV does not prohibit the marketing of products in non-reusable packaging beyond the proportions indicated, but provides merely that the exceeding of those proportions will result in a change in the management system for non-reusable packaging.

c 63. However, the fact remains that while paras 8(1) and 9(2) of the VerpackV admittedly apply to all producers and distributors operating in national territory, they do not affect the marketing of drinks produced in Germany and that of drinks from other member states in the same manner.

d 64. While a changeover from one packaging management system to another results, generally, in costs so far as concerns the marking or labelling of packaging, rules, such as those at issue in the main proceedings, which oblige producers and distributors using non-reusable packaging to replace their participation in a global collection system with a deposit and return system cause every producer and distributor using such packaging to incur additional costs connected with organisation of the taking back of packaging, the refunding of sums paid by way of deposit and any balancing of those sums between distributors.

e 65. It is not in dispute that producers established outside Germany use considerably more non-reusable packaging than German producers.

f 66. The national court observes that recourse to reusable packaging normally causes a drinks producer established in another member state to incur costs higher than those borne by a German producer, given that costs linked to organisation of a deposit system and to transport are greater if the producer is established at a certain distance from the points of sale.

g 67. It follows that the replacement, as regards non-reusable packaging, of a global packaging collection system with a deposit and return system is such as to hinder the placing on the German market of drinks imported from other member states (see to this effect, as regards reusable drinks packaging, *Commission v Denmark*, cited above (para 13)).

h 68. It is immaterial in this regard that the provisions in question envisage deposit and return obligations for non-reusable packaging and do not prohibit imports of drinks in such packaging and that it is, moreover, possible for producers to resort to reusable packaging. A measure capable of hindering imports must be classified as a measure having equivalent effect to a quantitative restriction even though the hindrance is slight and even though it is possible for the products to be marketed in other ways (see *Criminal proceedings against Van de Haar* Joined cases 177/82 and 178/82 [1984] ECR 1797 (para 14)).

i 69. In this context, it is not relevant to assert, as the German government does, that the increase of imports into Germany of natural mineral water in non-reusable packaging in respect of the period preceding the introduction of the deposit and return obligations demonstrates that there is no discrimination against drinks producers established in other member states. Even if that trend is observed on the German market, it cannot take away the fact that, for drinks producers established in other member states, paras 8 and 9 of the VerpackV constitute an obstacle to the marketing of their products in Germany.

70. Contrary to the submissions of the defendant in the main proceedings and the German government, paras 8 and 9 of the VerpackV cannot be treated as national provisions which restrict or prohibit certain 'selling arrangements' within the meaning of the judgment in *Criminal proceedings against Keck* joined cases C-267/91 and C-268/91 [1993] ECR I-6097 (para 16 et seq). a

71. The court has held that the need, resulting from the measures at issue, to alter the packaging or the labelling of imported products prevents those measures from concerning selling arrangements for the products within the meaning of the judgment in *Keck's* case (see *Colim NV v Bigg's Continent Noord NV* Case C-33/97 [1999] ECR I-3175 (para 37), *European Commission v Spain* Case C-12/00 [2003] ECR I-459 (para 76) and *Morellato v Comune di Padova* Case C-416/00 [2003] ECR I-9343 (para 29)). b

72. As noted in para 64 of the present judgment, the replacement of participation in a global collection system by the establishment of a deposit and return system obliges the producers concerned to alter certain information on their packaging. c

73. In any event, given that the provisions of the VerpackV do not affect the marketing of drinks produced in Germany and that of drinks from other member states in the same manner, they cannot fall outside the scope of art 28 EC (see *Keck's* case (paras 16, 17)). d

#### *Justifications relating to protection of the environment*

74. It must be examined next whether, as the defendant in the main proceedings and the German government assert, rules such as those laid down in paras 8(1) and 9(2) of the VerpackV can be justified by reasons relating to protection of the environment. e

75. In accordance with settled case law, national measures capable of hindering intra-Community trade may be justified by overriding requirements relating to protection of the environment provided that the measures in question are proportionate to the aim pursued (see *Commission v Denmark* (paras 6, 9) and *Aher-Waggon GmbH v Germany* Case C-389/96 [1998] ECR I-4473 (para 20)). f

76. The obligation to establish a deposit and return system for empty packaging is an indispensable element of a system intended to ensure that packaging is re-used (see *Commission v Denmark* (para 13)). g

77. With regard to non-reusable packaging, as the defendant in the main proceedings and the German government state, the establishment of a deposit and return system is liable to increase the proportion of empty packaging returned and results in more precise sorting of packaging waste, thus helping to improve its recovery. In addition, the charging of a deposit contributes to the reduction of waste in the natural environment since it encourages consumers to return empty packaging to the points of sale. h

78. Furthermore, in so far as the rules at issue in the main proceedings make the entry into force of a new packaging waste management system conditional on the proportion of reusable packaging on the German market, they create a situation where any increase in sales of drinks in non-reusable packaging on that market makes it more likely that there will be a change of system. Inasmuch as those rules thus encourage the producers and distributors concerned to have recourse to reusable packaging, they contribute towards reducing the amount of waste to be disposed of, which constitutes one of the general objectives of environmental protection policy. i



a 79. However, in order for such rules to comply with the principle of proportionality, it must be ascertained not only whether the means which they employ are suitable for the purpose of attaining the desired objectives but also whether those means do not go beyond what is necessary for that purpose (see *Safety Hi-Tech Srl v S & T Srl* Case C-284/95 [1998] ECR I-4301 (para 57)).

b 80. In order for national rules to satisfy the latter test, they must allow the producers and distributors concerned, before the deposit and return system enters into force, to adapt their production methods and the management of non-reusable packaging waste to the requirements of the new system. While it is true that a member state may leave to those producers and distributors the task of setting up that system by organising the taking back of packaging, the refunding of sums paid by way of deposit and any balancing of those sums  
c between distributors, the member state in question must still ensure that, at the time when the packaging waste management system changes, every producer or distributor concerned can actually participate in an operational system.

d 81. Legislation, such as the *VerpackV*, that makes the establishment of a deposit and return system dependent on a packaging re-use rate, which is certainly advantageous from an ecological point of view, complies with the principle of proportionality only if, while encouraging the re-use of packaging, it gives the producers and distributors concerned a reasonable transitional period to adapt thereto and ensures that, at the time when the packaging waste management system changes, every producer or distributor concerned can  
e actually participate in an operational system.

82. It is for national courts to determine whether the change of packaging waste management system, such as the change provided for in paras 8(1) and 9(2) of the *VerpackV*, allows the producers and distributors concerned to participate in an operational system under the above-mentioned conditions.

f 83. Consequently, the answer to the fourth question must be that art 28 EC precludes national rules, such as those laid down in paras 8(1) and 9(2) of the *VerpackV*, when they announce that a global packaging waste collection system is to be replaced by a deposit and return system without the producers and distributors concerned having a reasonable transitional period to adapt thereto and being assured that, at the time when the packaging waste management system changes, they can actually participate in an operational  
g system.

### Question 2

h 84. In light of the answer given to the fourth question, it is no longer necessary to answer the second question.

### COSTS

i 85. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the court, other than the costs of those parties, are not recoverable.

On those grounds, the Court of Justice (Grand Chamber) rules as follows:

(1) Article 1(2) of European Parliament and Council Directive (EC) 94/62 (on packaging and packaging waste) does not preclude the member states from introducing measures designed to promote systems for the re-use of packaging.

(2) While art 7 of Directive 94/62 does not confer on the producers and distributors concerned any right to continue to participate in a given packaging waste management system, it precludes the replacement of a global system for the collection of packaging waste with a deposit and return system where the new system is not equally appropriate for the purpose of attaining the objectives of that directive or where the changeover to the new system does not take place without a break and without jeopardising the ability of economic operators in the sectors concerned actually to participate in the new system as soon as it enters into force. a  
b

(3) Article 28 EC (formerly art 30 of the EC Treaty) precludes national rules, such as those laid down in paras 8(1) and 9(2) of the Verordnung über die Vermeidung und Verwertung von Verpackungsabfällen (Regulation on the Avoidance and Recovery of Packaging Waste), when they announce that a global packaging waste collection system is to be replaced by a deposit and return system without the producers and distributors concerned having a reasonable transitional period to adapt thereto and being assured that, at the time when the packaging waste management system changes, they can actually participate in an operational system. c  
d

**a** **Holcim (Deutschland) AG (formerly Alsen AG) v European Commission**  
(Case T-28/03)

**b** COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES (THIRD CHAMBER)  
JUDGES AZIZI (PRESIDENT), JAEGER AND DEHOUSSE  
10 JUNE 2004, 21 APRIL 2005

*European Community – Commission – Decision – Decision giving applicant undertaking option to pay fine or provide bank guarantee as security for payment of fine – Applicant undertaking electing to offer Commission bank guarantee – Annulment by Court of First Instance of decision in relation to applicant undertaking – Consequences of annulment – Whether bank guarantee charges recoverable – Articles 233, 235, 288 EC (formerly EC Treaty, arts 176, 178, 215).*

**d** The applicant company, which had been formed in 1997 as the result of a merger between two companies, manufactured construction materials. By Commission Decision (EC) 94/815 (relating to a proceeding under art 85<sup>a</sup> of the EC Treaty (now art 81 EC) (Cases IV/33.126 and 33.322—Cement) both those companies were found to be amongst those associations, federations and undertakings which had infringed art 85 of the EC Treaty by participating in concerted practices designed to prevent incursions by competitors on respective national markets in the Community. Fines were imposed upon them. In accordance with the option offered to them by the Commission of the European Communities, they decided to provide bank guarantees, thus avoiding the need to pay the fines immediately. The two companies brought actions for the annulment of the decision. On 15 March 2000, the Court of First Instance annulled the decision in so far as the applicant was concerned and ordered the Commission to pay the costs (the judgment). Pursuant to art 91 of the Rules of Procedure of the Court of First Instance, the applicant requested the Commission to pay, inter alia, the charges incurred in providing the bank guarantees. The Commission refused. The applicant's second request for payment of the charges was also refused. The applicant then brought proceedings seeking, under arts 233 EC<sup>b</sup>, 235 EC<sup>c</sup> and 288 EC<sup>d</sup> (formerly arts 176, 178 and 215 of the EC Treaty), compensation in the form of reimbursement of the charges it had incurred. The Commission contended, inter alia, that the action should be dismissed as inadmissible or, in the alternative, unfounded.

**h** **a** Article 81 EC, so far as material, provides: 'The following shall be prohibited as incompatible with the common market: all ... concerted practices ... which have as their object or effect the prevention, restriction or distortion of competition within the common market ...'

**b** Article 233 EC, so far as material, provides: 'The institution or institutions whose act has been declared void or whose failure to act has been declared contrary to this Treaty shall be required to take the necessary measures to comply with the judgment of the Court of Justice. This obligation shall not affect any obligation which may result from the application of the second paragraph of Article 288.'

**i** **c** Article 235 EC provides: 'The Court of Justice shall have jurisdiction in disputes relating to compensation for damage provided for in the second paragraph of Article 288.'

**d** Article 288 EC, so far as material, provides: 'The contractual liability of the Community shall be governed by the law applicable to the contract in question. In the case of non-contractual liability, the Community shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties.'



**Held** – (1) Article 233 EC, in the context of the objection of inadmissibility, did not constitute a specific remedy. The EC Treaty provided, restrictively, the remedies which were available to persons to rely on their rights. As art 233 EC did not establish a remedy, it could not autonomously found a claim such as the claim for reimbursement of the bank guarantee charges in the instant case. The fact that the Commission had no discretion, or that the Court of First Instance had declared that the charges had to be reimbursed, did not alter that finding (see judgment paras 31, 32, 35, 36, below). a  
b

(2) The breach of Community law found in the judgment regarding that part of the decision which concerned the applicant was not sufficiently serious to allow the non-contractual liability of the Community to be incurred. Without fundamentally calling into question the Commission's analysis regarding the application of art 85(1) of the EC Treaty, the Court of First Instance had confined itself to challenging the Commission's appraisal of the probative nature of certain documents used for the purpose of establishing the infringement in respect of certain applicants. Furthermore, although the court annulled the decision in so far as it concerned the applicant, it had none the less found that there was a certain amount of evidence of such a kind as to accredit the argument that the impugned co-operation had had the object and effect of reinforcing the rule on non-transshipment to home markets. In addition, regard had to be had to: (i) the fact that the decision involved consideration of a particularly complex case; (ii) that investigation of the structure of the relevant association had been difficult; (iii) it had been necessary to analyse a great number of documents; and (iv) the difficulties in applying the provisions of the EC Treaty in matters relating to cartels. Accordingly, the Commission was not liable to compensate the applicant for those charges which were admissible as having been incurred within the limitation period (see judgment paras 86, 113–116, 118, below). c  
d  
e

(3) An undertaking which brought an action against a decision imposing a fine upon it had a choice whether to pay the fine, apply for suspension of the operation of the decision, or to provide a bank guarantee. In the circumstances, the applicant could not maintain that the guarantee charges which it had incurred were the direct consequence of the unlawfulness of the decision. The damage it alleged it had suffered was the consequence of its own decision not to comply with the obligation to pay the fine within the period prescribed by providing a bank guarantee (see judgment paras 122, 123, below); *Corus UK Ltd v European Commission* Case T-171/99 [2001] ECR II-2967 distinguished. f  
g

## Notes

For the power of the Commission to impose fines on undertakings for infringement of art 81 EC, see 47 *Halsbury's Laws* (4th edn) (2001 reissue) para 399. h

## Cases cited

- Asteris AE v EC Commission* Joined cases 97/86, 193/86, 99/86 and 215/86 [1988] ECR 2181, ECJ.
- Autosalone Ispra dei Fratelli Rossi Snc v European Commission* Case T-124/99 [2001] ECR II-53, CFI; *affd* Case C-136/01 P [2002] I-6565, ECJ. i
- Biret International SA v EU Council* Case T-174/00 [2002] ECR II-17, CFI; *affd* Case C-93/02 P [2003] ECR I-10497, ECJ.
- Birra Wührer SpA v EC Council* Joined cases 256/80, 257/80, 265/80, 267/80 and 5/81 [1982] ECR 85, ECJ.

- a* *Blackspur DIY Ltd v EU Council* Case T-168/94 [1995] ECR II-2627, CFI.  
*British American Tobacco International (Investments) v European Commission* Case T-111/00 [2001] ECR II-2997, CFI.  
*Camar Srl v European Commission* Joined cases T-79/96, T-260/97 and T-117/98 [2000] ECR II-2193, CFI; *affd in part sub nom European Commission v Camar Srl* Case C-312/00 P [2002] ECR I-11355, ECJ.
- b* *Cimenteries CBR v European Commission* Joined cases T-25/95, T-26/95, T-30-32/95, T-34-39/95, T-42-46/95, T-48/95, T-50-65/95, T-68-71/95, T-87/95, T-88/95, T-103/95 and T-104/95 [2000] ECR II-491, CFI.  
*Coöperatieve vereniging Suiker Unie UA v EC Commission* Joined cases 40-48/73, 50/73, 54-56/73, 111/73 and 113-114/73 [1975] ECR 1663, ECJ.
- c* *Corus UK Ltd v European Commission* Case T-171/99 [2001] ECR II-2967, CFI.  
*Deere (John) Ltd v European Commission* Case C-7/95 P [1998] All ER (EC) 481n, [1998] ECR I-3111, ECJ.  
*Dumortier Frères (P) v EC Council* Joined cases 64/76 and 113/76, 167/78 and 239/78, 27/79, 28/79 and 45/79 [1979] ECR 3091, ECJ.  
*Efisol SA v European Commission* Case T-336/94 [1996] ECR II-1343, CFI.
- d* *Enso Española SA v European Commission* Case T-348/94 [1998] ECR II-1875, CFI.  
*Etablissements Biret et Cie SA v EU Council* Case T-210/00 [2002] ECR II-47, CFI.  
*Fresh Marine Co SA v European Commission* Case T-178/98 [2000] ECR II-3331, CFI; *affd sub nom European Commission v Fresh Marine Co SA* Case C-472/00 P [2003] ECR I-7541, ECJ.
- e* *Groupement des Cartes Bancaires 'CB' v European Commission* Case T-275/94 [1995] All ER (EC) 717, [1995] ECR II-2169, CFI.  
*Hartmann v EU Council* Case T-20/94 [1997] ECR II-595, CFI.  
*Jestädt v EU Council* Case T-332/99 [2001] ECR II-2561, CFI.  
*K v Germany* Case 233/82 [1982] ECR 3637, ECJ.  
*Kurt Kampffmeyer Mühlenvereinigung KG v EC Commission* Joined cases 56-60/74 [1976] ECR 711, ECJ.
- f* *Laboratoires Pharmaceutiques Bergaderm SA (in liq) v European Commission* Case C-352/98 P [2000] ECR I-5291, ECJ.  
*Lamberts v European Ombudsman* Case T-209/00 [2002] ECR II-2203, CFI; *affd* Case C-234/02 P [2004] ECR I-2803, ECJ.
- g* *Meskens v European Parliament* Case T-84/91 [1992] ECR II-1565, CFI.  
*Meyer v European Commission* Case T-333/01 [2003] ECR II-117, CFI.  
*Oleifici Mediterranei (SA) v EEC* Case 26/81 [1982] ECR 3057, ECJ.  
*Philip Morris International Inc v European Commission (supported by European Parliament intervening)* Joined cases T-377/00, T-379/00, T-380/00, T-260/01 and T-272/01 [2003] All ER (EC) 1008, [2003] ECR II-1, CFI.
- h* *Remia BV v EC Commission* Case 42/84 [1985] ECR 2545, ECJ.  
*Salamander AG (supported by Markenverband eV, intervening) v European Parliament (supported by Finland, intervening)* Joined cases T-172/98 and T-175-177/98 [2000] All ER (EC) 754, [2000] ECR II-2487, CFI.  
*Unión de Pequeños Agricultores v EU Council (supported by the European Commission intervening)* Case C-50/00 P [2002] All ER (EC) 893, [2003] QB 893, [2003] 2 WLR 795, [2002] ECR I-6677, ECJ.
- i*

### Application

By application lodged at the Registry of the Court of First Instance on 31 January 2003, Holcim (Deutschland) AG, formerly Alsen AG, established in Hamburg, Germany, brought the present action for compensation in the form

of reimbursement of the bank guarantee charges incurred by the applicant following a fine fixed by Commission Decision (EC) 94/815 (relating to a proceeding under art 85 of the EC Treaty (now art 81 EC) (Cases IV/33.126 and 33.322—Cement)) (OJ 1994 L343 p 1), which was annulled by the judgment of the Court of First Instance of 15 March 2000 in *Cimenteries CBR v European Commission* Joined cases T-25/95, T-26/95, T-30-32/95, T-34-39/95, T-42-46/95, T-48/95, T-50-65/95, T-68-71/95, T-87/95, T-88/95, T-103/95 and T-104/95 [2000] ECR II-491. The applicant was represented initially by F Wiemer and K Moosecker, then by F Wiemer, P Niggemann and B Menkhaus, lawyers. The Commission of the European Communities was represented by R Lyal and W Mölls, acting as agents, with an address for service in Luxembourg. The language of the case was German. The facts are set out in the judgment of the court.

21 April 2005. **THE COURT OF FIRST INSTANCE (Third Chamber)** delivered the following judgment.

#### FACTS

1. The applicant, Alsen AG, which became Holcim (Deutschland) AG, whose registered office is in Hamburg, Germany, manufactures construction materials. Alsen AG came about as a result of the merger in 1997 between Alsen Breitenburg Zement- und Kalkwerke GmbH (Alsen Breitenburg) and Nordcement AG (Nordcement).

2. By Decision (EC) 94/815 (relating to a proceeding under art 85 of the EC Treaty (now art 81 EC) (Cases IV/33.126 and 33.322—Cement)) (OJ 1994 L343 p 1; the Cement decision), the Commission of the European Communities ordered Alsen Breitenburg and Nordcement to pay fines of €3.841m and €1.85m, respectively, for infringement of art 85 of the EC Treaty (now art 81 EC).

3. Alsen Breitenburg and Nordcement brought actions for annulment of that decision. Those actions were registered under the references T-45/95 and T-46/95 and were then joined to the actions brought by the other companies to which the Cement decision was addressed.

4. In accordance with the option given by the Commission, Alsen Breitenburg and Nordcement decided to provide bank guarantees, thus avoiding the need to pay the fines immediately. Alsen Breitenburg's bank guarantee was in existence from 3 May 1995 until 2 May 2000 and was arranged by Berenberg Bank, in consideration of an annual commission of 0.45%. Nordcement provided, from 18 April 1995 until 3 May 2000, a bank guarantee arranged by Deutsche Bank, in consideration of an annual commission of 0.375% and a single start-up commission of €15.34. The applicant paid to the banks, for arranging the bank guarantees, a total amount of €139,002.21.

5. By judgment of 15 March 2000 in *Cimenteries CBR v European Commission* Joined cases T-25/95, T-26/95, T-30-32/95, T-34-39/95, T-42-46/95, T-48/95, T-50-65/95, T-68-71/95, T-87/95, T-88/95, T-103/95 and T-104/95 [2000] ECR II-491 (the Cement case), the Court of First Instance of the European Communities annulled the Cement decision in so far as the applicant was concerned and ordered the Commission to pay the costs.

6. Pursuant to art 91 of the Rules of Procedure of the Court of First Instance, and by letter of 28 September 2001, the applicant therefore requested the defendant to pay, first, the costs of the proceedings (in particular the lawyers' fees, amounting to €545,000) and, second, the charges incurred in providing the bank guarantees.



a 7. By letter of 24 January 2002, the defendant offered to pay to the applicant part of its lawyers' fees (€130,000), but refused to pay the bank guarantee charges, relying on the case law on costs within the meaning of art 91 of the Rules of Procedure.

b 8. By letter of 5 April 2002, the applicant again requested the applicant to pay it the whole of the lawyers' costs and the bank guarantee charges. For payment of the bank guarantee charges, the applicant relied this time on the second paragraph of art 288 EC (formerly art 215 of the EC Treaty) and art 233 EC (formerly art 176 of the EC Treaty) and also on the judgment of the Court of First Instance of 10 October 2001 in *Corus UK Ltd v European Commission* Case T-171/99 [2001] ECR II-2967, which had been delivered in the meantime.

c 9. By an email of 30 May 2002, the defendant offered to pay the lawyers' fees in the amount of €200,000. As regards the bank guarantee charges, it again refused to pay them, taking the view that the possibility of deferring payment of the fine by providing a bank guarantee was a simple option and that the defendant could not therefore be held liable for the charges occasioned where undertakings decided to take advantage of that possibility.

d PROCEDURE AND FORMS OF ORDER SOUGHT BY THE PARTIES

10. By application lodged at the Registry of the Court of First Instance on 31 January 2003, the applicant brought the present action.

e 11. On 10 April 2003, the defendant raised an objection of inadmissibility, under art 114 of the Rules of Procedure, in so far as the action is based on art 233 EC, and lodged a defence.

12. Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Third Chamber) decided to open the oral procedure. The parties presented oral argument and their answers to the questions put by the court at the public hearing held on 10 June 2004.

f 13. The applicant claims that the court should:  
—order the Commission to pay it the sum of €139,002.21, plus default interest at the rate of 5.75% per annum from 15 April 2000;  
—order the Commission to pay the costs.

g 14. The defendant contends that the court should:  
—dismiss the action as inadmissible, in so far as it is based on art 233 EC;  
—dismiss the action in its entirety, in so far as it is based on art 288 EC;  
—as inadmissible, or, in the alternative, as unfounded, in so far as it relates to the bank guarantee charges incurred before 31 January 1998;  
—as unfounded for the remainder;  
—order the applicant to pay the costs.

h 15. In its observations, the applicant claims that the court should:  
—declare the action admissible, in so far as it is based on art 233 EC;  
—in the alternative, interpret the action, in so far as it is based on art 233 EC, as being an action for annulment or for failure to act;  
—order the defendant to pay the costs.

#### ADMISSIBILITY

i *The admissibility of the action in so far as it is based on art 233 EC*

##### *Arguments of the parties*

16. The defendant submits that if the applicant is of the opinion that art 233 EC has not been observed, two remedies are available, namely an action for annulment (see art 230 EC (formerly art 173 of the EC Treaty)) and an action for failure to act (see art 232 EC (formerly art 175 of the EC Treaty)).

17. The present action, whereby the applicant seeks an order that the defendant pay a certain sum, is neither an action for annulment nor an action for failure to act. a

18. In the defendant's submission, by initiating the present proceedings, the applicant hopes to secure a judgment producing directly the result to which, in its opinion, the Commission is bound in execution of the *Cement* judgment. However, the EC Treaty contains no legal basis which would allow such a solution. b

19. The case law of the Court of Justice of the European Communities on what are known as 'payment' actions confirms that no type of action other than those provided for in arts 230 and 232 EC can be contemplated.

20. The defendant infers that the claim based on the first paragraph of art 233 EC and seeking an order that the Commission reimburse the bank guarantee charges is manifestly inadmissible. Nor, in its submission, can such a claim be interpreted as being an action brought under arts 230 or 232 EC, which, moreover, would be equally inadmissible in the present circumstances. c

21. The applicant observes, first, that it seeks reimbursement for the damage it sustained. It maintains, therefore, that reliance on art 233 EC comes within the framework of an 'action for damages' and that the defendant had no discretion in this case. Relying on the retroactive effect of a judgment annulling a measure and also on the case law of the Court of First Instance (and in particular the judgment in the *Corus UK* case (see para 8, above) (para 50)), the applicant submits that the defendant is under an obligation to reimburse the bank guarantee charges. The applicant further submits that the Court of First Instance rightly stated in the *Cement* judgment (at para 5116 et seq) that the bank guarantee charges must be reimbursed. d

22. Second, the applicant claims that the first paragraph of art 233 EC also gives rise to a right to compensation, so that it is entitled to rely on that provision. e

23. The applicant refutes the defendant's submission that the rights derived from the first paragraph of art 233 EC could be invoked solely within the framework of an action for annulment or an action for failure to act. That argument finds no support in the wording of art 233 EC, nor does it follow from the case law cited by the defendant. f

24. The applicant further submits that the defendant's argument is inconsistent with the principle of procedural economy, since it would entail embarking upon two remedies (an action for damages under art 288 EC and an action for annulment or for failure to act under art 233 EC). g

25. In the alternative, the applicant requests the court to interpret the action, in so far as it is based on the first paragraph of art 233 EC, as being an action for annulment or for failure to act. h

26. In that regard, the applicant maintains that it would be inconsistent with the principle of procedural economy to require it to claim anew reimbursement from the Commission for the bank charges and then to bring an action for annulment or for failure to act, even when the defendant has already definitively indicated that it refused to pay the amount in question. The applicant observes, last, that it would still be possible to bring an action for annulment since the Commission would not yet have adopted a contestable decision. i

*a Findings of the court*

—Admissibility of the action in so far as it is based on art 233 EC

27. It should be observed at the outset that the applicant has based its action in part, and autonomously, on art 233 EC, in order to secure reimbursement of the bank guarantee charges.

*b* 28. Thus, in order to explain the legal basis of its right, the applicant draws a clear distinction in its application between ‘the right to reimbursement under Article 233 EC’ (Title II, point 1(a) of the application) and ‘the right to compensation based on the combined provisions of the second paragraph of Article 288 EC and Article 235 EC [formerly art 178 of the EC Treaty]’ (Title II, point 1(b) of the application).

*c* 29. In addition, the applicant states that ‘[a]longside the right derived from Article 233 EC, the Commission is also required, on the basis of the combined provisions of the second paragraph of Article 288 EC and Article 235 EC, to reimburse the guarantee charges’ (para 22 of the application).

30. Last, the applicant stated at the hearing that its action rested on two separate and autonomous legal bases, namely (i) art 233 EC and (ii) the

*d* combined provisions of arts 288 and 235 EC.

31. It should be borne in mind, in that regard, that the EC Treaty provides, restrictively, the remedies which are available to persons to rely on their rights (see, to that effect, the order of the Court of Justice in *K v Germany* Case 233/82 [1982] ECR 3637).

*e* 32. As art 233 EC does not establish a remedy, it cannot autonomously found a claim such as the claim for reimbursement of the bank guarantee charges in the present case.

33. That does not mean, however, that a person is without a remedy when he considers that the measures required for the purpose of complying with a judgment have not been taken. The Court of Justice has already had occasion to hold, on that point, that the obligation arising under art 233 EC could be implemented by means, in particular, of the remedies provided for in arts 230 and 232 EC (see *Asteris AE v EC Commission* Joined cases 97/86, 193/86, 99/86 and 215/86 [1988] ECR 2181 (paras 24, 32, 33)).

*g* 34. In that context, it is not for the Community judicature to usurp the function of the founding authority of the Community in order to change the system of legal remedies and procedures established by the Treaty (see *Unión de Pequeños Agricultores v EU Council* (supported by the European Commission intervening) Case C-50/00 P [2002] All ER (EC) 893, [2002] ECR I-6677 (para 45), *Salamander AG* (supported by *Markenverband eV*, intervening) *v European Parliament* (supported by *Finland*, intervening) Joined cases T-172/98 and T-175-177/98 [2000] All ER (EC) 754, [2000] ECR II-2487 (para 75) and *Philip Morris International Inc v European Commission* (supported by *European Parliament* intervening) Joined cases T-377/00, T-379/00, T-380/00, T-260/01 and T-272/01 [2003] All ER (EC) 1008, [2003] ECR II-1 (para 124)).

*i* 35. The fact that, as the applicant submits, the defendant had no discretion in the present case, or that the Court of First Instance declared in the *Cement* case that the bank guarantee charges must be reimbursed, does not alter that finding. The same applies to the applicant’s argument that art 233 EC creates ‘rights to compensation’ or that other remedies, outside an action for annulment or for failure to act, may be used in order to rely on those rights, or again the argument that the principle of procedural economy should be applicable.



36. The only question raised in the context of the objection of inadmissibility is whether art 233 EC, as such, constitutes a specific remedy. In the light of the restrictive remedies provided for in the Treaty and of the case law cited above, the answer must be in the negative. a

37. For the sake of completeness, it should be noted that in the *Cement* case the Court of First Instance, contrary to the applicant's claim, did not state that the bank guarantee charges must be reimbursed. It merely stated, and, moreover, did so in the context of Cases T-50/95 and T-51/95, in which the applicant was not a party, that 'those claims in actual fact concern[ed] compliance with the present judgment and that it [was] for the Commission to take the necessary steps to comply with it, in accordance with Article 176 of the EC Treaty (now Article 233 EC)' (see the *Cement* judgment (para 5118)). It follows from that paragraph that the court did not hold that the Commission was under an obligation, under art 233 EC, to reimburse the bank guarantee charges. The court merely stated that it was for the Commission to take the necessary steps to comply with the judgment. It must be borne in mind, in that regard, that it is not for the court to substitute itself for the Commission and determine the measures that the latter should have adopted in the context of art 233 EC (see *Meskens v European Parliament* Case T-84/91 [1992] ECR II-1565/II-2335 (paras 78, 79)). b  
c

38. Nor is the present case comparable with the *Corus UK* case (see para 8, above). In that judgment, the Court of First Instance held (at para 39) that art 34 CS (the counterpart in the ECSC Treaty of art 233 EC) provided for a specific legal remedy, distinct from that provided by the general rule of Community liability under art 40 CS (the counterpart in the ECSC Treaty of art 288 EC), in cases where the injury relied upon resulted from a decision of the Commission that had subsequently been annulled by the Community courts. d  
e

39. However, art 233 EC, on which the applicant relies in the present case, is drafted in different terms from those of art 34 CS. According to art 34 CS, not only is the Commission to take steps to ensure equitable redress for the harm resulting directly from the decision or recommendation declared void, but its failure to do so provides a ground for bringing an action for damages before the court. In those circumstances, the solution adopted by the Court of First Instance in the *Corus UK* case (see para 8, above) cannot be transposed to the present case. f  
g

40. For all of those reasons, the applicant's action, in so far as it is based on art 233 EC, must be dismissed as inadmissible.

—The applicant's request that the action be interpreted as being an action for annulment or for failure to act h

41. It should be noted, first of all, that in the introduction to its application, the applicant states that the objective of the present action is a 'claim for damages'. Furthermore, by the form of order which it seeks, the applicant claims that 'the Commission should be ordered to pay the applicant the sum of EUR 139 002.21, plus default interest at the rate of 5.75% per annum from 15 April 2000'. It follows that the object of the present action is clearly to obtain damages and not to obtain annulment of an act or a declaration that the defendant has failed to act. i

42. The first paragraph of art 21 of the Statute of the Court of Justice, which, pursuant to the first paragraph of art 53 of that statute, is applicable to the procedure before the Court of First Instance, provides that '[a] case shall be

a brought before the Court by a written application addressed to the Registrar' and that '[t]he application shall contain the applicant's name and permanent address and the description of the signatory, the name of the party or names of the parties against whom the application is made, the subject-matter of the dispute, the form of order sought and a brief statement of the pleas in law on which the application is based'.

b 43. Likewise, art 44(1)(c) of the Rules of Procedure provides that an application of the kind referred to in art 21 of the Statute of the Court of Justice is to state the subject matter of the proceedings and a summary of the pleas in law on which the application is based.

c 44. It is settled case law that that information must be sufficiently clear and precise to enable the defendant to prepare its defence and the court to decide the case, if appropriate, without other information in support. In order to ensure legal certainty and the sound administration of justice, if an action is to be admissible, the essential facts and law on which it is based must be apparent from the text of the application itself, even if only stated briefly, provided the statement is coherent and comprehensible (see *Enso Española SA v European Commission* Case T-348/94 [1998] ECR II-1875 (para 143)).

d 45. It is also settled case law that, under art 44(1) in conjunction with art 48(2) of the Rules of Procedure, the subject matter of the claim must be defined in the application. A claim put forward for the first time in the reply modifies the original subject matter of the application and must therefore be regarded as a new claim and be rejected as inadmissible (see *Etablissements Biret et Cie SA v EU Council* Case T-210/00 [2002] ECR II-47 (para 49) and the case law cited there). The same reasoning applies where the initial subject matter of the application is modified in observations on an objection of inadmissibility.

e 46. In the light of those factors, and since the sole object of the application was to obtain 'damages', the applicant's request that the action, in so far as it is based on the first paragraph of art 233 EC, be interpreted as being an action for annulment or for failure to act, must be dismissed as inadmissible.

f  
*The time-barring of the action for damages based on art 235 EC and the second paragraph of art 288 EC*

*Arguments of the parties*

g 47. The defendant also disputes, for a part of the bank charges incurred by the applicant, the admissibility of the action based on art 235 EC and the second paragraph of art 288 EC.

h 48. Having regard to art 46 of the Statute of the Court of Justice, the defendant contends that the alleged right which the applicant claims is time-barred and the action inadmissible, in so far as it relates to the bank guarantee charges incurred before 31 January 1998.

i 49. In the present case, the act which may possibly give rise to an obligation to compensate the applicant, namely the Cement decision, was adopted on 30 November 1994 and notified to the applicant on 3 February 1995. The bank guarantees were issued on 18 and 21 April 1995 and then sent to the Commission. The period covered by the guarantee began at the end of the period allowed for payment, ie on 3 May 1995. Since, according to the defendant, the conditions of an obligation to provide compensation could be satisfied, where appropriate, with effect from that day, 3 May 1995 must be regarded as the starting date of the limitation period.

50. The defendant acknowledges that, in the present case, the damage was not caused by a single isolated incident, but continuously, until the expiry of

the bank guarantees. In such a case, the limitation referred to in art 46 of the Statute of the Court of Justice applies to the period more than five years before the date of the interrupting act but does not affect rights which came into being during later periods. a

51. In the present case, the defendant submits that the applicant, in its letter of 5 April 2002, did indeed request it to reimburse the bank guarantee charges, relying on the second paragraph of art 288 EC, but it did not, as required by the third sentence of art 46 of the Statute of the Court of Justice, then bring an action within the period prescribed in art 230 EC. b

52. The defendant concludes that the limitation period was interrupted only when the application was lodged, on 31 January 2003, and that the rights in respect of the bank guarantee charges incurred before 31 January 1998 are therefore time-barred. c

53. The applicant contends, on the contrary, that the limitation period for the claim for reimbursement of the bank guarantee charges began to run only with the pronouncement of the *Cement* judgment. Referring in particular to *Birra Wührer SpA v EC Council* Joined cases 256/80, 257/80, 265/80, 267/80 and 5/81 [1982] ECR 85 (paras 10–12), the applicant submits that it is only from pronouncement of the judgment that the conditions on which the obligation to make reparation depends were satisfied. d

54. In the applicant's submission, the decisive factor giving rise to the right to compensation is not, in the present case, the mere illegality of the decision imposing the fine, but its annulment by the court, since while the decision was valid there was a legal basis for providing the bank guarantees. As the action for annulment of the decision imposing the fine did not have suspensory effect, the obligation imposed by the operative part of the *Cement* decision continued throughout the duration of the proceedings. e

55. A different approach would not, in the applicant's submission, be consistent with the principle of procedural economy, since it would also make it necessary to initiate, alongside the action for annulment of the decision imposing the fine, an action for compensation, seeking reimbursement of the bank guarantee charges. In order to avoid divergent judgments on the legality of the decision in issue, the court would be unable to adjudicate on the action for compensation until after the judgment annulling the decision, and the action for compensation would have to be suspended until that time. f

56. Furthermore, the applicant contends that the extent of the harm was determined by the duration of the action for annulment. On that basis, there is no indirect damage in the present case. g

57. Last, the applicant maintains that the approach supported by the defendant would have the consequence that the limitation period for the right to reimbursement of the bank guarantee charges would continue to run while the annulment proceedings were pending. Thus, the defendant would be able to avoid claims for compensation by ensuring, by lodging an appeal, that the judgment annulling the decision became enforceable at the latest possible moment. h

58. The applicant concludes that the limitation period began to run in March 2000 and was interrupted when it brought the action on 31 January 2003, ie before the expiry of the limitation period, in accordance with art 46 of the Statute of the Court of Justice. i



*a Findings of the court*

59. According to the case law, the limitation period for proceedings against the Communities in matters arising from non-contractual liability cannot begin before all the requirements governing the obligation to make good the damage are satisfied (see *Biret International SA v EU Council* Case T-174/00 [2002] ECR II-17 (para 38)).

*b* 60. In the present case, the damage alleged to have been caused to the applicant became apparent when it provided the bank guarantees. Annexes 2 and 3 to the application show that Alsen Breitenburg's bank guarantee was in existence between 3 May 1995 and 2 May 2000 and was arranged by Berenberg Bank and that Nordcement's was in existence between 18 April 1995 and 3 May 2000 and arranged by Deutsche Bank. Those banks therefore applied charges, *c* calculated on the basis of annual commission expressed as a percentage of the sums guaranteed (0.45% in the case of Berenberg Bank and 0.375% in the case of Deutsche Bank).

61. In those circumstances, the sums payable to the banks were proportionate to the number of days during which the bank guarantees *d* were in force. That method of calculating the bank charges is apparent from Annex 2 to the application, as Berenberg Bank calculated the charges in proportion to the number of days elapsed. The applicant confirmed at the hearing that the bank guarantee charges accrued by reference to the days.

62. It should further be noted that the charges already incurred would have been payable to the banks whatever the final outcome of the action for *e* annulment.

63. Being of the view that the Cement decision was illegal (which is confirmed by the fact that it brought an action for annulment), the applicant was in a position to invoke the non-contractual liability of the Community as soon as it provided the bank guarantees. It could have relied, in that context, on the existence of future but certain and quantifiable damage (namely the bank *f* guarantee charges applicable), since that harm was foreseeable with sufficient certainty (see, on the possibility of relying on future loss, in particular, *Kurt Kampffmeyer Mühlenvereinigung KG v EC Commission* Joined cases 56–60/74 [1976] ECR 711 (para 6) and *Camar Srl v European Commission* Joined cases T-79/96, T-260/97 and T-117/98 [2000] ECR II-2193 (paras 192, 207)).

64. Contrary to the applicant's contention, it was not necessary for the *g* Cement decision to be annulled in order for the limitation period for the action for compensation to begin. The court has already had occasion to hold that the fact that an applicant considered that it did not yet have all the evidence it needed to prove to the requisite legal standard in judicial proceedings that the Community was liable could not, as such, prevent the limitation period from *h* running. Confusion would then arise between the procedural criterion relating to the commencement of the limitation period and the finding that the conditions for liability were satisfied, which can ultimately be made only by the court before which the matter has been brought for final adjudication on its substance (see the order of the Court of First Instance in *Autosalone Ispra dei Fratelli Rossi Snc v European Commission* Case T-124/99 [2001] ECR II-53 *i* (para 24).

65. In the present case, any infringement of Community law existed before the Cement decision was adopted. At the time when the applicant was notified of that decision, it took formal notice of it, in fact and in law. It was also at that

point that the Cement decision began to produce legal effects vis-à-vis the applicant. From that date, it was therefore open to the applicant to plead an infringement of Community law. a

66. To adopt a different approach would amount to calling in question the autonomy of actions for damages vis-à-vis other remedies, and in particular an action for annulment (see, on the autonomy of an action for damages, the judgment in *Lamberts v European Ombudsman* Case T-209/00 [2002] ECR II-2203 (para 58) and the case law cited there). b

67. The arguments put forward by the applicant concerning the principle of procedural economy are inoperative. Even though that principle means that a litigant may not be required to bring a new action where the contested decision is replaced by a new decision (see *British American Tobacco International (Investments) v European Commission* Case T-111/00 [2001] ECR II-2997 (para 22)), it cannot permit the rules governing the limitation period of an action for compensation to be called in question. That would be the case if the applicant's argument were followed. c

68. Taking into account all those elements, it must be held that the limitation period for the action in respect of non-contractual liability began to run, in the present case, as soon as the bank guarantees were provided by the companies concerned, namely on 3 May 1995 for Alsen Breitenburg and on 18 April 1995 for Nordcement. d

69. However, account must also be taken of the fact that the damage relied on in the present case was not a single isolated incident but was ongoing. In fact, as stated above, the charges were calculated in proportion to the number of days during which the bank guarantees were in force. That point, moreover, was confirmed by the applicant at the hearing. Accordingly, the damage in question increased from day to day and was ongoing in nature. e

70. In such a case, the limitation period referred to in art 46 of the Statute of the Court of Justice applies, by reference to the date of the event which interrupted the limitation period, to the period preceding that date by more than five years and does not affect rights which arose during subsequent periods (see *Hartmann v EU Council* Case T-20/94 [1997] ECR II-595 (para 132), the *Biret International* case (see para 59, above) (para 41) and the order of the Court of First Instance in *Jestädt v EU Council* Case T-332/99 [2001] ECR II-2561 (paras 44, 45)). f

71. In that regard, art 46 of the Statute of the Court of Justice envisages as an act interrupting the limitation period either the proceedings instituted before the court or the application made prior to such proceedings by the aggrieved party to the relevant institution. In the latter case, the application must be made within the period of two months provided for in art 230 EC and the provisions of the second paragraph of art 232 EC are to apply where appropriate. g

72. In the present case, by an initial letter of 28 September 2001, on the basis of art 91 of the Rules of Procedure, the applicant requested the defendant to reimburse the charges incurred in providing the bank guarantees. It reiterated its request by letter of 5 April 2002, relying on that occasion on the second paragraph of art 288 EC. h

73. Following those two requests, however, the applicant did not institute proceedings within the period provided for in art 230 EC, as required by the third sentence of art 46 of the Statute of the Court of Justice. Those letters therefore do not constitute events interrupting the limitation period for the purposes of art 46 of the Statute of the Court of Justice. i

- a 74. For all of those reasons, and in view of the fact that the present action was brought on 31 January 2003, it must be dismissed as inadmissible as regards the bank guarantee charges incurred by the applicant five years before that date, ie before 31 January 1998.

#### SUBSTANCE

- b 75. As the action is being dismissed as inadmissible in so far as it is based on art 233 EC, the court's examination of the substance is confined to the arguments which the applicant puts forward on the basis of the second paragraph of art 288 EC and art 235 EC. Furthermore, as the action for compensation is also being dismissed as inadmissible as regards the bank guarantee charges incurred before 31 January 1998, the examination of the substance will be confined to the costs incurred after that date.

#### Arguments of the parties

- d 76. As regards the unlawfulness of the Cement decision, which was annulled by the Court of First Instance, the applicant claims that that decision contains a defect which renders the Community liable. It maintains that that decision was annulled in part because the defendant was unable to prove that the applicant had infringed art 85 of the EC Treaty or that it had participated in agreements that restricted competition. The applicant therefore submits that in the present case the Commission made a grave error.

- e 77. The applicant explains that the defendant had no discretion when it adopted the Cement decision. Referring to the judgment in *European Commission v Fresh Marine Co SA* Case C-472/00 P [2003] ECR I-7541, the applicant contends that a mere infringement of Community law is therefore sufficient to establish the existence of a 'sufficiently serious breach'. According to the *Cement* judgment, the defendant should not have imposed a fine in the present case, which completely reduces its discretion. The present case is also different from the *Corus UK* case (see para 8, above) where it was necessary to analyse whether the Commission had incorrectly exercised its discretion when determining the amount of the fine. The applicant concludes that, in this case, the illegality of the decision imposing the fine is sufficient to engage the liability of the Community.

- g 78. In those circumstances, there is no need to determine whether the case was complex. In any event, it is necessary to analyse the applicant's particular situation. Since the Court of First Instance considered that there was not sufficient evidence in the present case, the applicant's situation could not be regarded as complex. There was in any event a serious infringement of the Commission's duty to exercise diligence.

- h 79. Last, the applicant observes that the co-operation or lack thereof on the part of the other undertakings during the administrative procedure cannot in any event harm it. In addition, the bank guarantee charges should be reimbursed under the principle of fairness.

- i 80. As regards the causal link, the applicant maintains that the Cement decision directly caused it damage, namely the bank guarantee charges. That damage is not based on a decision freely taken by the applicant and if its action for annulment had been dismissed it would have suffered damage either as a result of the interest paid or as a result of the bank guarantee charges imposed. The applicant also submits that if the provision of a bank guarantee did not have the same legal consequences as immediate payment of the fine, it would no longer be a valid alternative for undertakings.



81. As regards the damage, the applicant submits, annexed to its application, two bank invoices for a total amount of €139,002.21. It also claims that the Commission should be ordered to pay default interest (at 5.75%) from one month after delivery of the *Cement* judgment, ie from 15 April 2000. a

82. The defendant contends that the applicant has misread the *Fresh Marine* judgment (see para 77, above). The Court of Justice stated in that judgment that the mere infringement of Community law 'may' be sufficient to establish the existence of a sufficiently serious breach. The determining factor is the manifest and grave nature of the error committed and it is also necessary, in the defendant's submission, to examine all the factors which may provide an indication of the gravity of the fault committed by the Commission. b

83. In the present case, the defendant contends that the *Cement* case was very complex. The infringement was distinguished by numerous ramifications, the involvement of a large part of the European industry and an extremely high number of participants and therefore of addressees of the decision. The cartel was kept secret, moreover, and during the investigation none of the undertakings co-operated to a greater extent than provided for by the rules on investigative powers. c

84. As regards the causal link, the defendant contends that, unlike payment of a fine, the provision of a bank guarantee is not an obligation. It concludes that there is no direct causal link, within the meaning of the case law, between any fault committed by the Commission and the alleged damage. d

85. Concerning the damage, the defendant explains that, as regards the interest claimed, on 15 April 2000 (which the applicant proposes as the date on which default interest begins to accrue), it was not aware of the applicant's demands or of the amount claimed. As for the applicant's letter of 5 April 2002, it was not followed by an application within the period set out in the second sentence of art 46 of the Statute of the Court of Justice. The defendant therefore submits that a right to payment of default interest could in any event be envisaged only from the date on which the present action was brought, on 31 January 2003. Last, as regards the rate of interest claimed, the defendant submits that the rate applied by the European Central Bank to its main refinancing transactions, on 31 January 2003, was 2.75%. The addition of two percentage points fixed in the *Corus UK* case (see para 8, above), would result in an interest rate of 4.75% and not of 5.75%, as the applicant maintains. e

#### *Findings of the court*

86. It follows from a consistent line of decisions that the non-contractual liability of the Community, within the meaning of the second paragraph of art 288 EC, depends on the fulfilment of a set of conditions, namely the unlawfulness of the conduct alleged against the institutions, the fact of damage and the existence of a causal link between the conduct and the damage complained of (see *SA Oleifici Mediterranei v EEC* Case 26/81 [1982] ECR 3057 (para 16) and *Efisol SA v European Commission* Case T-336/94 [1996] ECR II-1343 (para 30)). f

#### *The condition relating to the unlawfulness of the alleged conduct*

87. As regards the condition relating to the unlawfulness of the alleged conduct, the case law requires that a sufficiently serious breach of a legal rule designed to confer rights on individuals be established. In that regard, it must be borne in mind that the system of rules which the Court of Justice has worked out with regard to non-contractual liability on the part of the Community takes into account, inter alia, the complexity of the situations to g

a be regulated, difficulties in the application or interpretation of the texts and, more particularly, the margin of discretion available to the author of the act in question. The determining factor for regarding a breach of Community law as sufficiently serious lies in the manifest and serious failure by the Community institution concerned to observe the limits on its discretion. Where that institution has only considerably reduced, or even no, discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach (see *Laboratoires Pharmaceutiques Bergaderm SA (in liq) v European Commission* Case C-352/98 P [2000] ECR I-5291 (paras 40, 42–44), *European Commission v Camar Srl* Case C-312/00 P [2002] ECR I-11355 (paras 52–55) and the *Fresh Marine* case (see para 77, above) (paras 24–26)).

c —The factual and legal context of the Cement decision

88. It should be observed at the outset, first, that the Cement decision provides, in art 1, that certain associations, federations and undertakings (including the applicant) had infringed art 85(1) of the EC Treaty by participating in an agreement (known as ‘the Cembureau agreement’ after the European cement association) designed to ensure non-transshipment to home markets and to regulate cement transfers from one country to another. Cembureau was made up of direct members and indirect members. The undertakings whose merger led to the creation of the applicant formed part of the second category (see, in particular, para 1440 of the *Cement* judgment). In that context, and in respect of the indirect members of Cembureau, art 1 of the Cement decision referred to the undertakings (including therefore the applicant) which had manifested their accession to the Cembureau agreement by participating in a measure implementing that agreement (see para 4076 of the *Cement* judgment).

f 89. In that regard, art 5 of the Cement decision concluded that certain associations, federations and undertakings (including the applicant) had infringed art 85(1) of the EC Treaty by participating, within the framework of the European Cement Export Committee (the ECEC), in concerted practices designed to prevent incursions by competitors on respective national markets in the Community.

g 90. For those reasons, according to art 9 of the Cement decision, fines of €3.841m and €1.85m respectively were imposed on Alsen Breitenburg and on Nordcement (the merger of which led to the creation of the applicant).

h 91. The Court of First Instance held, however, that the evidence adduced in the Cement decision, even considered as a whole, did not establish that the members of the ECEC aimed, in the framework of their co-operation within that export committee, to channel their production surpluses in order to reinforce the rule that there should be no transshipment to home markets (see para 3849 of the *Cement* judgment).

i 92. In so far as the activities within the ECEC were considered, in art 5 of the Cement decision, to constitute an infringement of art 85(1) of the EC Treaty, on the ground that they were designed to prevent incursions by competitors on respective national markets in the Community, the Court of First Instance decided to annul art 5 of the Cement decision (see para 3850 of the grounds and paras 16 and 17 of the operative part of the *Cement* judgment).

93. Furthermore, since it had not been established that the conduct referred to in art 5 of the Cement decision pursued the same objective as the Cembureau agreement, the Court of First Instance held that that conduct could not be regarded as elements of the infringement referred to in art 1 of

the Cement decision (see para 4058 of the *Cement* judgment). The Court of First Instance therefore decided also to annul, in so far as it concerned the applicant, art 1 of the Cement decision (see paras 4074–4079 of the grounds and paras 16 and 17 of the operative part of the *Cement* judgment). a

94. Consequently, art 9 of the Cement decision, which fixed the fines for Alsen Breitenburg and Nordcement, was also annulled (see para 4718 of the grounds and paras 16 and 17 of the operative part of the *Cement* judgment). b

—The Commission's discretion

95. The Community judicature undertakes generally a comprehensive review of the question whether or not the conditions for the application of art 85(1) of the EC Treaty are met. It is only where it reviews complex economic appraisals made by the Commission that the Community judicature confines itself to verifying whether the rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of appraisal or a misuse of powers (see *Remia BV v EC Commission* Case 42/84 [1985] ECR 2545 (para 34) and *John Deere Ltd v European Commission* Case C-7/95 P [1998] All ER (EC) 481n, [1998] ECR I-3111 (para 34)). c  
d

96. In the present case, it should be observed at the outset that the review carried out by the Court of First Instance, which led to the annulment of the Cement decision so far as the applicant was concerned, covered the existence of conduct which was contrary to art 85(1) of the EC Treaty. That review did not cover the fixing by the Commission of the amount of the fines imposed on the applicant. e

97. It follows from the *Cement* judgment (at paras 3771–3850), moreover, which set out the grounds on which the Court of First Instance annulled art 5 of the Cement decision, and therefore, in consequence, annulled arts 1 and 9 of that decision, so far as the applicant was concerned, that the court undertook a comprehensive review of the application by the defendant of art 85(1) of the EC Treaty. f

98. The relevant paragraphs of the *Cement* judgment make no reference to economic appraisals made by the Commission or to any discretion on its part that might have limited the scope of the review carried out by the Court of First Instance. g

99. Last, the classification of the conduct of the undertakings concerned as constituting or not constituting an infringement for the purposes of art 85(1) of the EC Treaty fell in this case within the scope of the simple application of the law on the basis of the elements of fact available to the Commission.

100. It follows from those factors that the Commission's discretion was reduced in the present case. In those circumstances, the infringement of art 85(1) of the EC Treaty found by the Court of First Instance in the *Cement* judgment, namely the insufficiency of the evidence adduced by the defendant in support of the applicant's impugned practices, could suffice to establish the existence of a sufficiently serious breach. h

101. As stated at para 87, above, however, the system of rules which the Court of Justice has worked out with regard to non-contractual liability on the part of the Community must also induce the Community judicature to take into account, in addition to the discretion enjoyed by the institution concerned, in particular, the complexity of the situations to be regulated and also the difficulties in the application or interpretation of the texts. i



a —The complexity of the situations to be regulated and the difficulties in the application or interpretation of the texts

102. In the present case, it should be noted, first, that the case at the origin of the Cement decision and then of the *Cement* judgment was particularly complex. In that regard, the applicant's argument that the complexity of the context of the case is irrelevant must be rejected. On the contrary, that context permits the complexity of the situations to be regulated to be measured, within the meaning of the case law.

b 103. The procedure, which lasted more than three years, involved both international and national associations and numerous undertakings established in non-member countries and also virtually all the Community undertakings in the cement sector. The investigation carried out by the defendant required the presence of a large number of factors.

c 104. The Court of First Instance referred to the complexity of the case when it stated that 'the Court held ... in [*Coöperatieve vereniging Suiker Unie UA v EC Commission* Joined cases 40–48/73, 50/73, 54–56/73, 111/73 and 113–114/73 [1975] ECR 1663] ... which was also a complex case, that a period of two months was reasonable [to prepare a reply to a statement of objections]' (see the *Cement* judgment (para 654)).

d 105. Furthermore, concerning the time taken by the investigation, the Court of First Instance observed (at para 709) that '[t]he period of 31 months which elapsed between the investigations in April 1989 and dispatch of the [statement of objections] in November 1991 was reasonable, taking into account ... the scope and the difficulties of an investigation into almost the whole of the European cement industry' and that—

e '[t]he fact that it took the Commission 20 months after the end of the hearings to adopt the contested decision, on 30 November 1994, is not an infringement of the principle that the duration of administrative proceedings relating to competition policy should be reasonable, since the decision had to be sent to 42 undertakings and associations of undertakings, concerned 24 separate infringements, and had to be drawn up in the nine official Community languages.'

f 106. The applicant itself acknowledged, in its letter to the defendant dated 28 September 2001, that the case was characterised by extreme complexity. The applicant referred, in particular, to the subject matter and the nature of the dispute, to its importance from the aspect of Community law and also to the difficulties of the case and to the number of undertakings concerned.

g 107. It should be noted, second, that the situations to be regulated in the present case were all the more complex because the undertakings concerned by the Commission's investigation were direct or indirect members of Cembureau. In the latter case, which applied to the applicant's situation, the undertakings concerned were represented within Cembureau by their respective associations.

h 108. It should be noted, third, that, as regards the part of the Cement decision which specifically concerned the applicant, the defendant was faced with a range of probative documents whose interpretation was unclear.

i 109. Thus, as regards the grounds which led to the annulment of the Cement decision, so far as the applicant was concerned, the Court of First Instance stated first of all (in the *Cement* judgment):

'3790. ... It is not ... apparent [from art 1 of the ECEC statutes of 6 December 1979, from art 1 of the statutes of 26 September 1986, from

the minutes of the meeting held in Paris on 23 January 1979 and from an internal memorandum of Ciments Français of 7 March 1989] that the real object of the members of the ECEC was to reinforce the rule that there should be no transshipment to European home markets ... *a*

3792. ... Although [the Blue Circle memorandum of 1 December 1983] refers to a link between the rule that there should be no transshipment to home markets and the channelling of production surpluses, it cannot be presumed, on the basis of the mere existence of an export committee, that its members intended, through their activities in it, to "prevent incursions by competitors on respective national markets in the Community" ... *b*

110. As regards the direct or indirect affiliation of the members of the ECEC to Cembureau, the court observed: *c*

'3799. Admittedly, for the parties to the Cembureau agreement which took part in the activities of the ECEC after the conclusion of that agreement, the information exchanged during ECEC meetings concerning third country markets helped them to channel their production surpluses to non-European destinations and as such therefore facilitated the implementation of the Cembureau agreement. Amongst the members of the ECEC are several direct members of Cembureau (FIC, SFIC, Aalborg, Oficemen, Irish Cement, ATIC, Italcementi, Cementir and AGCI), whose participation in the Cembureau agreement is not in any doubt, as they participated in the meetings of the Head Delegates at which the Cembureau agreement was concluded and/or confirmed ... *d*

3800. However, that finding does not mean that the cooperation organised within the framework of the ECEC between all its members had as its object the reinforcement of the rule that there should be no transshipment to home markets.' *e*

111. As regards the relationships between the ECEC and the European Export Policy Committee (the EPC), the court observed: *f*

'3806. ... the Court finds, having regard to the evidence to which the Commission refers in the contested decision [i.e the documents mentioned at recital (32) of the Cement decision], that the members of the ECEC always took the view that the characteristics and identity of their export committee were independent of those of the EPC ... *g*

3821. ... Even if it is accepted that non-transshipment to home markets was the rule underlying cooperation in the EPC, the documents referred to in recital 32 of the contested decision do not therefore support the conclusion that the links which existed between the ECEC and the EPC had influenced the activities of the ECEC in such a way that the members of the ECEC had adopted the rule of not transshipping to internal markets for their activities within the ECEC.' *h*

112. As regards, last, the fact that the ECEC's activities were not restricted to large-scale exports, the court considered:

'3825. The Commission cannot, however, rely on [the] minutes [of the ECEC meeting of 22 March 1985] in order to prove that the cooperation within the ECEC aimed to reinforce the rule that there should be no transshipment to home markets through the channelling of production surpluses ... *i*

3827. The Court finds that none of the minutes cited in ... paragraph [3826] prove a link between imports from non-member

a countries and the principle of non-transshipment to home markets ... In any event, the mere fact that on some occasions the situation of imports from non-member countries was examined does not prove that "the object and effect of the cooperation within the ECEC was to reinforce the rule that there should be no transshipment to home markets" ...

b 3828. As regards the documents referred to in recital 33, paragraph 5, of the contested decision, it is true, as the Commission submits, that some minutes refer to some information on the situation in the member countries. However, the mere mention of an item of information relating to an internal market of the Community at a meeting of the ECEC or of the ECEC Steering Committee does not necessarily prove that the activities of the ECEC aimed to "reinforce the rule that there should be no transshipment to home markets".

c 113. It follows that, without fundamentally calling in question the Commission's analysis as regards the application of art 85(1) of the EC Treaty to the agreements in question, the Court of First Instance confined itself in the *Cement* judgment to challenging the Commission's appraisal of the probative nature of certain documents used for the purpose of establishing the infringement in respect of certain applicants. In particular, it appears that the divergence in interpretation between the court and the Commission on that point concerned only a marginal activity of the cartel, namely that carried out in the context of co-operation between the parties within the ECEC, with a view to channelling their production surpluses with the aim of thus reinforcing the rule on non-transshipment to home markets, namely the market-sharing that constituted the real 'core' of the cartel. Furthermore, although the court annulled the *Cement* decision in so far as it concerned the applicant, it none the less found that the Commission had a certain amount of evidence of such a kind as to accredit its argument that the co-operation within the ECEC had the object and effect of reinforcing the rule on non-transshipment to home markets and it was only after making a detailed appraisal of the content of the documents in question that the court arrived at the conclusion that, seen in their entirety and taking account, in particular, of the explanations provided by the undertakings concerned, those documents did not allow it to be established to the requisite legal standard that the activity within the ECEC reinforced the rule on non-transshipment to home markets.

g 114. For all of those reasons, regard being had to the fact that *Cement* was a particularly complex case, involving a very large number of undertakings and almost the entire European cement industry, to the fact that the structure of Cembureau made the investigation difficult owing to the existence of direct and indirect members, and to the fact that it was necessary to analyse a great number of documents, including in the applicant's specific situation, it must be held that the defendant was faced with complex situations to be regulated.

h 115. Last, it is necessary to take account of the difficulties in applying the provisions of the EC Treaty in matters relating to cartels (see, by analogy, the *Corus UK* case (see para 8, above) (para 46)). Those practical difficulties were all the greater because the factual elements of the case in question, including in the part of the decision concerning the applicant, were numerous.

i 116. On all of those grounds, it must be held that the breach of Community law found in the *Cement* judgment as regards the part of the decision concerning the applicant is not sufficiently serious.



117. As regards the principle of fairness, which would render mandatory reimbursement of the bank guarantee charges, the applicant does not explain how that principle is intended to confer rights on individuals or how there is a sufficiently serious breach of that principle in the present case. The same applies to the principle of diligence which in the applicant's submission is borne by the defendant. Those arguments are therefore inoperative. a

118. In the light of the foregoing, the first condition which, according to the case law, allows the non-contractual liability of the Community to be incurred is not satisfied in the present case. b

*The condition relating to the existence of a causal link between the conduct and the alleged damage*

119. In any event, the Community can be held liable only for the damage which is a sufficiently direct consequence of the unlawful conduct of the institution concerned (see, in particular, *P Dumortier Frères v EC Council* Joined cases 64/76 and 113/76, 167/78 and 239/78, 27/79, 28/79 and 45/79 [1979] ECR 3091 (para 21), *Blackspur DIY Ltd v EU Council* Case T-168/94 [1995] ECR II-2627 (para 52), *Fresh Marine Co SA v European Commission* Case T-178/98 [2000] ECR II-3331 (para 118) and *Meyer v European Commission* Case T-333/01 [2003] ECR II-117 (para 32)). c

120. In the present case, it should first of all be borne in mind that, under art 9 of the Cement decision, fines of €3.841m and €1.85m respectively were imposed on Alsen Breitenburg and on Nordcement. Under the first paragraph of art 11 of that decision, the fines were to be paid within three months of the date of notification of the decision. Under the second paragraph of art 11, moreover, the fines attracted automatic interest upon expiry of that period. e

121. Under the first paragraph of art 192 of the EC Treaty (now art 256 EC), the Cement decision was enforceable in that regard, since it imposed a pecuniary obligation on persons other than states, notwithstanding the action for annulment of that decision initiated under art 173 of the EC Treaty (now, after amendment, art 230 EC). Pursuant to the first sentence of art 185 of the EC Treaty (now art 242 EC), actions brought before the Community judicature do not have suspensory effect (see *Groupeement des Cartes Bancaires 'CB' v European Commission* Case T-275/94 [1995] All ER (EC) 717, [1995] ECR II-2169 (paras 50–52)). f

122. It is common ground that the applicant, in derogation from those provisions, did not pay the fine imposed on it in art 9 of the Cement decision, as the Commission, in the letter notifying the applicant of that decision, gave it the opportunity to provide a bank guarantee as security for payment of the fine until such time as the *Cement* judgment had been pronounced. An undertaking which brings an action against a Commission decision imposing a fine on it has a choice: it can pay the fine on its becoming payable, together with default interest, should any such interest have accrued, at the rate set by the Commission in its decision; or it can apply for suspension of operation of the decision pursuant to the second sentence of art 185 of the EC Treaty; or, last, if the Commission so allows, it can provide a bank guarantee as security for payment of the fine and default interest, in accordance with the conditions laid down by the Commission (see the *CB* case (para 121, above) (para 54)). g  
h  
i

123. In those circumstances, the applicant cannot validly maintain that the bank guarantee charges which it incurred in the present case are the direct consequence of the unlawfulness of the Cement decision. The damage which it alleges in that regard is the consequence of its own decision not to comply

a with the obligation to pay the fine, in derogation from the rules laid down in the first paragraph of art 192 of the EC Treaty and the first sentence of art 185 of the EC Treaty, within the period prescribed by the Cement decision, by providing a bank guarantee.

124. It should further be emphasised that the two options open to the applicant, namely to bring an action against the Cement decision and also an application for suspension of operation of that decision (at least as regards payment of the fine) and to provide a bank guarantee in accordance with the option offered by the Commission, were real alternatives to immediate payment of the fine. Those options were, moreover, left entirely to the discretion of the undertakings (see, to that effect, the *CB* case (para 121, above) (paras 54, 55)). Those options were therefore not mandatory in nature as a consequence of the Cement decision. Furthermore, a number of undertakings (like the applicant) opted to provide bank guarantees, whereas others preferred to comply with the financial obligation arising under the Cement decision and to pay the relevant fine (see, in that regard, the *Cement* judgment (para 5116)). If the applicant had decided to pay the fine, it would thus have avoided having to pay the bank guarantee charges (see, in relation to default interest, the *CB* case (para 121, above) (para 83)).

125. None of the arguments put forward by the applicant is capable of calling that conclusion in question.

126. In particular, as regards the alleged circumstance that the considerations set out in the *Corus UK* case (see para 8, above) (para 57), may be transposed to the present case, it must be held that at that point in the judgment the Court of First Instance held not, as the applicant suggests, that the undertakings to which a decision imposing fines was addressed did not have a choice between paying the fine immediately and providing a bank guarantee, but that, first, by paying the fine, the undertaking merely complied with the operative part of a decision which was enforceable notwithstanding the action which it had brought before the court and, second, that the provision of a bank guarantee rather than immediate payment of the fine was a simple option allowed by the Commission to the undertaking concerned.

127. In any event, and without embarking here on an examination of possible damage or a detailed analysis of the differences between art 34 CS and art 233 EC, it must be emphasised that the considerations in the judgment in the *Corus UK* case (see para 8, above), which led the Court of First Instance to hold that, in the case of a judgment annulling or reducing the fine imposed on an undertaking for infringing the competition rules, the Commission is under an obligation to reimburse not only the principal amount of the fine which has been wrongly paid, but also the default interest on that amount, are not applicable where the undertaking concerned has provided a bank guarantee. It must be borne in mind that in the *Corus UK* case (see para 8, above), the court (at paras 54–56) based that obligation on the fact, first, that the obligation to reimburse in full the fine which has been wrongly paid cannot disregard the time elapsed, which has reduced the value of the fine, and, second, that failure to pay default interest would entail the unjust enrichment of the Community, which is contrary to the general principles of Community law.

128. Neither of those considerations can be relied on by the applicant in the present case.

129. As regards the first consideration, it should be observed that where a bank guarantee has been provided, the Commission is not required to

reimburse a fine that was wrongly paid, since, *ex hypothesi*, the fine was not paid. The undertaking has therefore suffered no loss in value as regards the fine that it was required to pay immediately to the Commission, in light of the enforceable nature of the contested decision (see the second paragraph of art 192 of the EC Treaty) and the absence of suspensory effect of actions brought before the Court of First Instance (see the first sentence of art 185 of the EC Treaty). As stated above, the only financial damage that may have been sustained by the undertaking concerned is the consequence of its own decision to provide a bank guarantee in order to be in a position, in derogation from the rules set out above, not to pay the fine immediately, even though it has not secured a suspension of enforcement of the decision imposing the fine. a

130. As regards the second consideration, moreover, it must be held that, contrary to the situation in the *Corus UK* case (para 8, above), the Commission's failure to assume responsibility for the charges incurred in providing a bank guarantee does not entail any undue enrichment of the Community, since the bank guarantee charges are paid not to the Community but to a third party. Observance of the general principle prohibiting undue enrichment does not justify such reimbursement in any circumstances. Quite to the contrary, if the Commission were to assume responsibility for the charges incurred in providing a bank guarantee, that would allow the undertaking concerned to be placed in the situation in which it was before the contested decision was adopted, but the Commission, on the other hand, would be penalised, since it would be required to reimburse to the undertaking sums of which it did not have the benefit. b

131. Taking those factors into account, the causal link between the conduct attributed to the defendant and the alleged damage cannot in this case be qualified as sufficiently direct. c

132. In the light of the foregoing, and without there being any need to adjudicate on the damage alleged to have been sustained, the action based on art 235 EC and the second paragraph of art 288 EC, as concerns the costs of the bank guarantee after 31 January 1998, must be dismissed as unfounded. d

#### COSTS e

133. Under art 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful in its submissions, it must be ordered to pay all the costs, in accordance with the form of order sought by the defendant. f

On those grounds, the Court of First Instance (Third Chamber) hereby:

- (1) Dismisses the action as inadmissible in so far as it is based on art 233 EC;
  - (2) Dismisses as inadmissible the alternative request that the action, in so far as it is based on art 233 EC, be interpreted as being an action for annulment or for failure to act; g
  - (3) Dismisses as inadmissible the claim for damages, as regards the bank guarantee charges incurred by the applicant before 31 January 1998;
  - (4) Dismisses the remainder of the application as unfounded;
  - (5) Orders the applicant to pay the costs. h
- i



# European Commission v Tetra Laval BV

(Case C-12/03 P)

COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES (GRAND CHAMBER)

JUDGES JANN (PRESIDENT OF THE FIRST CHAMBER, ACTING FOR THE PRESIDENT),  
TIMMERMANS AND ROSAS (RAPPORTEUR) (PRESIDENTS OF CHAMBERS), GULMANN,  
PUISSOCHET, SCHINTGEN, COLNERIC, VON BAHR AND CUNHA RODRIGUES  
ADVOCATE GENERAL TIZZANO

27 JANUARY, 25 MAY 2004, 15 FEBRUARY 2005

*European Community – Rules on competition – Mergers – Commission declaring proposed concentration incompatible with the common market – Collective dominant position – Requisite proof – Power of judicial review – Whether Court of First Instance erring in infringing Commission’s appraisal of concentration and failing to take account of the Commission’s discretion regarding factual and economic matters – Commission Decision C(2004) 124 – Council Regulation (EEC) 4064/89.*

The applicant company was the group holding company of a group which included the Tetra Pak company. The Tetra Pak company was the world leader in the carton packaging sector and was regarded as holding a dominant position in aseptic packaging on that market. Sidel SA was a leading company in the production and supply of stretch blow moulding (SBM) machines, which were used for the production of polyethylene terephthalate (PET) packaging. The merger of the applicant and Sidel was notified to the Commission of the European Communities. The applicant entered into a number of commitments which included keeping the companies separate for ten years. The Commission declared the merger incompatible with the common market and the functioning of the Agreement on the European Economic Area by Commission Decision C(2004) 124 (Case No COMP/M.2416—Tetra Laval/Sidel). The Commission concluded, inter alia, that the markets for carton and PET packaging systems were distinct but closely related and potentially converging markets. Further, the notified merger would encourage the applicant to leverage its dominant position on the market for equipment and consumables for carton packaging so as to persuade its customers on that market who were switching to PET in order to package certain sensitive products, such as milk, to choose Sidel’s SBM machines, thereby excluding smaller competitors and turning Sidel’s leading position on the relevant market into a dominant position. Subsequently, the applicant brought an action for annulment of that decision. The Court of First Instance (the CFI) found that the Commission had committed manifest errors of assessment in its findings as to leveraging and the strengthening of the applicant’s dominant position in the carton sector and annulled the contested decision. The CFI held that, where the Commission takes the view that a merger should be prohibited because it will create or strengthen a dominant position within a foreseeable period, it was incumbent upon it to produce convincing evidence supporting that view. The CFI also stated that in order to assess the foreseeability of the merged entity’s conduct the Commission had to examine all the circumstances which might determine that conduct. Given that, in the case of a dominant

undertaking, the supposed leveraging could constitute an abuse of the pre-existing dominant position, the CFI held that, when examining the likelihood of the adoption of anti-competitive conduct, the Commission had to have regard not only to the incentives to adopt such conduct but also to the factors liable to reduce, or even eliminate, those incentives, such as the probability of legal action against, and penalties for, such conduct. Since the Commission had failed to carry out such an examination, its findings could not be upheld. As regards the Commission's claim that '[the applicant's] current dominant position in carton packaging' would be strengthened by the elimination of a source of constraints on competition from neighbouring markets as a result of the elimination of competition from Sidel on the PET packaging market, the CFI held that the Commission had to prove that strengthening, which could not be inferred automatically from the fact that there was a dominant position. It found that the Commission had failed to provide such proof. The Commission appealed to the Court of Justice of the European Communities on a number of grounds. Those grounds included: firstly, that the CFI had erred in law as to the standard of proof which it was required to satisfy and as to the scope of the CFI's power of judicial review. Secondly, that arts 2<sup>a</sup> and 8<sup>b</sup> of Council Regulation (EEC) 4064/89 (on the control of concentrations between undertakings) had been infringed in so far as the CFI required the Commission to: (a) take account of the impact which the illegality of certain conduct had on the incentives for the merged entity to engage in leveraging; and (b) to assess, as a potential remedy, the commitments not to adopt any abusive conduct. Additionally it alleged infringement of art 2, distortion of the facts and failure to take account of the Commission's arguments in that the CFI had failed to recognise the merits of the Commission's finding that the applicant would strengthen its dominant position in the carton sector.

**Held** – (1) The CFI had correctly set out the tests to be applied when carrying out judicial review of a Commission decision on concentration. While the Commission had a margin of discretion with regard to economic matters, that did not mean that the Community courts had to refrain from reviewing the Commission's interpretation of information of an economic nature. Not only should the Community courts, *inter alia*, establish whether the evidence relied on was factually accurate, reliable and consistent but also whether that evidence contained all the information which had to be taken into account in order to assess a complex situation and whether it was capable of substantiating the conclusions drawn from it. Such a review was all the more necessary in the case of a prospective analysis required when examining a planned merger with conglomerate effect. Further, the CFI had not erred in specifying the quality of the evidence which the Commission was required to produce in order to demonstrate that the requirements of art 2(3) were satisfied. Proof of anti-competitive conglomerate effects of a merger of the kind notified in the instant case, involved prospective analysis in which the chains of cause and effect were dimly discernible, uncertain and difficult to establish. Therefore the quality of the evidence produced by the Commission

a Article 2 of Regulation 4064/89 is set out at judgment para 2, below

b Article 8 of Regulation 4064/89 provides, so far as material: '... (2) Where the Commission finds that, following modification by the undertakings concerned if necessary, a notified concentration fulfils the criterion laid down in Article 2(2), it shall issue a declaration declaring the concentration compatible with the common market ...'

*a* in order to establish that it was necessary to adopt a decision declaring the concentration incompatible with the common market was particularly important, as that evidence had to support the Commission's conclusion that, were the decision not to be adopted, the economic development envisaged by the Commission would be plausible. In the present case, the CFI had carried out its review in the manner required and had observed the criteria to be applied in exercising its power of review. Accordingly, arts 2(2) or (3) had not been infringed (see judgment paras 38–40, 44, 45, 48, 49, below).

*b* (2) Although the CFI had erred in law by rejecting the Commission's conclusions as to the adoption by the merged entity of conduct likely to result in leveraging, it was nevertheless right to hold that the Commission should have taken account of the commitments offered by the applicant with regard to its future conduct. The CFI's error had been to reject the Commission's conclusions as to the adoption by the merged entity of anti-competitive conduct capable of leveraging on the sole ground that the Commission had, when assessing the likelihood of such conduct, failed to take account of the unlawfulness of that conduct and consequently the likelihood of its detection, *c* of action by the competent authorities and of the financial penalties which might ensue. Accordingly, whilst the ground of appeal was well founded in part, it could not call into question the judgment under appeal in so far as it annulled the contested decision since that annulment had been based, *d* inter alia, on the Commission's refusal to take account of those commitments (see judgment paras 78, 89, below).

*e* (3) The CFI had been correct to point out that although an important factor, the mere fact that the acquiring undertaking already held a clear dominant position on the relevant market did not in itself justify a finding that a reduction in the potential competition which that undertaking had to face constituted a strengthening of its position. The potential competition represented by a producer of substituted products on a segment of the relevant market was only one of the factors which had to be taken into account when assessing whether there was a risk that a concentration might strengthen a dominant position. It could not be ruled out that a reduction in potential competition might be compensated by other factors, with the result that the competitive position of the already dominant undertaking remained unchanged. The CFI had been right to state in connection with the parties' arguments regarding a lack of innovation in the carton sector that the Commission had to show that, if there was a reduction in potential competition, this will tend to strengthen the applicant's dominant position in relation to its competitor on the aseptic carton market. Thus the CFI had relied on the potential reactions of the applicant's competitors as a basis for refuting the contention that the applicant might be encouraged to increase prices on the aseptic carton market or to innovate less. Accordingly, that part of the ground of appeal in which the Commission claimed that the potential competition was unrelated to the competitive relationship between the undertaking regarded as dominant and other undertakings active on the relevant market could not be regarded as well-founded (see judgment paras 126–130, below).

*i*

## Notes

For abuse of a dominant position by one or more undertakings in regard to Community competition law, see 47 *Halsbury's Laws* (4th edn) (2001 reissue) paras 353, 356.



**Cases cited**

- Aalborg Portland A/S v European Commission* Joined cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P [2004] ECR I-123, ECJ.
- Air France (SA à Participation Ouvrière Cie Nationale) v EC Commission* Case T-2/93 [1994] ECR II-323, CFI.
- Airtours plc v European Commission* Case T-342/99 [2002] All ER (EC) 783, [2002] ECR II-2585, CFI.
- AKZO Chemie BV v EC Commission* Case C-62/86 [1991] ECR I-3359, ECJ.
- British American Tobacco Co Ltd v EC Commission* Joined cases 142/84 and 156/84 [1987] ECR 4487, ECJ.
- Cie Maritime Belge Transports SA v European Commission* Joined cases C-395/96 P and C-396/96 P [2000] All ER (EC) 385, [2000] ECR I-1365, ECJ.
- Coca-Cola Co v European Commission* (supported by *The Virgin Trading Co Ltd* and *anor*, interveners) Joined cases T-125/97 and T-127/97 [2000] All ER (EC) 460, [2000] ECR II-1733, CFI.
- Culin v EC Commission* Case C-343/87 [1990] ECR I-225, ECJ.
- Deere (John) Ltd v European Commission* Case C-7/95 P [1998] All ER (EC) 481n, [1998] ECR I-3111, ECJ.
- European Commission v Camar Srl* Case C-312/00 P [2002] ECR I-11355, ECJ.
- France v European Commission* Joined cases C-68/94 and C-30/95 [1998] ECR I-1375, ECJ.
- Gencor Ltd v European Commission* (Germany intervening) Case T-102/96 [1999] All ER (EC) 289, [1999] ECR II-753, CFI.
- Hilti AG v EC Commission* Case C-53/92 P [1994] ECR I-667, ECJ.
- Hoffmann-La Roche & Co AG v EC Commission* Case 85/76 [1979] ECR 461, ECJ.
- Italy v European Commission* Joined cases C-15/98 and C-105/99 [2000] ECR I-8855, ECJ.
- Lestelle v EC Commission* Case C-30/91 P [1992] ECR I-3755, ECJ.
- Michel v European Parliament* Case 195/80 [1981] ECR 2861, ECJ.
- Nederlandsche Banden-Industrie Michelin (NV) v EC Commission* Case 322/81 [1983] ECR 3461, ECJ.
- New Holland Ford Ltd v European Commission* Case C-8/95 P [1998] ECR I-3175, ECJ.
- Remia BV v EC Commission* Case 42/84 [1985] ECR 2545, ECJ.
- Salzgitter AG (formerly Preussag Stahl AG) v European Commission* Case C-210/98 P [2000] ECR I-5843, ECJ.
- Società Finanziaria Siderurgica Finsider SpA (in liq) v European Commission* Case C-320/92 P [1994] ECR I-5697, ECJ.
- Tetra Pak International SA v EC Commission* Case T-51/89 [1990] ECR II-309, CFI.
- Tetra Pak International SA v EC Commission* Case T-83/91 [1994] ECR II-755, CFI; *affd* Case C-333/94 P [1996] ECR I-5951, ECJ.

**Appeal**

By application lodged at the Court Registry on 8 January 2003, the Commission of the European Communities brought an appeal under art 49 of the EC Statute of the Court of Justice against the judgment of the Court of First Instance in *Tetra Laval BV v European Commission* Case T-5/02 [2003] All ER (EC) 762, [2002] ECR II-4381, by which the Court of First Instance annulled Commission Decision (EC) 2004/124 declaring a concentration to be incompatible with the common market and the EEA Agreement (Case No COMP/M.2416—*Tetra Laval/Sidel*). The Commission was represented by

- a** M Petite, A Whelan and P Hellström, acting as agents, with an address for service in Luxembourg. Tetra Laval BV, a company established in Amsterdam, Netherlands, was represented by A Vandencastele and D Waelbroeck of the Brussels Bar, M Johnsson of the Swedish Bar and A Weitbrecht and S Völcker, Rechtsanwälte. The language of the case was English. The facts are set out in the opinion of the Advocate General.

**b**

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25 May 2004. **The Advocate General (A Tizzano)** delivered the following opinion<sup>1</sup>.

- h** 1. The subject matter of this case is an appeal brought by the Commission of the European Communities against the judgment of the Court of First Instance of 23 October 2002 in *Tetra Laval BV v European Commission* Case T-5/02 [2003] All ER (EC) 762, [2002] ECR II-4381 which annulled Commission Decision C(2001) 3345 final declaring a concentration to be incompatible with the common market and with the EEA Agreement (Case No COMP/M.2416—Tetra Laval/Sidel).

**i**

## I—THE RELEVANT PROVISIONS

2. As everyone knows, in order to contribute to the creation of 'a system ensuring that competition in the internal market is not distorted' (see art 3(f) of

<sup>1</sup> Original language: Italian.

the EEC Treaty, then, after amendment, art 3(g) of the EC Treaty, now art 3(g) EC), Council Regulation (EEC) 4064/89<sup>2</sup> (the Merger Regulation or just the regulation) introduced control of concentrations with a Community dimension<sup>3</sup>. For that purpose, it provided in particular that prior notification of those operations should be made to the Commission, which is called upon to appraise their compatibility with the common market.

3. In accordance with art 2(1) of the regulation, in making that appraisal the Commission is to take into account—

(a) the need to preserve and develop effective competition within the common market in view of, among other things, the structure of all the markets concerned and the actual or potential competition from undertakings located either within or without the Community;

(b) the market position of the undertakings concerned and their economic and financial power, the opportunities available to suppliers and users, their access to supplies or markets, any legal or other barriers to entry, supply and demand trends for the relevant goods and services, the interests of the intermediate and ultimate consumers, and the development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition.'

4. The subsequent subparagraphs of art 2 then provide:

—on the one hand, that '[a] concentration which does not create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it shall be declared compatible with the common market' (sub-para (2));

—on the other hand, that '[a] concentration which creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it shall be declared incompatible with the common market' (sub-para (3)).

## II—FACTS AND PROCEDURE

### *The concentration notified and the procedure before the Commission*

5. The relevant parts of the reconstruction of the facts in the judgment under appeal reveal the following:

'9. On 27 March 2001, Tetra Laval SA, a privately held company incorporated under French law and a wholly owned subsidiary of Tetra Laval BV (Tetra or the applicant), a holding company belonging to the Tetra Laval group, announced a public bid for all outstanding shares in Sidel SA (Sidel), a French publicly-quoted company. On the same day, Tetra Laval SA acquired roughly 9.75% of the shares in Sidel from Azeo (5.56%) and Sidel's directors (4.19%) ...

11. Pursuant to the bid, Tetra acquired approximately 81.3%, of the outstanding shares in Sidel. After the closing of the bid, the applicant acquired certain additional shares, making its current holdings roughly 95.2% of the shares and 95.93% of the voting rights in Sidel.

<sup>2</sup> On the control of concentrations between undertakings (OJ 1989 L395 p 1; corrigendum in OJ 1990 L257 p 13). Regulation 4064/89 was amended by Council Regulation (EC) 1310/97 (OJ 1997 L180 p 1).

<sup>3</sup> What is meant by 'concentrations' is explained in art 3 of the regulation, while art 1(2) and (3) makes clear in what circumstances a concentration may have a 'Community dimension'.



*a* 12. Tetra comprises, inter alia, the Tetra Pak company, which is mainly active in the area of liquid food carton packaging, where Tetra Pak is the worldwide market leader. Tetra also has more limited activities in the plastic packaging sector, mainly as a converter (which consists of manufacturing and supplying empty packaging to producers who then fill the packaging themselves), particularly of high density polyethylene (HDPE) bottles.

*b* 13. Sidel is involved in the design and production of packaging equipment and systems, particularly stretch blow moulding machines (SBM machines), which are used in the production of polyethylene terephthalate (PET) plastic bottles. It is the worldwide leader for the production and supply of SBM machines. It is also active in barrier technology, used to make PET compatible with products which are sensitive to gas and light, as well as in the manufacture of filling machines for PET and, to a lesser extent, HDPE bottles.

*c* 14. On 18 May 2001, the operations by which Tetra acquired its shareholding in Sidel were notified to the Commission.

*d* 15. It is agreed by the parties that those operations (the merger or the notified transaction) constitute an acquisition within the meaning of art 3(1)(b) of Regulation 4064/89 and that the merger has a Community dimension within the meaning of art 1(2) thereof.

*e* 16. By decision of 5 July 2001, the Commission, having concluded that the merger raised serious doubts as to its compatibility with the common market and the Agreement on the European Economic Area (the EEA Agreement), initiated proceedings in accordance with art 6(1)(c) of Regulation 4064/89 ...

*f* 19. On 25 September 2001, the applicant proposed a number of commitments, in accordance with art 8(2) of Regulation 4064/89, with a view to remedying the competition concerns expressed in the first statement of objections ...

21. On 9 October 2001, the applicant offered the Commission a new set of firm commitments (the commitments), replacing those dated 25 September 2001 ...

*g* 24. By decision of 30 October 2001 (Commission Decision C(2001) 3345 (Case No COMP/M.2416—Tetra Laval/Sidel)) (the contested decision), the Commission declared the notified transaction incompatible with the common market and the functioning of the EEA Agreement, pursuant to art 8(3) of Regulation 4064/89 ...

*h* 26. In the light of the findings in the contested decision and following a separate administrative procedure initiated by the sending of a statement of objections to Tetra on 19 November 2001, the Commission adopted, on 30 January 2002, a decision setting out measures in order to restore conditions of effective competition pursuant to art 8(4) of the regulation (Case No COMP/M.2416—Tetra Laval/Sidel).'

*i* *The contested decision*

6. If I confine myself to the core passages, and reserve the right to return in greater detail to certain aspects of particular importance to this case, the contested decision can be briefly summarised as follows.

7. After describing in general terms the packaging for liquid foods industry, the Commission analysed the relevant product markets, starting with an

assessment of whether it was possible to substitute alternative packaging materials and, in consequence, alternative packaging systems. a

8. For the purposes of that analysis, the Commission considered it appropriate to use 'end-use segmentation'; that is to say, to assess by reference to the kind of liquid to be packaged whether or not the various packaging materials and systems are substitutable<sup>4</sup>. From that point of view, and considering that Tetra and Sidel were active chiefly in the segments of carton and PET packaging, the Commission focused its analysis in particular on drinks that could be packaged in both those materials ('common' or 'sensitive' products), namely: liquid dairy products (referred to in the contested judgment also as 'LDPs'<sup>5</sup>); 'juices' and 'nectars' (which in the contested decision and judgment are referred to simply as 'juices'); 'fruit-flavoured still drinks' (which in the decision are simply called 'fruit-flavoured drinks' and in the judgment 'FFDs') and 'ready-to-drink tea and coffee drinks' (referred to in the decision and judgment simply as 'tea/coffee drinks')<sup>6</sup>. b c

9. Examining the interrelation between the two materials, the Commission began by pointing out that although they have 'traditionally been used for ... different beverages'<sup>7</sup>, 'PET is a suitable material for the packaging of all the products that have been traditionally packaged in carton'<sup>8</sup>. Following a full analysis and in particular 'in the light of recent and forthcoming technological developments, cost and marketing considerations', the Commission arrived at the conclusion that 'PET use in the common product segments will grow significantly in the next five years'<sup>9</sup>. d

10. The Commission then stated— e

'that although substitution between the ... systems [of carton and PET packaging] does not currently have the necessary effectiveness and immediacy required for the purposes of market definition (i.e. they are weak substitutes), this may change in the future.'

It also concluded that— f

'given their presence in the same sector of liquid-food packaging, their common product segments, customer base and increasing use of aseptic technology, the two packaging systems belong to two very closely neighbouring markets.'<sup>10</sup>

11. Having said that, the Commission found it 'necessary to analyse whether there are distinct relevant product markets for specific equipment within each packaging system'<sup>11</sup>. g

4 See in particular recitals (40) and (44) of the decision.

5 This footnote is not relevant in the English version. h

6 See in particular recitals (12) and (45) of the decision.

7 Recital (55), in which it is explained that 'PET and carton have traditionally been used for packaging different beverages. This is mainly due to different physical characteristics of these packaging solutions. Carton is non-transparent and hence suitable for oxygen and light-sensitive products but cannot withstand carbonation. PET is transparent and can withstand carbonation but has been traditionally less suitable for oxygen and light-sensitive products. As a result, carton has been used mainly for LDPs (primarily white milk) and juices whereas PET has been principally used for water (still and carbonated) and CSDs [carbonated soft drinks]'. i

8 Recital (57).

9 Recital (103).

10 Recital (163).

11 Recital (164).

*a* 12. As a result of that analysis, with reference to the PET packaging systems<sup>12</sup>, the Commission concluded: (i) that 'high-capacity stretch blow-moulding [SBM] machines form a separate market from low-capacity SBM machines' and that, '[in] the light of the specific characteristics of the "sensitive" products and the ability for price discrimination', 'separate relevant markets exist for each distinct group of customers on the basis of end-use in particular in the four "sensitive" beverage segments'<sup>13</sup>; (ii) that the various 'barrier technologies for PET form part of the same product market'<sup>14</sup>; (iii) that there existed 'two distinct product markets for aseptic PET filling machines and non-aseptic PET filling machines'<sup>15</sup>; (iv) and that 'preforms [for PET] are a distinct product market'<sup>16</sup>.

*b* 13. With reference to carton packaging systems on the other hand, the Commission has—

'concluded that there are four distinct product markets: aseptic carton packaging machines, aseptic cartons, non-aseptic carton packaging machines and non-aseptic cartons.'<sup>17</sup>

*d* 14. After making those statements with regard to the relevant product markets, the Commission then went on to a rapid examination of the geographical dimension of those markets, concluding that for them 'the relevant geographic market ... is the EEA'<sup>18</sup>.

15. Turning to an assessment of the effect on competition of the notified concentration, the Commission began by finding that before the concentration  
*e* Tetra already held 'a dominant position on the market for aseptic packaging machines and cartons and a leading position on the market for non-aseptic

*f* 12 With regard to those systems, it ought to be borne in mind that '[p]ackaging of liquid-food in PET bottles requires a combination of distinct machinery and, if required, a barrier technology. There are three distinct stages in the packaging process: (a) production of plastic preforms, the preproduction tubes used to make PET bottles; (b) production of empty PET bottles using the plastic preforms in specialised stretch blow-moulding machines (SBM machines) and (c) filling of the finished PET bottles with the liquid using a dedicated filling machine' (see recital (20) of the contested decision). In the PET packaging systems '[l]iquids are packaged in two main ways: in-house by the liquid producers themselves and by "bottle converters". In-house packaging requires the purchase of packaging equipment and installation of packaging lines at the premises of the beverage company. By contrast, converters produce empty packages, which are then either filled by filling companies or sold to beverage companies for filling in-house' (see recital (15) of the decision).

*g* 13 Recital (188).

14 Recital (199). In this regard I would point out that 'for oxygen-sensitive products (such as juices or beer), the gas barrier properties of a PET bottle need to be enhanced ... To enhance the barrier properties of PET, a barrier technology is applied onto the standard PET bottle ... For light-sensitive products such as UHT white milk a light barrier needs to be added' (see recitals (22)–(24) of the decision).

*h* 15 Recital (204). In this connection, I would note that 'non-aseptic PET filling machines are generally used for carbonated drinks, mineral water, edible oils and fresh milk. Aseptic PET filling machines are used for ambient juices, fruit or flavoured still drinks, ready-to-drink tea and coffee drinks and liquid dairy products ...' (see recital (21) of the decision).

16 Recital (206).

*i* 17 Recital (209). With regard to such systems, it is helpful to note that '[u]nlike PET with its distinct stages of production (preforms, empty bottles, filling), the liquid-food carton business is one of integrated pack construction, filling and sealing ... All these operations are done on one carton packaging machine within the beverage company's factory ... There are distinct aseptic and non-aseptic carton machines and the distinction between aseptic and non-aseptic carton packaging runs throughout the packaging process' (see recital (28) of the decision).

18 Recital (212).



packaging machines and cartons'; moreover, it also held 'a dominant position in the carton packaging market as a whole'<sup>19</sup>. Before the notified concentration Sidel, on the other hand, held— a

'a leading position in the high and low-capacity SBM machine market across all end-use segmentations and a strong position in other PET packaging equipment, in particular aseptic filling machines, secondary equipment and associated services.'<sup>20</sup> b

16. In those circumstances, the Commission assessed whether the concentration notified would lead to the creation or strengthening of one or more dominant positions within the meaning of art 2 of the Merger Regulation. c

17. In that regard, the Commission first of all found that—

'[t]he proposed transaction produces direct horizontal effects as both parties are active in three distinct product markets: SBM machines (low capacity); barrier technology and aseptic PET filling machines.'

According to the Commission, 'the already strong position of Sidel' would as a result 'immediately be strengthened further through the merger.'<sup>21</sup> d

18. More particularly, with reference to the 'horizontal effects' of the merger, the Commission concluded: (i) that 'the low-capacity market would become more concentrated as a result of the operation' and that 'Tetra/Sidel would be by far the leading company throughout the entire spectrum of SBM machinery from the simplest low-capacity machines to the highest-capacity and most technologically advanced machines'<sup>22</sup>; (ii) 'that the combination of the parties'... technologies would enhance the merged entity's position in the barrier technology market significantly', even though 'not to the extent that a dominant position would be created'<sup>23</sup>; and (iii) 'that the merged entity would have a strong position in aseptic PET filling machines'.<sup>24</sup> e

19. The Commission then examined the 'vertical effects' of the merger, finding that it would result in 'Tetra/Sidel being vertically integrated in three packaging systems: carton, HDPE and PET'. That could 'create a channel conflict with independent converters with possible anti-competitive effects'. The Commission did not, however, conclude that 'these vertical concerns would, by themselves, result in the creation of a dominant position for PET equipment or preforms'<sup>25</sup>. f

20. After making those findings in respect of the 'horizontal' and 'vertical' effects of the merger, the Commission went on to assess the possible 'conglomerate' anti-competitive effects arising from the fact that the body created by the merger would occupy a strong position in neighbouring markets, such as those in carton and carton packaging equipment and those in PET packaging equipment. Such an assessment, in its opinion, was made especially necessary by the close links between the various markets, due to the fact that— g

19 Recital (231).

20 Recital (259).

21 Recital (263).

22 Recitals (269), (270).

23 Recital (282).

24 Recital (290).

25 Recital (324).

a 'PET is already becoming an important alternative, as well as complementary, packaging to carton in the "sensitive" product markets and that it will continue to grow in importance.'<sup>26</sup>

21. From that point of view, the Commission first of all appraised whether the merged entity might not exploit its dominance in the carton sector in order to gain a dominant position in the markets for PET packaging equipment ('leveraging'). In this connection, following a thorough analysis, the Commission arrived at the conclusion—

c 'that, by combining the dominant company in carton packaging, Tetra, and the leading company in PET packaging equipment, Sidel, the proposed transaction would create a market structure which would provide the merged entity with the incentives and tools to turn its leading position in PET packaging equipment, in particular SBM machines (low and high-capacity) used for the "sensitive" product segments into a dominant position. This is also likely to enhance the merged entity's position and have anti-competitive effects on the overall SBM machine market.'<sup>27</sup>

22. The Commission then assessed the possible effects of the notified merger on Tetra's dominant position in carton. On this point, considering that 'carton and PET packaging systems form ... closely neighbouring product markets that exert some competitive constraint on one another', it came to the conclusion that 'by eliminating Sidel as a growing competitive constraint in a closely neighbouring market, Tetra's position in carton packaging would be strengthened'<sup>28</sup>.

e 23. Last, the Commission assessed whether the merged entity's dominance in carton and PET packaging equipment could lead to further strengthening of its predominance. In this respect, it considered it—

f 'likely that, through the merger, the merged entity's position in the end-use sectors of "sensitive" products would marginalise competitors and raise barriers to entry thus reinforcing dominance in the relevant markets for carton packaging equipment and PET packaging equipment in particular SBM machines used for "sensitive" products.'<sup>29</sup>

g 24. After carrying out those assessments of the effect on competition of the notified transaction, the Commission went on to evaluate the commitments offered by Tetra, namely: (i) 'divestiture of Tetra's SBM business'; (ii) 'divestiture of Tetra's PET preform business'; (iii) 'holding Sidel separate from TetraPak companies' and (iv) 'granting a licence of Sidel's SBM business for sale to customers filling "sensitive" products and for sales to converters'<sup>30</sup>.

h 25. Following a swift examination of those commitments, the Commission considered, however, that they were 'insufficient to eliminate the major competition concerns identified on the PET packaging equipment and carton packaging markets', since the 'two divestitures will have a minimal impact on the position of the merged entity'; the licence, apart from being 'insufficient to

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26 Recital (337).

27 Recital (389).

28 Recitals (397), (399).

29 Recital (408).

30 Recital (410).

remove the Commission's competition concerns ... does not appear to be a viable option and may actually introduce complex mechanisms in the market resulting in artificial regulation', and 'the two behavioural commitments are considered insufficient as such to resolve the concerns arising from the structure of the market following the merger'<sup>31</sup>.

26. The Commission therefore concluded 'that, given both the lack of viability of the proposed commitments and their overall insufficiency to address the competition concerns raised by the transaction', they were not 'sufficient to remove the identified competition concerns and thus cannot form the basis for an authorisation decision'<sup>32</sup>.

27. Having regard to the considerations summarised above, the Commission concluded therefore—

'that the notified concentration would create a dominant position in the market for PET packaging equipment, in particular SBM machines used for the "sensitive" product segments, and strengthen a dominant position in aseptic carton packaging equipment and aseptic cartons in the EEA, as a result of which effective competition would be significantly impeded in the common market and in the EEA.'<sup>33</sup>

Taking the view that the commitments proposed by Tetra were considered insufficient to remedy that situation, the Commission accordingly declared the concentration 'incompatible with the common market and the functioning of the EEA Agreement'<sup>34</sup>.

#### *The judgment under appeal*

28. By action lodged at the Registry of the Court of First Instance on 15 January 2002, Tetra challenged the Commission's decision. By judgment of 25 October 2002 the Court of First Instance granted the application, annulling the contested decision.

29. If I again confine myself to the essential passages and reserve the right to return in greater detail to certain aspects, the judgment can be briefly summarised as follows.

30. After dismissing the plea in the action alleging 'infringement of the right of access to the file'<sup>35</sup>, the Court of First Instance—so far as is of more direct interest here—dwelled: (i) on the pleas based on the absence of horizontal or vertical anti-competitive effects of the modified merger<sup>36</sup> and (ii) on 'the plea based on the lack of foreseeable conglomerate effect'.

31. With reference to the pleas concerning the 'horizontal' and 'vertical' effects of the merger, the Court of First Instance began by finding—

'that, even though the Commission did not base the contested decision on those ... effects, it did take them into account in support of its finding that the modified merger must be prohibited.'<sup>37</sup>

31 Recital (424).

32 Recital (451).

33 Recital (452).

34 Article 1 of the operative part.

35 Paragraphs 83–118.

36 By 'modified merger' the Court of First Instance means 'the merger as modified by the commitments' (see para 81).

37 Paragraph 124.



- a 32. Having said that, the Court of First Instance found that, taking into account the commitments proposed by Tetra—  
‘the negative horizontal effects of the merger referred to by the Commission in the contested decision are merely minimal, if not almost non-existent, on the various relevant PET packaging equipment markets.’
- b On that basis it concluded—  
‘that the Commission made a manifest error of assessment in so far as it relied on the horizontal effects of the modified merger to support its finding that a dominant position on those PET markets would be created for the merged entity through leveraging.’<sup>38</sup>
- c 33. Similarly, the Court of First Instance found that—  
‘it has not been shown that the modified merger would result in sizeable or, at the very least, significant vertical effects on the relevant market for PET packaging equipment.’
- d In such circumstances, it had, in its opinion, necessarily to find—  
‘that the Commission made a manifest error of assessment in so far as it relied on the vertical effects of the modified merger to support its finding that a dominant position on those PET markets would be created for the merged entity through leveraging.’<sup>39</sup>
- e 34. According to the Court of First Instance, however, the ‘manifest errors of assessment’ into which the Commission fell ‘in relying on the horizontal and vertical effects of the modified merger to support its analysis of the creation of a dominant position on the relevant PET markets’ did not, however, ‘lead to the annulment of the contested decision, since the conglomerate effect alleged by the Commission could by itself suffice to justify the decision’<sup>40</sup>.
- f 35. Coming to the ‘plea based on the lack of foreseeable conglomerate effect’, the Court of First Instance went on to examine in turn—  
‘the three pillars of the Commission’s reasoning concerning leveraging, the elimination of potential competition and the general effect of strengthening the competitive position of the merged entity.’<sup>41</sup>
- g 36. Beginning with the first of those pillars, the Court of First Instance noted first of all that, as the Commission itself had acknowledged, ‘leveraging by Tetra through the conduct described [in the decision]’<sup>42</sup> could constitute abuse of Tetra’s pre-existing dominant position in the aseptic carton markets’<sup>43</sup>. In such a case, according to the Court of First Instance, the Commission ought to have assessed—
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38 Paragraph 132.

39 Paragraph 140.

40 Paragraph 141.

41 Paragraph 145.

i 42 In this connection, summarising the contents of the decision, the Court of First Instance noted that ‘the leveraging from the aseptic carton market ... would manifest itself—in addition to the possibility of the merged entity’s engaging in practices such as tying sales of carton packaging equipment and consumables to sales of PET packaging equipment and forced sales (recitals (345), (365))—firstly, by the probability of predatory pricing by the merged entity (recital (364) ...) secondly, by price wars; and, thirdly, by the granting of loyalty rebates.’ (See para 156.)

43 Paragraph 158.

'whether, despite the prohibition of such conduct, it is none the less likely that the entity resulting from the merger will act in such a manner or whether, on the contrary, the illegal nature of the conduct and/or the risk of detection will make such a strategy unlikely. While it is appropriate to take account, in its assessment, of incentives to engage in anti-competitive practices, such as those resulting in the present case for Tetra from the commercial advantages which may be foreseen on the PET equipment markets ... the Commission must also consider the extent to which those incentives would be reduced, or even eliminated, owing to the illegality of the conduct in question, the likelihood of its detection, action taken by the competent authorities, both at Community and national level, and the financial penalties which could ensue.'<sup>44</sup>

37. Since, therefore, 'the Commission did not carry out such an assessment in the contested decision', the Court of First Instance stated that—

'in so far as the Commission's assessment is based on the possibility, or even the probability, that Tetra will engage in such conduct in the aseptic carton markets, its findings in this respect cannot be upheld.'<sup>45</sup>

38. Likewise, the Court of First Instance held that—

'the fact that the applicant offered commitments regarding its future conduct is also a factor which the Commission should have taken into account in assessing whether it was likely that the merged entity would act in a manner which could result in the creation of a dominant position on one or more of the relevant PET equipment markets.'

However—

'[t]here is no indication in the contested decision that the Commission took account of the implications of those commitments when it assessed the creation of such a position in future through leveraging.'<sup>46</sup>

39. The Court of First Instance then concluded in examining 'whether the Commission based its analysis of the likelihood of leveraging ... and of the consequences ... on sufficiently convincing evidence', it was necessary 'to take account only of conduct which would, at least probably, not be illegal'<sup>47</sup>.

40. Having said that, and going on with its analysis, the Court of First Instance asserted that 'the Commission did not commit a manifest error of assessment in finding that it would be possible for the merged entity to engage in leveraging practices'<sup>48</sup>. In particular, according to the Court of First Instance, that institution had 'established to the requisite legal standard that growth in the PET market is foreseeable, rendering possible the occurrence of the predicted leveraging'<sup>49</sup>.

41. Since, however, the contested decision indicates 'that the incentive for the merged entity to exercise leveraging depends to a large extent on

<sup>44</sup> Paragraph 159.

<sup>45</sup> Paragraph 160.

<sup>46</sup> Paragraph 161.

<sup>47</sup> Paragraph 162.

<sup>48</sup> Paragraph 199.

<sup>49</sup> Paragraph 195.

a the anticipated level of growth in the PET markets', the Court of First Instance found it necessary to examine whether, as the applicant maintained—

b 'the foreseeable volume of sensitive products packaged in PET by 2005, as compared with the total future volume of products packaged in PET, makes that incentive unlikely or at least reduces the likelihood significantly.'<sup>50</sup>

42. At the outcome of that examination, it concluded that—

c 'the growth forecasts for LDPs and juices as stated by the Commission in the contested decision have not been proven to the requisite legal standard. Although a certain amount of growth in those segments is likely, especially for premium products, convincing evidence of the extent of the growth is lacking.'<sup>51</sup>

According to the Court of First Instance, however—

d 'having regard to the fact that PET use will probably increase by 2005, even if less sharply than that forecast by the Commission, the incentive to leverage cannot be excluded.'<sup>52</sup>

e 43. Given the foregoing, the Court of First Instance went on 'to examine the ways in which the merged entity could engage in leveraging'<sup>53</sup>. On that point, it found that by limiting the analysis 'to those [practices] which, at least probably, do not constitute an abuse of a dominant position on the aseptic carton markets'<sup>54</sup>, and taking into consideration the commitments proposed by Tetra, it had to 'be found that the merged entity's possible means of leveraging would be quite limited'<sup>55</sup>. Account would therefore have to be taken of that in 'examination of the foreseeable consequences of its resorting to such conduct'<sup>56</sup>.

f 44. Turning to the consideration of those consequences, the Court of First Instance found that it was 'necessary to distinguish the various PET equipment markets from those specifically for SBM machines'<sup>57</sup>.

45. As regards the former, following a careful market-by-market analysis, the Court of First Instance concluded—

g 'that the contested decision does not provide sufficiently convincing evidence to show that leveraging from the aseptic carton market would enable a dominant position to be created for the new entity by 2005 on the markets for barrier technology, aseptic and non-aseptic filling machines, plastic bottle closure systems and auxiliary equipment.'<sup>58</sup>

h 46. With regard to the SBM machines markets, again after a detailed analysis, the Court of First Instance concluded:

50 Paragraph 201.

51 Paragraph 214. Nevertheless, the Commission did not commit an error on that point, according to the Court of First Instance, with regard to the forecast growth in FFDs and tea/coffee drinks (see para 215).

52 Paragraph 216.

i 53 Paragraph 216.

54 Paragraph 218.

55 Paragraph 224.

56 See footnote above.

57 Paragraph 225.

58 Paragraph 254.



that, 'on the basis of the evidence in the contested decision, the Commission ... committed an error, first, by finding that "the majority of SBM machines are 'generic'" ... and, second, by distinguishing between them according to end use'. Moreover, '[t]he contested decision does not provide sufficient evidence to justify the definition of distinct sub-markets among SBM machines with reference to their end use', for which reason 'the only sub-markets it is necessary to consider are those for low- and high-capacity machines'<sup>59</sup>; a

that, 'as regards low-capacity SBM machines ... in so far as the Commission predicts that a dominant position will be created on that market by 2005 through leveraging, it committed a manifest error of assessment'<sup>60</sup>; b

and that, 'as regards the market for high-capacity SBM machines, the evidence relied on by the Commission does not justify a finding that both the merged entity's competitors and the converters would be marginalised by 2005 due to leveraging by that entity directed at Tetra's current customers on the carton markets who, during that period, intend to switch all or part of their production over to PET for packaging of sensitive products'<sup>61</sup>. c

47. Drawing a '[g]eneral conclusion on leveraging', the Court of First Instance held, in consequence— d

'that, in relying as it did on the consequences of leveraging by the merged entity in order to support its finding that a dominant position would be created by 2005 on the PET packaging equipment markets, especially those for low- and high-capacity SBM machines used for sensitive products, the Commission committed a manifest error of assessment.'<sup>62</sup> e

48. The Court of First Instance then noted that—

'[s]ince the conditions required by art 2(3) of Regulation 4064/89 have not been fulfilled as regards the leveraging foreseen by the Commission, it must be examined whether those conditions are fulfilled with regard to the second pillar of the Commission's reasoning concerning the carton markets.'<sup>63</sup> f

49. Undertaking that assessment, the Court of First Instance first of all observed generally that the Commission did not—

'commit any error in examining the significance for the carton markets of a reduction of potential competition from the PET equipment markets. It does have to show, however, that such a reduction, if it exists, would tend to strengthen Tetra's dominant position in relation to its competitors on the aseptic carton markets.'<sup>64</sup> g

50. In that regard, after examining the assessments made by the Commission, the Court of First Instance concluded that— h

'the evidence relied on in the contested decision does not establish to the requisite legal standard that the effects of the modified merger on Tetra's

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<sup>59</sup> Paragraph 269.

<sup>60</sup> Paragraph 283.

<sup>61</sup> Paragraph 306.

<sup>62</sup> Paragraph 308.

<sup>63</sup> Paragraph 309.

<sup>64</sup> Paragraph 323.

- a position, principally on the aseptic carton markets, would, by eliminating Sidel as a potential competitor, be such as to fulfil the conditions of art 2(3) of Regulation 4064/89.'

Indeed, in its opinion, 'it has not been shown that the merged entity's position would be strengthened vis-à-vis its competitors on the carton markets'<sup>65</sup>.

- b 51. Turning, finally, to the 'third pillar' of the Commission's reasoning, which concerns the overall position of the merged entity in the packaging of sensitive products, the Court of First Instance confined itself to the finding that—

'[t]hese effects of the notified transaction cannot, however, be considered in isolation from the analysis in the contested decision concerning the first two pillars of the Commission's reasoning. Since the analysis of those two pillars is vitiated by manifest errors of assessment ... the third pillar must also be dismissed and it is not necessary to examine it in detail.'<sup>66</sup>

- c 52. The Court of First Instance therefore concluded that 'the contested decision does not establish to the requisite legal standard that the modified merger would give rise to significant anti-competitive conglomerate effects'. In its view—

'[i]t must therefore be concluded that the Commission committed a manifest error of assessment in prohibiting the modified merger on the basis of the evidence relied on in the contested decision relating to the foreseen conglomerate effect.'<sup>67</sup>

- e 53. Drawing an overall conclusion as to the outcome of the action, the Court of First Instance therefore affirmed that 'the pleas alleging lack of horizontal, vertical and conglomerate anti-competitive effects must be declared well-founded, and it is not necessary to examine the other pleas' and that '[c]onsequently, the contested decision is annulled'<sup>68</sup>.

- f *The appeal and the procedure before the Court of Justice of the European Communities*

- g 54. By application lodged at the Registry of the Court of Justice on 8 January 2003, the Commission brought an appeal against that judgment of the Court of First Instance, seeking to have it set aside. Tetra has of course opposed that request, lodging a response as provided for by art 115 of the Rules of Procedure of the Court of Justice.

- h 55. In that response, in addition to claiming that the appeal should be dismissed, Tetra requested—as a measure of inquiry pursuant to art 45(2)(b) of the Rules of Procedure—the production of the translation into French of the appeal (the original version of which is in English, the language of the case in the proceedings before the Court of First Instance and, therefore, in these proceedings). The request for that measure of inquiry was rejected by the court by order of 24 July 2003.

- i 56. On leave given by the President of the Court of Justice in accordance with art 117 of the Rules of Procedure, the Commission submitted a reply, which was followed by a rejoinder lodged by Tetra. In addition, the parties replied in writing to a question asked by the court and were heard at the hearing of 27 January 2004.

65 Paragraph 333.

66 Paragraph 335.

67 Paragraph 336.

68 Paragraphs 337, 338.

## III—LEGAL ANALYSIS

57. In support of its application the Commission has raised five grounds of appeal, relating to:

(i) an error of law concerning the standard of proof required and the scope of judicial review;

(ii) an error of law, and in particular infringement of arts 2 and 8(2) of the Merger Regulation, in that the Court of First Instance required the Commission to take into consideration the unlawfulness of certain conduct and to take account of purely behavioural commitments;

(iii) an error of law in that the Court of First Instance did not uphold the Commission's definition of separate product markets for SBM machines by reference to their end use;

(iv) infringement of art 2 of the regulation, distortion of the facts and failure to take account of the Commission's arguments in that the Court of First Instance did not uphold the Commission's finding as to the strengthening of Tetra's dominant position in carton;

(v) error of law in that the Court of First Instance did not uphold the Commission's conclusions as to the creation of a dominant position for Tetra in SBM machines.

58. After a few brief general remarks on the admissibility of appeals against the judgments of the Court of First Instance, those grounds of appeal will be examined in the same order as that in which they were submitted by the Commission.

*General considerations on the admissibility of appeals against judgments of the Court of First Instance*

59. Having regard to the fact that Tetra is challenging the admissibility of most of the Commission's grounds of appeal, before I go on to analyse those grounds, I must briefly point out that, in accordance with art 225 EC (formerly art 168a of the EC Treaty) and art 51 of the Statute of the Court of Justice, an appeal may be brought against a judgment of the Court of First Instance 'on points of law only'.

60. It follows, according to settled case law, that the Court of First Instance—

'has exclusive jurisdiction, first, to establish the facts except where the substantive inaccuracy of its findings is apparent from the documents submitted to it and, second, to assess those facts.

When the Court of First Instance has established or assessed the facts, the Court of Justice has jurisdiction under art 168a of the Treaty [now art 225 EC] to review the legal characterisation of those facts by the Court of First Instance and the legal conclusions it has drawn from them ...

22. The Court of Justice thus has no jurisdiction to establish the facts or, in principle, to examine the evidence which the Court of First Instance accepted in support of those facts. Provided that the evidence has been properly obtained and the general principles of law and the rules of procedure in relation to the burden of proof and the taking of evidence have been observed, it is for the Court of First Instance alone to assess the value which should be attached to the evidence produced to it ... The appraisal by the Court of First Instance of the evidence put before it does



a not constitute, save where the evidence has been fundamentally misconstrued, a point of law which is subject, as such, to review by the Court of Justice.<sup>69</sup>

61. It is, therefore, only within those narrow confines fixed by established case law that the various grounds of appeal may be examined by the Court of Justice.

*The ground of appeal relating to an error of law concerning the standard of proof required and the scope of judicial review*

c 62. By the first ground of appeal, which may in essence be broken down into two parts, the Commission first criticises generally the scope of the judicial review carried out by the Court of First Instance and the standard of proof demanded by that court in order for a concentration to be prohibited and, second, provides a 'concrete example' of the mistakes made by the Court of First Instance, challenging the kind of review carried out by that court in relation to the Commission's assessments of foreseeable growth in PET. For the sake of clarity, those two aspects will be analysed separately.

*(a) The Commission's general criticisms*

e 63. The criticisms of a general nature formulated by the Commission relate first and foremost to the scope and nature of the judicial review carried out by the Court of First Instance in relation to the complex economic evaluations made in the contested decision.

f 64. In particular, the Commission complains that the Court of First Instance did not confine itself to establishing whether the institution had committed a 'manifest error of assessment', and therefore to ascertaining whether the facts on which its assessment was based were correct, whether the conclusions drawn from those facts were not clearly mistaken or inconsistent and whether all the relevant factors had been taken into account.

g 65. According to the appellant institution, instead of limiting itself to those aspects, the Court of First Instance carried out a far more incisive review, going so far as to ascertain whether the Commission's conclusions were supported by 'convincing'<sup>70</sup> evidence or facts. In its view, therefore, the Court of First Instance carried out a form of review that, taken literally, required the Commission to 'convince' it of its conclusions and, as a result, enabled the court to tackle the substance of the issues and to substitute its own point of view for that of the Commission. To the latter's mind, furthermore, in the case in point the Court of First Instance carried out a review far more rigorous than performed by the Court of Justice in *France v European Commission* (the *Kali and Salz* case)<sup>71</sup>, which also concerned concentrations and in which the Community judicature merely established whether the Commission's conclusions were borne out by a 'sufficiently cogent and consistent body of evidence'<sup>72</sup>.

i <sup>69</sup> See *John Deere Ltd v European Commission* Case C-7/95 P [1998] All ER (EC) 481n, [1998] ECR I-3111 (paras 21, 22). To the same effect, see, inter multos, *Hilti AG v EC Commission* Case C-53/92 P [1994] ECR I-667 (paras 42, 43) and *New Holland Ford Ltd v European Commission* Case C-8/95 P [1998] ECR I-3175 (para 26).

<sup>70</sup> [Footnote not relevant to the English language version of this text].

<sup>71</sup> Joined cases C-68/94 and C-30/95 [1998] ECR I-1375.

<sup>72</sup> Paragraph 228.

66. Next, the Commission complains that the Court of First Instance considered that, where 'the anticipated dominant position would emerge only after a certain lapse of time', the 'analysis [by the Commission] of the future position must, whilst allowing for a certain margin of discretion, be *particularly plausible*'<sup>73</sup>. Such an approach would in fact excessively reduce the discretion enjoyed by the Commission in carrying out complex economic assessments, requiring it to rely exclusively on facts and evidence lending themselves to a single, unequivocal interpretation.

67. Lastly, the Commission challenges the Court of First Instance for considering that, in order for a conglomerate-type merger to be prohibited, the Commission must base its decision on facts that show that '*in all likelihood*' the merger would produce the predicted anti-competitive effects<sup>74</sup>. In that manner, however, the Court of First Instance left very little opportunity of prohibiting that type of merger and introduced an unequal standard of proof, depending on whether the decision was to prohibit or to authorise the concentration. It argues that the Court of First Instance's interpretation is therefore contrary to art 2(2) and (3) of Regulation 4064/89, which provide perfectly symmetrical legal requirements whether a concentration is declared compatible or incompatible with the common market<sup>75</sup>.

68. Tetra counters those challenges by claiming, in essence, that the Commission's arguments are toothless, since they turn on a disquisition of a semantic nature on the terminology used by the Court of First Instance, rather than a specific examination of the kind of judicial review carried out by that court. In any case, according to Tetra, the Commission's complaints fall wide of the mark since the expressions used by the Court of First Instance, taking account also of the various language versions, do not materially depart from those used by the Court of Justice in the *Kali and Salz* case and by the Commission itself in its decisions.

69. In Tetra's opinion, furthermore, regardless of the expressions used, the Court of First Instance in substance respected the discretion enjoyed by the Commission in carrying out complex economic assessments. Just as the Court of Justice did in the *Kali and Salz* case, so the Court of First Instance simply established whether the Commission had discharged the burden of proof placed on it in relation to the requirements laid down by art 2(3) of the Merger Regulation.

70. Next, with regard to the Commission's argument concerning the perfectly symmetrical nature of the requirements laid down by art 2(2) and (3), Tetra maintains that if the Commission fails to prove that the requirements of art 2(3) are fulfilled, then it must approve the concentration, without any need for it to prove subsequently that those requirements are not fulfilled. If that were not so, indeed, the undertakings concerned would without justification be required to prove that the transaction notified was not incompatible with the common market.

<sup>73</sup> Paragraph 162 of the judgment under appeal; my emphasis.

<sup>74</sup> Paragraph 153 of the judgment under appeal; my emphasis.

<sup>75</sup> As we have seen, that provision states: on the one hand, that '[a] concentration which does not create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it shall be declared compatible with the common market' (art 2(2)); and, on the other, that '[a] concentration which creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it shall be declared incompatible with the common market' (art 2(3)).

a 71. For my part, I agree with Tetra that the Court of Justice cannot linger over the carrying out of a purely formal linguistic or semantic assessment in order to establish whether or not the Court of First Instance committed an error of law in applying too rigorous a judicial review or in claiming a standard of proof too high for decisions prohibiting mergers. I believe rather that the Court of Justice must look to the heart of the matter, assessing in concrete terms whether, beyond the formal aspect, the Court of First Instance did in fact carry out a review inconsistent with the relevant provisions of Community law and incompatible with the particular judicial role entrusted to it by the Treaty.

b 72. In carrying out that assessment it must first and foremost bear in mind that, on the basis of the system laid down by Regulation 4064/89, the Commission is to prohibit a concentration—of any kind whatsoever—  
c whenever it arrives at the conclusion that that concentration would lead to the creation or strengthening of a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it (see art 2(3) of the regulation).

73. It is plain, however, that the Commission's opinion regarding the creation or strengthening of such a dominant position involves more than a mere factual assessment as to the material existence or otherwise of certain requirements. In addition to that assessment, its opinion entails a complex technical evaluation, based not on the application of precise scientific rules but on criteria and principles which are open to question, such as economic ones. More particularly, the Commission is required to undertake a complex  
e assessment predicting the effects of the concentration on the structure and competitive dynamics of the markets concerned, taking into consideration the many constantly evolving factors which may impinge on the future development of supply and demand on those markets.

74. It therefore cannot be claimed that in order to prohibit a concentration the Commission must establish with absolute certainty that the concentration  
f would lead to the creation or strengthening of a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it. It seems to me sufficient for that purpose if, on the basis of solid elements gathered in the course of a thorough and painstaking investigation, and having recourse to its technical knowledge, the Commission is persuaded that the notified transaction would very probably  
g lead to the creation or strengthening of such a dominant position. If the Commission is not so convinced, it must on the contrary authorise the merger.

75. Unlike the Commission, I believe that application of such a test is not contrary to the perfectly symmetrical nature of the legal requirements laid down by art 2(2) and (3) of the regulation for a declaration that a concentration  
h is or is not compatible with the common market.

76. As a matter of fact, I consider that the symmetry of those requirements cannot be absolute, seeing that there is, between the cases in which the notified transactions would very probably create or strengthen a dominant position within the meaning of art 2 and the cases in which those transactions very probably would not create or strengthen such a dominant position, a 'grey area': an area, that is to say, in which cases are to be found where it is especially difficult to foresee the effects of the notified transaction and where it is therefore impossible to arrive at a clear distinct conviction that the likelihood that a dominant position will be created or strengthened is significantly greater or less than the likelihood that such a position will not be created or  
i



strengthened. The system laid down by Regulation 4064/89 must therefore necessarily provide a yardstick for the solution of those cases which are of doubtful or difficult classification. a

77. I believe that in such cases the most correct solution is quite certainly to authorise the notified transactions.

78. It appears to me that art 10(6) of the regulation provides to that effect, stating that where, within the deadlines set, the Commission has not taken a decision concerning a notifiable transaction, the concentration 'shall be deemed to have been declared compatible with the common market'. b

79. By stipulating that, if the Commission does not make a decision in good time, the concentration must be deemed to be authorised, the Community legislature demonstrates as a matter of fact that it considers that, in the case of uncertainty as to whether or not the transaction is compatible with the common market, the interest of the undertakings seeking to make the merger must prevail. In other words, in similar situations it has been thought preferable to run the risk of authorising a transaction incompatible with the common market, rather than the risk of prohibiting one that is compatible, so unjustifiably restraining the parties' freedom of economic activity. c

80. To my mind the same must hold good in cases falling within the 'grey area' of which I have spoken, those also being marked by appreciable uncertainty as to whether or not the notified concentrations are compatible with the common market. d

81. That notified concentrations are authorised in such situations seems moreover justified to me by the fact that, if they should lead to the creation or strengthening of a dominant position within the meaning of art 2 of the regulation, the Commission and the competent national authorities would nevertheless be able to limit the distortions of competition by making ex post use of the powers given them by art 86 of the Treaty. e

82. Having said that with regard to the evaluations which the Commission must carry out, I can now turn to the question of the bounds of judicial review. f

83. On this point, I shall begin with the observation that in accordance with settled case law—

'[e]xamination by the Community judicature of the complex economic assessments made by the Commission must necessarily be confined to verifying whether the rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of appraisal or misuse of powers.'<sup>76</sup> g

84. With specific reference to Regulation 4064/89, the Court of Justice in the *Kali and Salz* case had furthermore the opportunity to make it clear that— h

'the basic provisions of the Regulation, in particular Article 2 thereof, confer on the Commission a certain discretion, especially with respect to assessments of an economic nature ...

224. Consequently, review by the Community judicature of the exercise of that discretion, which is essential for defining the rules on i

<sup>76</sup> See *Aalborg Portland A/S v European Commission* joined cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P [2004] ECR I-123 (para 279). To the same effect, see inter multos *Remia BV v EC Commission* Case 42/84 [1985] ECR 2545 (para 34) and *British American Tobacco Co Ltd v EC Commission* joined cases 142/84 and 156/84 [1987] ECR 4487 (para 62).

a concentrations, must take account of the discretionary margin implicit in the provisions of an economic nature which form part of the rules on concentrations.<sup>77</sup>

85. It is clear from that case law that the Community judicature, in addition naturally to monitoring observance of the rules of law and in particular those relating to procedure and the obligation to state reasons, exercises a different review dealing with the accuracy of the findings of fact and economic assessments made by the Commission.

86. With regard to the findings of fact, the review is clearly more intense, in that the issue is to verify objectively and materially the accuracy of certain facts and the correctness of the conclusions drawn in order to establish whether certain known facts make it possible to prove the existence of other facts to be ascertained. By contrast, with regard to the complex economic assessments made by the Commission, review by the Community judicature is necessarily more limited, since the latter has to respect the broad discretion inherent in that kind of assessment and may not substitute its own point of view for that of the body which is institutionally responsible for making those assessments.

d 87. However, the fact that the Commission enjoys broad discretion in assessing whether or not a concentration is compatible with the common market does certainly not mean that it does not have in any case to base its conviction on solid elements gathered in the course of a thorough and painstaking investigation or that it is not required to give a full statement of reasons for its decision, disclosing the various passages of logical argument supporting the decision. The Commission has itself acknowledged in its appeal, moreover, that it is bound to examine the relevant market carefully; to base its assessment on elements which reflect the facts as they really are, which are not plainly insignificant and which support the conclusions drawn from them, and on adequate reasoning; and to take into consideration all relevant factors.

88. As is also clear from the approach taken by the Court of Justice in the *Kali and Salz* case, those duties imposed on the Commission make it possible for the Community judicature to exercise an adequate review. Without entering into the merits of the Commission's assessments, it can in particular ascertain whether the factual information on which such assessments are based is accurate and whether the conclusions drawn as to fact are correct<sup>78</sup>; whether the Commission undertook a thorough and painstaking investigation, and in particular whether it carefully inquired into and took sufficiently into consideration all the relevant factors<sup>79</sup>; and whether the various passages in the reasoning developed by the Commission in order to arrive at its conclusions in respect of the compatibility or otherwise of a concentration with the common market satisfy requirements of logic, coherence and appropriateness<sup>80</sup>.

h 89. The rules on the division of powers between the Commission and the Community judicature, which are fundamental to the Community institutional system, do not however allow the judicature to go further, and particularly—as

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77 Cited above (paras 223, 224).

78 This for example is the kind of review carried out in paras 229–231 and 245 of the *Kali and Salz* case.

79 This type of review underlies for example the finding made in the last sentence of para 241 in the *Kali and Salz* case.

80 It seems that the assessments made by the Court of Justice in paras 228, 239, 241 (except the last sentence), 246 and 247 of the *Kali and Salz* case are referable to this type of review.

I have just said—to enter into the merits of the Commission's complex economic assessments or to substitute its own point of view for that of the institution. a

90. That having been expressed in general terms, it is now necessary to go on to assess specifically whether the Court of First Instance committed an error of law in applying too rigorous a standard of judicial review or too high a standard of proof in respect of a decision to prohibit a concentration (see para 71, above). b

*(b) The 'concrete example' of the errors committed by the Court of First Instance*

91. After putting forward the general criticisms just mentioned, in the second part of its first ground of appeal the Commission proposes to give a 'concrete example' of the errors made by the Court of First Instance. In this part of that ground, in addition to challenging the various passages in the judgment under appeal in which it claims the Court of First Instance overstepped the bounds of judicial review, the Commission puts forward other summary complaints relating to errors of various kinds committed by the Court of First Instance in carrying out its own assessments. c

92. In its first objection the Commission complains that the Court of First Instance overstepped the bounds of judicial review by rejecting its conclusion as to the foreseeable growth in PET packaging for long-life (UHT) milk of up to 1% of that market segment. In particular, according to the Commission, the Court of First Instance unlawfully and without reasoning overturned the conclusion reached by the institution, merely finding that 'the use of PET will not actually increase for UHT milk and, consequently, for approximately half of the LDP market'<sup>81</sup>. d

93. The objection seems to me to hit the mark. Indeed, I agree with the Commission that with that terse statement (especially if we look at the text of the judgment in the language of the case) the Court of First Instance incorrectly substituted its own point of view for the Commission's, formulating its own autonomous prediction of future developments in the market. e

94. Contrary to what Tetra maintains, the Court of First Instance's laconic assertion contains no criticism of the logic, coherence or appropriateness of the reasoning developed by the Commission on the basis of the elements available. Instead, that assertion clearly shows that the Court of First Instance took those elements into direct consideration in order to draw from it its own distinct conclusion that use of PET would not increase for the packaging of UHT milk or, consequently, for approximately half the LDP market. By so doing, that court therefore plainly overstepped the bounds of its judicial review (see paras 82–89, above). f

95. The Commission's objections relating to the Court of First Instance's opinion concerning the estimated increased use of PET for packaging fresh milk (increase put at 10–15%) and flavoured milk and milk-based drinks (increase put at up to 25%) seem to me to be equally well founded. g

96. In this respect I agree first of all with the Commission that the conclusion that 'the growth estimates adopted by the Commission ... are not really very convincing'<sup>82</sup> is invalidated by an incomplete or inaccurate assessment of the relevant factors and is not, in any case, supported by adequate reasoning. h

<sup>81</sup> Paragraph 211 of the judgment.

<sup>82</sup> Paragraph 212. i



a 97. As, in fact, the Commission has correctly observed, in stating its reasons for that conclusion:

(i) the Court of First Instance did not even mention the extensive market investigation carried out by the Commission, which showed that market participants in the sector expected levels of growth even higher than those finally accepted by the Commission<sup>83</sup>. It is, by the way, clear that, contrary to  
b what Tetra maintains, the mere fact that the Commission opted for more prudent predictions can in no way justify the failure to assess one of the factors which the Commission had taken into account in arriving at its own conclusion;

(ii) the Court of First Instance appears to have distorted the sense of one of the studies considered in the decision (and placed in the file at its request)<sup>84</sup>, in which, examining the foreseeable growth of PET, it stated that 'for aseptic packaging, the Warrick report predicts only minimal growth, of 1%, for flavoured milk, and a slight decline for other milk-based drinks'<sup>85</sup>. It would indeed seem from that passage that the predictions of the Warrick report referred to the increase in PET for packaging flavoured milk and other  
c milk-based drinks, whereas reading of the document clearly shows (and this is, moreover, not denied by Tetra) that those predictions referred only to the volume of the products concerned to be packaged, irrespective of the material used;

(iii) the Court of First Instance did not make any serious criticisms of the Commission's reasoning, but did no more than remark that 'the PCI report (p 64), the only independent study to concentrate on the LDP market, predicts growth as a result of which PET use will be 9.2% of the fresh non-flavoured milk market in 2005' (and that is a proportion not far distant from that predicted by the Commission); 'for aseptic packaging, the Warrick report predicts only minimal growth, of 1%, for flavoured milk, and a slight decline for other milk-based drinks' (which as we have seen is misleading, for those  
d predictions did not relate to increased use of PET), 'whilst the Pictet report does not give any specific forecasts for LDPs'; and '[t]he PCI report ... provides the only proof which might possibly support the forecast of a 25% market share for PET in other milk-based drinks' (a proportion corresponding exactly to that predicted by the Commission)<sup>86</sup>. As may easily be established, those  
e summary observations concerning 'independent studies'<sup>87</sup> do not satisfactorily explain why, in the Court of First Instance's opinion, the Commission's estimates were not 'very convincing', especially when it is borne in mind that those estimates—based on a series of factors—were already more cautious than those appearing in the market investigation carried out by the Commission.

h 98. The Court of First Instance's statement that 'generally, the contested decision does not explain adequately how PET could displace HDPE as the

i <sup>83</sup> On this point, recital (142) of the decision states: 'Generally, market participants suggested significant growth in PET use in the short term in the "sensitive" products. For those participants who felt able to quote the proportion of the "sensitive" products that would be packaged in PET in 2005, the Commission found that on average PET would represent around 40% in milk, 30% in juice, 40% in FFDs and over 50% in ice tea'.

<sup>84</sup> In that regard, see paras 75 and 76 of the judgment under appeal.

<sup>85</sup> Paragraph 212.

<sup>86</sup> The quotations are again from para 212 of the judgment.

<sup>87</sup> 'Independent studies' means those not commissioned by Tetra.

main material competing with carton by 2005, especially in the important fresh milk packaging segment' also appears inadequately reasoned to me<sup>88</sup>. a

99. As rightly pointed out by the Commission, the Court of First Instance as a matter of fact came to that conclusion without in any way criticising, or indeed even mentioning, the assessments made by that institution—on the basis of the findings of its market investigation and of information provided in independent studies—concerning the competitive advantages of PET in comparison with HDPE<sup>89</sup>. b

100. That the Court of First Instance referred particularly to fresh milk packaging raises the doubt that it did not take any account at all of those assessments, seeing that the contested decision reveals that that product was one of those for which PET offered major competitive advantages compared to HDPE. In the decision it is in fact clearly stated that '[t]he Commission's market investigation confirmed PCI's suggestion that PET has marketing advantages over HDPE, in particular, where visibility can be achieved'<sup>90</sup>, and especially for those products, such as fresh milk, which do not need a light barrier<sup>91</sup>. As observed by the Commission, the failure to take those assessments into consideration seems furthermore to be confirmed by the part of the judgment concerning the possible effects of leveraging, in which, wrongly substituting its own assessments for those of the Commission, the Court of First Instance tersely affirmed that '[f]resh milk is not a product for which the marketing advantages offered by PET have any particular importance'<sup>92</sup>. c  
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101. I would add, moreover, that the Court of First Instance's conclusion as to the reasons given for the decision finds no valid justification in the subsequent statement that— e

'the Commission does not dispute either the overall figure of 17.3% for the use of HDPE for LDPs given by Canadean for 2000 ... or the forecast [again Canadean's] that that figure could reach 19.5% by 2005.'<sup>93</sup>

102. Indeed I agree with the Commission that the Court of First Instance made reference to the Canadean study (commissioned by Tetra) without considering that the Commission had explained that it did not regard the predictions made in that study as generally reliable. The Court of First Instance ought instead to have taken account of the Commission's criticisms that, on the one hand, that study had wrongly 'used a model which considers previous growth as an indicator of future growth and ignores the future technological developments particular to barrier technology' and that, on the other, given f  
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<sup>88</sup> Paragraph 212.

<sup>89</sup> See, in particular, recitals (80), (95)–(97) and (101)–(102) of the decision.

<sup>90</sup> Recital (97) of the decision.

<sup>91</sup> It is clear from the decision that while 'UHT white milk requires a light barrier', 'fresh milk can successfully [be] packaged in standard PET without any barrier properties' (recitals (76), (77)). Furthermore, according to Tetra, limitations on the use of PET because of the need for a light barrier 'apply only to UHT white milk'. In that respect, Tetra notes that 'technical solutions to provide a light barrier for PET' 'involve high costs and complex manufacturing technology, raise recycling issues and eliminate transparency of the bottle which is one of the major advantages of PET' (recital (74) of the decision). i

<sup>92</sup> Paragraph 289.

<sup>93</sup> Paragraph 212, end. h

a 'that the decision to package products in PET is said to be customer driven, a study [such as Canadean's] excluding customer views is not particularly robust'<sup>94</sup>.

103. Given the foregoing, I consider that the Commission's various charges in respect of foreseeable growth in the use of PET for packaging liquid dairy products must be upheld.

b 104. I believe, however, that the charge relating to the assessment of the foreseeable growth in the use of PET for packaging juices cannot be upheld.

c 105. In that objection, the Commission complains in particular that the Court of First Instance stated that, although 'the Commission itself acknowledged that the growth in question would be due mainly to a switch from glass to PET, it did not conduct any analysis of the glass market'<sup>95</sup>. By so doing, according to the Commission, the Court of First Instance ignored important evidence as to the decline of glass for non-premium products, which the Commission took as a basis in the contested decision, later examining them in more detail in its defence. According to the Commission, to proceed in such a way confirms that the Court of First Instance erred in regarding as d unimportant factors not mentioned in the contested decision, but referred to in the pleading in support of the necessarily more general considerations contained in the decision.

e 106. In that connection I must, nevertheless, agree with Tetra that the Court of First Instance did not make any mistake in asserting that the Commission had made no analysis of the market for glass, seeing that, apart from some vague and fleeting references, there is no trace of any such analysis in the decision. Contrary, therefore, to what the Commission maintains, that gap in the investigation could certainly not be filled by subsequent statements made in the pleadings, since the evidence and the assessments on which the decision was based had to be clearly indicated in that act and could not be supplied only f later in connection with proceedings before the Court of First Instance<sup>96</sup>.

f 107. Finally, the Commission's last objection seems to me to be well founded, in which it complains that the Court of First Instance took into account that 'the cost of PET is higher than that of carton' in assessing whether it was likely that Tetra's customers would switch from carton to PET as a result of leveraging<sup>97</sup>.

g 108. In fact, I agree with the Commission that no clear conclusion was reached in the contested decision as to the vexed question of the difference in cost between PET and carton and that, as a result, it was not open to the Court of First Instance to enter into the merits of that complex economic assessment, by deciding for itself that PET cost more than carton.

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<sup>94</sup> Recital (123) of the decision.

<sup>95</sup> Paragraph 213.

i <sup>96</sup> It is clear from the Court of Justice's case law that 'a failure to state the reasons cannot be remedied by the fact that the person concerned learns the reasons for the decision during the proceedings before the [Community judiciary]' (see *Michel v European Parliament* Case 195/80 [1981] ECR 2861 (para 22)). To essentially the same effect, see *Culin v EC Commission* Case C-343/87 [1990] ECR I-225 (para 15) and *Italy v European Commission* Joined cases C-15/98 and C-105/99 [2000] ECR I-8855 (para 70).

<sup>97</sup> Paragraph 288 of the judgment under appeal. That assertion as to the difference in cost between PET and carton is then repeated by the Court of First Instance in para 326 in connection with the assessment of the reduction of potential competition in the carton markets.



109. On this point, in contrast to what Tetra submits and is affirmed in a later passage of the judgment under appeal<sup>98</sup>, I do not think that the Commission by implication accepted the finding of the Warrick report that, with regard to aseptic packaging, PET is 30–40% more expensive than carton. After recalling the conclusions at which that study arrived, the Commission as a matter of fact stated that its ‘market investigation did not produce a clear picture of the relative costs of PET and carton packaging systems’, since the persons questioned had given contradictory answers<sup>99</sup>. It seems plain enough to me that even if that last assertion does not in some way cast doubt on the findings of the Warrick study, it certainly does not make it possible to hold that the Commission by implication confirmed them.

110. Nor, moreover, do I think it possible to discern, as Tetra would have it, confirmation of the greater cost of PET in the Commission’s statement that some customers ‘indicated that they would only consider a switch from carton to PET if carton prices rose by a significant amount of 20% or more’<sup>100</sup>. That assertion does no more, in fact, than report the point of view of certain customers questioned by the Commission in the ambit of its market investigation: an investigation which, as we have seen, ‘did not produce a clear picture of the relative costs of PET and carton packaging systems’.

111. As matters stand, it seems clear to me that, while the Court of First Instance could possibly have found that the Commission’s investigation was incomplete, or have criticised the logic, consistency and appropriateness of its reasoning, it definitely could not carry out its own assessment of the information in that institution’s possession in order to conclude that PET was ‘more expensive than carton’.

*(c) Conclusions on the first ground of appeal*

112. In the light of all the considerations set out above, I believe that the first ground of appeal is in part well founded and that, in particular, the Commission’s objections concerning foreseeable growth in the use of PET for packaging of liquid dairy products and the difference in cost between PET and carton must be upheld.

*Concerning the ground of appeal relating to the requirement that the unlawful nature of certain behaviour should be taken into consideration and that purely behavioural commitments should be taken into account*

113. By its second ground of appeal, the Commission criticises certain general assessments made by the Court of First Instance in respect of ‘leveraging’ (see paras 36–39, above), charging the court with having asked it to take into consideration as a possible deterrent to such a practice: (i) the unlawfulness of given conduct inherent in that practice which would have led to abuse of a dominant position<sup>101</sup>; (ii) the purely behavioural commitments offered by Tetra, which consist of nothing more than a promise not to act abusively.

<sup>98</sup> Paragraph 326.

<sup>99</sup> Recital (92). Referring to the findings of its market investigation, the Commission stated in particular that: ‘Some market participants stated that for most applications and in particular for products requiring a barrier, PET is more expensive. The majority of respondents, however, were not able to identify the precise cost differences; for many, this was because they did not have experience in both materials. However, some third parties (notably those with greater experience in PET) informed the Commission that for them PET was actually cheaper than carton.’

<sup>100</sup> Recital (397) of the decision.

<sup>101</sup> On this point, I would note that ‘leveraging from the aseptic carton market ... would manifest itself—in addition to the possibility of the merged entity engaging in practices such as tying sales of

a 114. Referring to the first aspect, the Commission recalls that Regulation 4064/89 introduced prior control of concentrations in order to avoid structural changes to the market that might involve abusive conduct. Where an undertaking dominant on one market acquires an undertaking operating on another neighbouring market, the concentration must be prohibited if the entity created by the merger would have the means and incentives to engage in abuses permitting it to oust its competitors from that other market<sup>102</sup>. In the Commission's view, therefore, by asking it to assess also whether economic incentives to abuse the dominant position held by the merged entity could not be counterbalanced by the disincentives of the unlawful nature of abuse, the Court of First Instance has misinterpreted art 2 of the regulation.

c 115. Furthermore, according to the Commission, yet another misinterpretation of that provision led the Court of First Instance to assert that—

d 'it is also appropriate to distinguish, on the one hand, between a situation where a merger having conglomerate effects immediately changes the conditions of competition on the second market and results in the creation or strengthening of a dominant position on that market due to the dominant position already held on the first market and, on the other hand, a situation where the creation or strengthening of a dominant position on the second market does not immediately result from the merger, but will occur, in those circumstances, only after a certain time and will result from conduct engaged in by the merged entity on the first market where it already holds a dominant position. In this latter case, it is not the structure resulting from the merger transaction itself which creates or strengthens a dominant position within the meaning of art 2(3) of the regulation, but rather the future conduct in question.'<sup>103</sup>

f In the Commission's opinion, indeed, in that latter case too, contrary to what the Court of First Instance maintains, it is the merger that creates or strengthens the dominant position since it has the direct immediate effect of bringing about the conditions in which abuse is not only possible but also economically rational.

g 116. Lastly, the Commission maintains that there are insuperable legal and practical obstacles to the engaging in an analysis of the possible deterrent effect of the unlawfulness of certain conduct. It would as a matter of fact be impossible to assess with a sufficient degree of certainty the inclination of particular undertakings to engage in unlawful conduct and the effect that the danger of being discovered and penalised might have on their actions.

h 117. With regard next to the second of those aspects, concerning the behavioural commitments offered by Tetra (see para 113, above), the Commission remarks that, given the purpose of prior control under Regulation 4064/89, commitments not to abuse a dominant position created or strengthened by a merger are unacceptable, because they do not make it

i carton packaging equipment and consumables to sales of PET packaging equipment and forced sales—firstly, by the probability of predatory pricing by the merged entity, secondly, by price wars; and, thirdly, by the granting of loyalty rebates' (see para 156 of the judgment under appeal).

102 In this connection, in its reply and at the hearing the Commission stated that a structural change in market conditions as a result of which the merged entity acquired such means and incentives constitutes the immediate creation of a dominant position on the other market.

103 Paragraph 154 of the judgment under appeal.

possible to put right the structural problems which the regulation seeks to avoid. In its view, by requiring it to take into consideration such commitments, the Court of First Instance has therefore infringed the provisions of the regulation, in particular arts 2 and 8(2). In any case, according to the Commission, the Court of First Instance incorrectly stated that that institution had not taken account of the commitments offered by Tetra, since it is clear from the decision that those commitments had been analysed and rejected not only for reasons of principle, but also because they were 'extremely difficult if not impossible to monitor'.<sup>104</sup>

118. I do not find those arguments of the Commission persuasive.

119. The criticisms made of the Court of First Instance would in fact be justified only if the decision revealed that, as the Commission maintained in its reply and at the hearing, the merger would lead to structural changes in the market which would immediately and automatically create a second dominant position which the new entity could abuse by foreseeable actions on its part.

120. However, as Tetra rightly emphasises, the decision does not say that the merged entity would immediately and automatically acquire a dominant position on the PET packaging equipment markets, but predicts that that would happen only subsequently, by means of abuse of the dominant position already held by Tetra in carton.

121. That is clearly shown in, for example, the passage in the decision in which we read that the—

'bringing together of Tetra's dominant position in carton packaging and Sidel's leading position in PET packaging equipment ... would create a market structure which would enable the merged entity to leverage its dominant position in aseptic carton packaging to acquire a dominant position in the PET packaging equipment market.'<sup>105</sup>

From that passage it is to be deduced, in fact, that the merger would immediately create a market structure giving the merged entity the means and incentives to engage in certain leveraging practices and subsequently to acquire, by means of those practices, a dominant position in the PET packaging equipment markets.

122. As matters stand, the Court of First Instance rightly declared that the Commission ought to have taken into consideration the various factors that might have influenced the likelihood of the merged entity's behaving in such a way as to enable it to acquire the predicted dominant position on the PET packaging equipment markets.

123. In other words, as stressed by Tetra, the Court of First Instance correctly found that, just as the Commission had assessed the economic incentives for engaging in such conduct, so it ought to have taken into consideration the possible disincentive in that respect of the unlawful nature of the conduct in

<sup>104</sup> Recital (431) of the decision.

<sup>105</sup> Recital (342) of the contested decision. To the same effect, see also recital (330), in which it is stated: '... By acquiring Sidel, Tetra would ensure that its dominant position in aseptic carton packaging was retained and strengthened by eliminating Sidel as a source of competitive constraint. In addition, leveraging its dominant position in carton, Tetra/Sidel would have the ability to reach a level of dominance in PET equipment and in particular SBM machines of high and low- capacity in the relevant end-use segments' (my emphasis). Similar assertions are made in many passages of the decision, such as, for example, recitals (331), (359) and (389).



a question (which would have involved abuse of Tetra's pre-existing dominant position in carton) or of the commitments into which that company had offered to enter.

124. Contrary to what the Commission maintains, by asking it to take into consideration the unlawful nature of certain conduct brought about by leveraging and the relevant commitments offered by Tetra, the Court of First Instance did not require the Commission to assess the likelihood of the merged entity's abusing the dominant position created by the merger. It simply requested that the Commission should assess the likelihood that, by exploiting Tetra's pre-existing dominant position in carton, the new entity might acquire a dominant position in the PET packaging equipment markets: that is to say, to assess whether the merger would lead to the creation of a dominant position for the purposes of art 2 of Regulation 4064/89.

125. Nor, moreover, do I believe that there were insurmountable legal and practical obstacles to carrying out the assessment requested by the Court of First Instance. The latter did not in fact expect the Commission to establish with certainty whether the unlawfulness of the conduct in question or the commitments proposed by Tetra would deter that undertaking from engaging in such conduct, nor on the other hand did it expect the Commission to demonstrate that the economic incentives identified in the decision would definitely drive Tetra to engage in that conduct. The Court of First Instance simply asked the Commission to take account of those factors in the ambit of its predictions, assessing, for example, whether—in view of the normal business practices in that sector—the Commission, the competent national authorities or injured competitors could easily learn of any unlawful conduct.

126. Lastly, the Commission's argument that the Court of First Instance wrongly ignored its analysis of the commitments as to conduct offered by Tetra does not seem to me to be persuasive. As that company rightly remarks, the Commission did no more than make the brief and unsupported assertion that the commitments in question were 'extremely difficult if not impossible to monitor', but made no adequate assessment of how they might possibly impinge on the merged entity's future conduct or, in particular, of whether they might constitute a significant disincentive to engaging the predicted leveraging practices.

127. Given the foregoing, it must be concluded that the Commission's allegations have not been justified. I repeat that it would have been otherwise had it been apparent from the decision that the merger would have brought about structural changes in the market liable to lead to the immediate and automatic creation of a dominant position on the PET markets. That is what the Commission maintained in its reply and at the hearing but, as we have seen, it is not what appears in the contested decision.

128. Having regard to the foregoing considerations, I therefore consider that the second ground of appeal must be rejected.

*The ground of appeal relating to the definition of distinct markets for SBM machines depending on their end use*

129. By its third ground of appeal the Commission criticises the Court of First Instance for not having upheld the Commission's assessment relating to the definition of distinct markets for SBM machines (high- and low-capacity) used for the packaging of 'sensitive' products. In that regard, the Commission formulates various grounds of complaint, distinguishing in particular between

those relating to the characteristics of the supply of, and those relating to the characteristics of the demand for, those machines. a

130. Beginning with supply-side characteristics, the Commission challenges the conclusion that 'the contested decision fails to provide sufficiently convincing evidence to demonstrate the allegedly specific characteristics of SBM machines used for packaging sensitive products'<sup>106</sup>. In its opinion, to put it extremely briefly, the Court of First Instance arrived at that conclusion without taking account of the information provided in the decision and defence as to the adaptation of SBM machines to suit customers' particular requirements and mistakenly based its own conviction on statements which Tetra made to the contrary at the hearing. b

131. I think, however, that that company holds a strong position when it insists that the contested decision clearly asserts that 'the majority of SBM machines are "generic"', but that, '[n]evertheless, a PET packaging line, of which the SBM machine is only one component, is usually tailored to the specific products filled by the customer'<sup>107</sup>. Contrary therefore to the Commission's submission, it was clear from the contested decision that SBM machines were for the most part generic, that is to say suitable for packaging various kinds of products, whereas PET packaging lines, of which such machines were just one component, were generally 'tailored' to the specific products to be packaged. c

132. In the light of that reasoning in the decision, it was possible therefore for the Court of First Instance correctly to state that— d

'[t]he mere fact that each SBM machine must be installed in a PET line in order to be useful to its purchaser does not justify that specific characteristics of other PET equipment in that line should be attributed to the SBM machines themselves.'<sup>108</sup> e

133. With regard next to the further information supplied in the defence concerning the technical adaptations which must be made to SBM machines also in order for them to be integrated in specific PET packaging lines, the Court of First Instance correctly responded that 'the contested decision makes no reference to this information'<sup>109</sup>. As I have said, in fact, the evidence and the assessments on which the decision was based ought to have been clearly indicated in that act and could not be supplied only later in connection with proceedings before the Court of First Instance (see para 106, above). f

134. In view of the foregoing, the assessments subsequently made by the Court of First Instance in order to counter, in light of evidence furnished by Tetra, the subsequent technical arguments developed in the defence must be considered to be irrelevant. Although the Court of First Instance would have done better not to have ventured into that sort of appraisal, that does not alter the fact that it was not in any event open to the Commission to introduce evidence in proceedings before that court to which it had made no reference in the contested decision. g

135. Having said that in connection with the grounds of challenge relating to the supply-side characteristics of SBM machines, I can now turn to those relating to demand-side characteristics. h

<sup>106</sup> Paragraph 261 of the judgment under appeal.

<sup>107</sup> Recital (177) of the contested decision.

<sup>108</sup> Paragraph 265 of the judgment under appeal.

<sup>109</sup> See footnote above. i

a 136. In this respect, it has to be made clear that these grounds of challenge refer to the reasoning used by the Commission in defining specific markets for SBM machines used for the packaging of 'sensitive' products having regard to the price discrimination in the past practised by Sidel with regard to customers intending to package such products and to the possible continuance of that practice by the new entity.

b 137. That reasoning was based, in particular, on the twofold theoretical premise that 'a distinct group of customers for the relevant product may constitute a narrower, distinct product market when such a group could be subject to price discrimination' and that—

c '[t]his will usually be the case when two conditions are met: (a) it is possible to identify clearly the group to which an individual customer belongs at the moment it purchases the relevant products and (b) trade among customers or arbitrage by third parties should not be feasible.'<sup>110</sup>

d Starting from that premise, and considering that the conditions set out therein had been satisfied in the case in point, the Commission reached the conclusion that there existed distinct markets for SBM machines used for the packaging of 'sensitive' products.

e 138. By the grounds of challenge now under consideration, the Commission objects to the assessments made in the judgment under appeal relating to that reasoning, alleging in particular that the Court of First Instance: (i) wrongly omitted to take into consideration the price discrimination practised in the past by Sidel, on the grounds that it 'cannot constitute sufficiently convincing evidence that the merged entity will continue to behave in a similar way', since '[u]nlike Sidel prior to the merger, the merged entity would be bound not only by the commitments but also by the various obligations limiting Tetra's conduct'<sup>111</sup>; (ii) wrongly omitted to take into consideration many of the Commission's observations about the possibility of identifying those customers that intended to use SBM machines to package 'sensitive' products and, in any case, that it misunderstood the relevance of those observations, and (iii) misunderstood and wrongly failed to take into consideration the Commission's observations about the impossibility of buying a given producer's machines from other persons (who would essentially be other customers seeking to sell secondhand).

g 139. Nor do those objections appear to me to be well founded.

h 140. With regard to the first of them, I have in fact to concur with Tetra that the statement challenged has nothing to do with the identification of specific markets for SBM machines used for packaging of 'sensitive' products. Far from relating to the definition of the relevant markets, that statement is in point of fact to be found in that part of the judgment which examines the 'ways in which the merged entity could engage in leveraging', and indicates in particular that 'the leveraging practices which may be taken into consideration by the Court are limited to those which, at least probably, do not constitute an abuse of a dominant position on the aseptic carton markets' and refers to the need to take into account the commitments offered by Tetra (see para 43, above).

i 141. Contrary to what is alleged in the appeal, I believe therefore that the Court of First Instance properly considered and understood the various passages in which the Commission's reasoning is set out. The Court of First

<sup>110</sup> Recital (178) of the decision.

<sup>111</sup> Paragraph 223 of the judgment.



Instance none the less found that that reasoning was in essence vitiated by a defect in logic, seeing that the fact that it is possible for the new entity to identify those customers who intend to package 'sensitive' products (and in consequence to practise price discrimination against them) 'does not preclude those customers from turning to other suppliers of SBM machines if they become dissatisfied with the conditions offered by the merged entity'.<sup>112</sup>

142. Although it is terse in the extreme, it seems to me that we may in substance concur with that appraisal by the Court of First Instance. I in fact consider that, even if the new entity should be capable of identifying those customers who intend to package 'sensitive' products and, in view of its being impossible for those customers to buy its machines from other persons, should decide to demand from them a higher price than that asked of the other customers, that would not of itself make it possible to identify specific markets for SBM machines used for the packaging of 'sensitive' products, inasmuch as—as the Court of First Instance stated—the customers 'discriminated against' could turn to other suppliers that did not operate the same pricing policy.

143. To my mind, in other words, the fact that a single operator (not followed by its competitors) adopts a pricing policy that discriminates against a particular group of customers does not of itself make it possible to identify a specific market in relation to that group of customers, for the presence of other operators that do not practise the same policy may prevent the establishment of essentially different market conditions for the group of customers in question.

144. Therefore I do not think that the Court of First Instance erred in law in criticising the Commission's reasoning based on the price discrimination operated in the past by Sidel and on the possible continuance of such a practice by the new entity.

145. Having regard to all the foregoing considerations, I therefore believe that the third ground of appeal must be rejected.

*The ground of appeal relating to the strengthening of Tetra's dominant position in carton*

146. In its fourth ground of appeal the Commission challenges the Court of First Instance's conclusion that—

'the evidence relied on in the contested decision does not establish to the requisite legal standard that the effects of the modified merger on Tetra's position, principally on the aseptic carton markets, would, by eliminating Sidel as a potential competitor, be such as to fulfil the conditions of art 2(3) of Regulation 4064/89'.<sup>113</sup>

147. In that regard, the Commission objects, first, that the Court of First Instance did not recognise that a reduction in 'potential' competition from the PET equipment markets would in itself lead to a strengthening of Tetra's dominant position in carton. The Court of First Instance was wrong to require it to show that any such reduction in potential competition would tend 'to strengthen Tetra's dominant position in relation to its competitors on the aseptic carton markets'.<sup>114</sup>, given that that strengthening was not to be assessed with

<sup>112</sup> Paragraph 268 of the judgment.

<sup>113</sup> Paragraph 333 of the judgment.

<sup>114</sup> Paragraph 323. Emphasis added by the Commission.

a reference to Tetra's competitors, but to the unavoidable consequences that reduction of 'potential' competition from PET would have for customers and consumers in the form of a price rise (or a failure to lower prices) for carton and less innovation in products.

b 148. According to the Commission, furthermore, in view of its submissions in connection with the first ground of appeal, the Court of First Instance was mistaken when it found that the Commission's assessment concerning the reduction in 'potential' competition was vitiated by the fact that growth in the use of PET for packaging of 'sensitive' products 'will probably be much less marked than the Commission believes'<sup>115</sup>.

c 149. The Commission also disputes the Court of First Instance's finding that it had not on any view been—

'shown that, in the event of elimination or significant reduction of competitive pressure from the PET markets, Tetra would have an incentive not to reduce its carton packaging prices and would stop innovating.'<sup>116</sup>

d 150. On this point it begins by remarking that the Court of First Instance's assessment of the effects of a reduction in 'potential' competition on carton prices was invalidated by the mistaken conviction that PET costs were higher than carton costs (here it refers to what it said in the first ground of appeal). Still in relation to that assessment, the Commission then criticises the comments made thereupon by the Court of First Instance, on account of the fact that the court reprimanded it for failing to explain why Tetra's competitors would not benefit from a rise in carton prices: by so doing, the Court of First Instance did not, in the Commission's opinion, consider that those competitors were ex hypothesi marginalised by Tetra's strongly dominant position. In addition, the Commission charges the Court of First Instance with failing to take into account the effects on carton prices of the fact that, as a result of acquiring the major operator on the PET markets, Tetra could safely assume that most of those of its customers who had switched from carton to PET would in any case be 'recaptured' through Sidel.

f 151. Again with reference to the effects of a reduction of 'potential' competition on innovation, the Commission alleges that the Court of First Instance overestimated the possible response of competitors marginalised by Tetra's dominant position. Finally, according to the Commission, the Court of First Instance erred: on the one hand, by passing over the difference between the pressure to innovate caused by the growth in the use of PET and the pressure proceeding from Tetra's competitors in the carton markets and, on the other, by claiming that recent innovations made by that company were not due to pressure exerted by PET.

g 152. Before evaluating those objections, it is necessary to specify that, as observed by Tetra, the 'potential' competition referred to in connection with this ground of appeal did not consist of competition on the part of undertakings able to enter the carton packaging markets which might therefore have represented potential competitors of Tetra on those markets. On the contrary, the issue was plainly indirect competition proceeding from undertakings active on markets distinct from the carton packaging markets (although closely neighbouring), which produced machinery for packaging in a material, PET, which was regarded by the Commission from the economic

115 Paragraph 324.

116 Paragraph 325.

point of view as a 'weak substitute' for carton<sup>117</sup>. From this point on I shall therefore refer to indirect rather than potential competition exerted by PET.

153. Having said that, I must agree with Tetra that it cannot be held that a reduction in indirect competition, proceeding from the acquisition of the leading undertaking operating on a neighbouring market, leads of itself to the strengthening of a dominant position within the meaning of art 2 of Regulation 4064/89. In view of the well-known notion of 'dominant position' used in the Court of Justice's case law, it falls instead to be determined whether such a reduction in indirect competition may increase the 'economic strength' of the dominant undertaking, with the result that it is in a position to impede yet further (or with greater facility) 'effective competition's being maintained on the relevant market' and has the power to behave still more 'independently of its competitors, its customers and ultimately of the consumers'<sup>118</sup>.

154. It therefore follows also that it is to that concept that the Court of First Instance ought more correctly to have referred in its analysis, instead of asserting that it was for the Commission to show that a reduction in indirect competition by PET could have strengthened 'Tetra's dominant position in relation to its competitors on the aseptic carton markets'. Nevertheless, I believe that this is not such a particularly serious mistake as to vitiate the conclusion reached by the Court of First Instance, since the latter did in any case assess, and find to be marred by several errors, the reasoning developed by the Commission in showing the effects that the predicted reduction in indirect competition by PET would have for customers and consumers in the shape of a rise (or a reduction that never took place) in carton prices and less innovation of the products.

155. Likewise, I consider that the conclusion arrived at by the Court of First Instance is not vitiated by the errors it may have made in respect of the assessment of foreseeable growth in the use of PET for packaging of liquid dairy products (see paras 103, 112, above)<sup>119</sup>.

156. Undoubtedly, the finding that growth in the use of PET for packaging of 'sensitive' products 'with the exception of growth in FFDs and tea/coffee drinks, will probably be much less marked than the Commission believes' led the Court of First Instance to hold that—

'it is, therefore, not possible, on the basis of the evidence relied on in the contested decision, to determine, with the certainty required to justify the prohibition of a merger, whether the implementation of the modified merger would place Tetra in a situation where it could be more independent than in the past in relation to its competitors on the aseptic carton markets.'<sup>120</sup>

117 See in particular recital (332) of the contested decision, which states that carton and PET are 'technical substitutes in that both packaging materials can package the relevant end-use product segments', and might be considered 'weak substitutes' in an economic sense. To that effect see also recital (163) of the decision (referred to in para 10, above), in which moreover attention is drawn to the fact that the definition of the markets for packaging in PET and carton may change in the future.

118 See *Hoffmann-La Roche & Co AG v EC Commission* Case 85/76 [1979] ECR 461 (para 38); my emphasis.

119 It is in this connection to be borne in mind that the Commission's objection concerning errors allegedly committed by the Court of First Instance in assessing the foreseeable growth of the use of PET for packaging of juices has been considered to be without foundation (see para 104, above).

120 Paragraph 324.



a Yet the Court of First Instance did not come to a stop with that assertion, but went on with its analysis, reaching the conclusion—

‘that the two factual elements regarding Tetra’s future conduct, on which the Commission relies in order to prove the alleged negative effects which the modified merger would have on the aseptic carton markets, have, *on any view*, not been established to the requisite legal standard’ (my emphasis).

b

In particular, as we have seen, according to the Court of First Instance—

‘it has not been shown that, in the event of elimination or significant reduction of competitive pressure from the PET markets, Tetra would have an incentive not to reduce its carton packaging prices and would stop innovating.’<sup>121</sup>

c

157. So, moving on to consider the Commission’s objections to that conclusion, I shall start by remarking that, contrary to what the Commission maintains, the Court of First Instance’s assessment of the effects of a reduction in indirect competition by PET on the prices of carton is not, to my mind, invalidated by the mistaken belief that PET costs were higher than those of carton (concerning the mistake actually made by the Court of First Instance, see paras 111, 112, above).

d

158. As a matter of fact, I would point out that, referring to the Commission’s notion that the merger would enable Tetra to avoid the reduction in carton prices which it would otherwise have been led to make, the Court of First Instance stated that:

e

(i) ‘As regards the “more price-sensitive” carton customers who indicated to the Commission, during its market investigation, “that they would only consider a switch from carton to PET if carton prices rose by a significant amount of 20% or more” ... it is clear that a lowering of carton prices is not necessary to keep them in the carton markets. In finding simply that “[t]hese same price-sensitive customers would presumably be dissuaded from making a switch from carton to PET if a carton-price reduction increased the price difference between a carton and PET packaging line” ... the contested decision does not explain why, without the merger, Tetra would be obliged to make such price reductions in order to keep those customers. These customers would not switch to PET unless carton prices rose by at least 20% or there was a corresponding reduction in PET prices’<sup>122</sup>;

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(ii) ‘Inasmuch as the Commission pleads before the court that, once the merger is implemented, it is possible that Tetra might find it more easy to raise its prices on the aseptic carton markets for those customers, it does not explain, in particular, why this would not enable Tetra’s competitors on the carton markets who are also active on the PET market, such as SIG and Elopak, to benefit from this’<sup>123</sup>;

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(iii) ‘As for beverage producers who will switch from carton to PET for commercial reasons despite the fact that PET is considerably more costly

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121 Paragraph 325.

122 Paragraph 327.

123 See footnote above.

than carton, a reduction in carton prices would not necessarily persuade those “non-price-sensitive customers” to keep carton packaging<sup>124</sup>; a

(iv) ‘The contested decision does not show why companies active in the PET equipment markets which, without the modified merger, “would be expected to compete vigorously to gain market share from carton” ... would modify their behaviour following the transaction in question here. If the pressure from Sidel were to disappear, the contested decision does not explain why, if Sidel’s competitors had not been marginalised through successful leveraging, the other companies active in the PET equipment markets would no longer be able to promote the advantages of PET to Tetra’s customers on the carton markets’<sup>125</sup>. b

159. As may easily be verified, with those statements the Court of First Instance pointed out flaws of logic inherent in the Commission’s reasoning, but never founded its own opinion on the mistaken persuasion that the costs of PET were greater than those of carton, even in (iii), which contains the only reference to that aspect. Careful reading of that passage makes it clear, indeed, that the Court of First Instance was doing no more than refer to the Commission’s claim that some customers would in any case switch to PET, despite its ‘being more expensive or despite no change at all in carton prices’<sup>126</sup>, logically deducing therefrom that ‘a reduction in carton prices would not necessarily persuade those “non-price-sensitive customers” to keep carton packaging’. c

160. Having made it clear, therefore, that the Court of First Instance’s assessment is not vitiated by the mistaken belief that PET costs are higher than those of carton, I would observe that I do not consider well founded the Commission’s objection concerning (ii) above, by which that institution charges the Court of First Instance with incorrectly failing to take into account the fact that Tetra’s competitors on the carton markets were ex hypothesi marginalised by the strongly dominant position held by that company. d

161. On this subject, first of all I agree with Tetra that such an objection runs the risk of proving too much. If one did no more than consider theoretically that, by virtue of its dominant position, Tetra could by definition ‘behave to an appreciable extent independently of its competitors’<sup>127</sup> in the carton markets, and therefore even raise prices without any fear of a response on their part, it would be hard to explain why, if the merger did not take place, that company, given its dominant position in carton, should not be able to do the same and ought rather to fear the indirect competition of operators active solely on neighbouring markets (Sidel), which produced machinery for packaging in a material regarded as just a ‘weak substitute’ for carton. e

162. I would furthermore remark that, contrary to what would appear to emerge from the Commission’s appeal, the Court of First Instance did not take into consideration Tetra’s competitors active solely on carton markets, but also those competitors already active on PET markets. It therefore referred to operators which could benefit from a rise in the price of carton in the PET f

124 Paragraph 328.

125 See footnote above.

126 The quotation is taken from recital (397) of the decision, where it is stated that many of the companies questioned in the scope of the market investigation carried out by the Commission ‘clearly stated that they have already switched or would switch from carton to PET despite PET being more expensive or despite no change at all in carton prices’.

127 See the *Hoffmann-La Roche* case, cited in footnote 118, above (para 38). g

- a markets too and which could therefore exert greater competitive pressure by virtue of the concomitant presence on the markets of the two packaging materials, considering also that they, 'unlike the merged entity, would not be subject to any constraints as to joint offers of carton and SBM machines'<sup>128</sup>.

b 163. Still in relation to the effect of reduction in indirect competition by PET on carton prices, I do not, in short, believe to be well founded the Commission's objection that the Court of First Instance failed to consider that, as a result of acquiring the leading operator on the PET markets, Tetra would have greater liberty to raise carton prices, knowing that through Sidel it could recapture most of the customers that had for that reason switched to PET.

c 164. As rightly emphasised by Tetra, the Court of First Instance really cannot be reproached for not considering that aspect, when it had not been developed in the contested decision. In any event, I would note that, even following the acquisition of Sidel, for Tetra's customers to switch from carton to PET would certainly not be a matter of economic indifference to the new entity. In point of fact it is obvious that the certain loss of Tetra's customers on markets which it dominated and on which it was in a position to make big profit margins could d be offset only in part by the hope of recapturing those customers on markets, such as those of PET, under full development and notable for lively competition<sup>129</sup>.

e 165. Coming next to the effects of reduction in indirect competition by PET upon innovation, I would remark that the ground of complaint relating to the overestimation of the response of Tetra's competitors must be rejected for the same reasons, mutatis mutandis, as set out in relation to the similar complaint concerning the effects on carton prices (see paras 161, 162, above).

f 166. Lastly, as regards the ground of challenge in which the Commission alleges that the Court of First Instance did not adequately consider the kind of pressure to innovate created by the growth in the use of PET and that it mistakenly held that the recent innovations made by Tetra were not due to the pressure exerted by that material, I too think that the Commission is in fact raising questions of fact that the Court of Justice has no jurisdiction to resolve (see paras 59–61, above).

167. In the light of all the foregoing considerations, I consider that the fourth ground of appeal must be rejected.

g *The ground of appeal relating to the creation of a dominant position for Tetra in SBM machines*

168. In its final ground of appeal the Commission criticises the Court of First Instance's conclusion that—

h 'the contested decision does not prove to the requisite legal standard that by 2005 the merged entity could acquire a dominant position on the market for low- and high-capacity machines, thereby fulfilling the conditions of art 2(3) of Regulation 4064/89 as regards those markets.'<sup>130</sup>

i <sup>128</sup> Paragraph 330.

<sup>129</sup> Clearly things would be otherwise (at least in part), were the new entity successful in leveraging Tetra's position in carton in order to drive towards Sidel those of its customers wishing to switch to PET and thus to acquire a dominant position on some or all of the PET markets. However, given that the assessments made on that subject by the Commission have been dropped by the Court of First Instance, that scenario cannot be taken into consideration.

<sup>130</sup> Paragraph 307 of the judgment.



169. Here I shall straight away briefly examine the summary objections raised by the Commission concerning errors supposedly committed by the Court of First Instance in relation to both the SBM machine markets (low- and high-capacity), in order to assess next whether the errors actually identified are such as to invalidate the conclusion reached by the Court of First Instance.

*(a) The objections raised by the Commission*

170. Starting with the allegations relating to the low-capacity SBM machines, the Commission first of all objects that the Court of First Instance referred to the share of the market held by Sidel during the period 1998–2000 (which was less than 40%), without taking into account the fact that the contested decision shows that in 2001 that share rose to a level of between 40 and 50%<sup>131</sup>.

171. I believe, however, that, as pointed out by Tetra, the Court of First Instance could legitimately take into account the period from 1998 to 2000, since that was the period in essence referred to by the Commission. The paragraph of the decision mentioned by the Commission (as, furthermore, in an earlier paragraph quoted by the Court of First Instance<sup>132</sup>) in fact showed the market shares held by Sidel, Tetra and their chief competitors 'during the period 1998–2000', whilst only in a footnote were Sidel and Tetra's shares in 2001 mentioned (and they were not, moreover, compared with those held for the same period by their main competitors).

172. Just as baseless seems to me the next objection in which the Commission challenges the Court of First Instance for asserting that 'with Tetra's exit from that market, the merged entity's position will remain basically unchanged as compared to Sidel's current position'<sup>133</sup>, without taking into account the immediate strengthening of Sidel's position proceeding from a series of factors indicated in the decision (Tetra's financial and commercial power, the 'first-mover's' advantage it enjoys vis-à-vis customers seeking to switch from carton to PET and its dominant position in carton)<sup>134</sup>.

173. In point of fact I agree with Tetra that those factors were indicated generally in the decision (but on the other hand no account was taken of the commitments offered by that company) in order to stress the new entity's leadership and global strength due also to its presence on all the markets concerned and not to highlight a particular and immediate strengthening of Sidel's position on the low-capacity SBM machine market. As matters stand, I consider that the Court of First Instance could legitimately declare that, as a result of Tetra's leaving that market, the new entity's position would remain in essence unchanged in relation to Sidel's.

<sup>131</sup> The Commission would appear to refer to para 272 of the judgment under appeal, in which it is stated that '[t]he Commission admits in the contested decision that, in low-capacity SBM machines, Sidel had "a market share of [30–40%] both in terms of capacity and by unit sales in the EEA in 2000" (recital (233))'. In order to demonstrate the Court of First Instance's error, the Commission refers instead to recital (266) of the decision. Since, for reasons of confidentiality, the version of the decision published in the Official Journal does not contain the exact share but just a bracket given for information purposes, it seems to me to be proper to follow the same yardstick in my opinion.

<sup>132</sup> See the previous footnote.

<sup>133</sup> Paragraph 280 of the judgment under appeal.

<sup>134</sup> On this subject, the Commission refers to recitals (376)–(387) of the contested decision.

a 174. Lastly, I do not think it possible to accept the objection relating to the Court of First Instance's statement that 'the contested decision does not contain a sufficient analysis of current and future use of low-capacity SBM machines' either<sup>135</sup>.

b 175. With that objection the Commission charges the Court of First Instance with basing its decision on two irrelevant aspects: first, the importance of low-capacity SBM machines in packaging non-'sensitive' products, which is irrelevant if the segmentation of the market in SBM machines proposed by the Commission is accepted; second, the proportion of customers that would opt for high- or low-capacity SBM machines for the packaging of 'sensitive' products<sup>136</sup>, a proportion that also is of no relevance to the assessing of Tetra's ability to leverage its dominant position in carton in order to gain a dominant position in the market for low-capacity SBM machines too.

c 176. With regard to the first aspect, it is nevertheless easy to establish that the Commission's assessment of the definition of specific markets for SBM machines for the packaging of 'sensitive' products has not been accepted (see para 145, above). As regards the second, I observe that it is not at all clear that choices made by customers intending to package 'sensitive' products in PET would be irrelevant in assessing development in the market for low-capacity SBM machines and the opportunity for the new entity to gain a dominant position in it. More generally, I cannot see how the Court of First Instance can be reproached for ascertaining whether the Commission's assessment concerning the acquiring of such a dominant position was based on an accurate and thorough analysis of the dynamics of the relevant market.

d 177. Turning then to the grounds of complaint relating to the high-capacity SBM machine market, I shall observe immediately that the objection raised by the Commission alleging that the Court of First Instance failed to take into account the immediate strengthening of Sidel's position as a result of the factors referred to in para 172, above<sup>137</sup>, must, in my opinion, *mutatis mutandis*, be rejected for the same reasons as those set out in para 173, above.

e 178. On the other hand, the objection relating to the Court of First Instance's assertion that 'the "first-mover" advantage [enjoyed by Tetra vis-à-vis customers intending to switch to PET] has been overestimated'<sup>138</sup> appears to me to be in part well founded.

f 179. In fact, I consider that with regard to the packaging of liquid dairy products the Commission rightly argues that the assessment made by the Court of First Instance is marred by errors it committed in relation to its estimates of growth in the use of PET (see para 103, above) and, in particular, the relationship between that material and HDPE (see para 98, above). The judgment under appeal makes it apparent that, as regards the packaging of the products in question, the Court of First Instance considered 'overestimated' the first mover advantage, in substance: (i) because '[t]he foreseeable growth in PET use among Tetra's ... customers on the aseptic carton market is not

i <sup>135</sup> Paragraph 280.

<sup>136</sup> On this point the Commission mentions in particular the Court of First Instance's statement that 'a significant proportion of the SBM machines used to package sensitive products will, in all likelihood, be low-capacity machines' (see para 279 of the judgment).

<sup>137</sup> Here the Commission refers in particular to the statement that 'Tetra would add nothing to the merged entity on this market [high-capacity SBM machines]' (see para 284 of the judgment).

<sup>138</sup> Paragraph 288.

considerable'<sup>139</sup>; and (ii) because '[a]s regards fresh milk in particular, the contested decision does not give an adequate explanation of the relationship between HDPE and PET'<sup>140</sup>. a

180. By contrast, I believe that that part of the Commission's objection cannot be accepted which criticises the assessment of the first mover advantage in relation to customers intending to switch from glass to PET, alleging in particular that the Court of First Instance: (i) failed to take into consideration the fact that only rarely do customers packaging drinks in glass use that material exclusively; (ii) distorted the facts when it stated that, with reference to those customers, Tetra's competitors 'active on the glass and PET packaging markets', such as SIG, Krones and KHS, could 'enjoy [a]... "first-mover" advantage'<sup>141</sup>. b

181. In fact I agree with Tetra that those arguments of the Commission's must be rejected, since they are based on matters not mentioned in the contested decision<sup>142</sup> (see para 106, above) and, in any event, especially as regards (ii), raise questions of fact which the Court of Justice has no jurisdiction to resolve (see paras 59–61, above). c

182. Then that objection seems to me baseless in which the Commission charges the Court of First Instance with stating: first, that 'the contested decision should have examined in more detail the ability of that competition to resist leveraging on the part of the merged entity'<sup>143</sup>; and, second, that 'the Commission committed an error in underestimating the importance of SIG's current position on the market for high-capacity machines and by playing down the positions held on that market by the merged entity's other principal competitors, in particular SIPA and Krones'<sup>144</sup>. d

183. I do not in fact believe that, as the Commission submits, the Court of First Instance distorted the contents of the decision (in particular, by denying that it contained any analysis of Sidel's position on the SBM machine markets vis-à-vis its competitors)<sup>145</sup> or that it substituted its own point of view for that of the Commission. e

184. Rather, the Court of First Instance simply found that, in view of the considerable and unchallenged increase in market shares recorded in recent years by those three competitors of Sidel (SIG, SIPA and Krones), and having regard to the timely observations made by Tetra during the administrative procedure, the Commission ought not to have confined itself to the generic observations contained in the decision, but ought to have examined more particularly those three companies' competitive power and ability to respond. f

139 Paragraph 288.

140 Paragraph 289. With reference to the relationship between HDPE and PET, the Court of First Instance considers in particular that 'it is at least as likely that Tetra's existing customers who wish to switch part of their fresh milk production to plastic will choose HDPE rather than PET' (see footnote above). h

141 Paragraph 290.

142 Only in relation to (i) does the Commission attempt to find a pretext in the decision for its assertions (recitals (14), (335)). Nevertheless, far from demonstrating that the decision makes it clear that glass customers are only rarely exclusively glass customers, the Commission quotes passages in which it is stated generally that '[i]ncreasingly, beverage companies use a mix of different materials to package their products', providing the single example of Coca Cola as a drink which 'can be found in glass, PET and aluminium cans' (recital (14)). i

143 Paragraph 294.

144 Paragraph 297.

145 On this subject, the Commission refers in particular to recitals (232) (248), (293)–(300), (303)–(310) and (369)–(387) of the decision.



- a The Court of First Instance did actually remark that it was only in relation to SIG that the contested decision contained any specific assessment (which cannot, it seems to me, be disputed in any substance) and considered that those assessments did not adequately answer the specific and pertinent points raised by Tetra<sup>146</sup>. It is from that point of view, therefore, that the statement must be read that in the decision the position of those three companies was
- b 'underestimated' or 'played down': meaning, that is, that the Commission did not give the consideration of their position that attention which, given the circumstances of the case, was necessary.

c 185. Furthermore, I would add that the part of the objection that goes so far as to accuse the Court of First Instance of distorting the facts in the definition of certain advantages enjoyed by Sidel's competitors raises questions of fact which the Court of Justice has no jurisdiction to resolve (see paras 59–61, above).

d 186. On the other hand the final objection, concerning the opportunity for converters to resist leveraging, does seem to me to be well founded. In this objection the Commission alleges that the Court of First Instance did not provide adequate reasons for its statements, did not answer the arguments put forward by the Commission in its decision and unlawfully substituted its own point of view for that of the appellant.

e 187. Indeed, I agree with the Commission that the Court of First Instance did not adequately explain what were the errors, the deficiencies of investigation or flaws of logic that, in its view, invalidated the Commission's conclusion that converters were 'to a certain extent dependent on Sidel and would continue to be dependent on the merged entity'<sup>147</sup>. Without making any assessment of the wide-ranging analysis carried out by the Commission in order to arrive at that conclusion<sup>148</sup>, the Court of First Instance did in fact no more than assert: (i) that, 'given the current level of existing competition, also in the high-capacity SBM machine market, the finding of the converters' dependency

f on Sidel is not convincing'; (ii) that, 'if the sales conditions offered by the merged entity were to become less attractive, converters could always purchase such machines from one of Sidel's current competitors'<sup>149</sup>.

g 188. From what is apparently to be understood, the Court of First Instance therefore found the Commission's conclusion that the converters were dependent on Sidel 'not convincing' just because they could have bought SBM machines from that company's competitors. By so doing, the Court of First Instance failed, however, to consider that, although the Commission had acknowledged that converters could 'turn to other suppliers of SBM machines for purchases of new machinery and design and testing of preforms', none the less—in the light of its market analysis—it considered that 'switching costs and

h the continued need to use the large number of Sidel machines they have already acquired will prolong converters' current degree of dependency on Sidel'<sup>150</sup>.

146 See, in particular, the observations in para 295 of the judgment under appeal.

147 Recital (310).

i 148 See recitals (303)–(310) of the decision.

149 Paragraph 305 of the judgment. For our purposes here no particular importance seems to attach to the later clarification that 'SIG and Elopak could also offer [to converters] carton equipment if the converters' customers want the joint supply of PET and carton packaging equipment', since the Commission had in no manner linked the converters' dependency on Sidel or on the merged entity to the need for joint supplies of PET and carton packaging equipment.

150 Recital (310) of the decision.

189. It therefore seems obvious to me that, while the Court of First Instance might possibly discover mistakes, deficiencies of investigation or flaws of logic in the Commission's reasoning, it could not reject the conclusion reached by that institution without stating sufficient reasons. I would moreover observe that the line of argument used by Tetra to justify the Court of First Instance's opinion as to the converters' chance to respond, regardless of its merits, cannot make good the defective reasoning which mars the judgment under appeal.

*(b) The effect of the errors detected on the conclusion arrived at by the Court of First Instance*

190. Of the foregoing considerations the following must, to my mind, be regarded as well founded: (i) the objection concerning the first mover advantage, in so far as it relates to the packaging of LDPs (see paras 178, 179, above), and (ii) the objection concerning the opportunity for converters to resist leveraging (see para 186, above).

191. I consider, nevertheless, that the errors made by the Court of First Instance and made clear in those objections are not such as to vitiate the conclusion reached by that court—

'that the contested decision does not prove to the requisite legal standard that by 2005 the merged entity could acquire a dominant position on the market for low- and high-capacity machines, thereby fulfilling the conditions of art 2(3) of Regulation 4064/89 as regards those markets.'<sup>151</sup>

192. Indeed, that conclusion seems to me to be most certainly justified by the many defects in the decision which the Court of First Instance has identified in assessments not challenged in these proceedings or challenged in objections here held to be unfounded. Since there is no need to dwell on this point, drawing up a long list of the defects in question, I can confine myself to the observation that, in addition to the flaws identified in the course of assessments which have been the subject of unsuccessful objections in this ground of appeal, it is necessary to bear in mind the defects relating to: (i) the failure to take into consideration, as a possible disincentive to leveraging, the unlawfulness of certain conduct and the commitments as to conduct offered by Tetra (defect identified in the assessments unsuccessfully challenged in the second ground of appeal); (ii) the identification of specific markets for SBM machines for packaging 'sensitive' products (defect identified in assessments unsuccessfully challenged in the third ground of appeal).

193. It follows therefore that acceptance of the two objections mentioned in para 190, above cannot of itself vitiate the conclusion arrived at by the Court of First Instance in relation to the creation of a dominant position on the low- and high-capacity SBM machine markets.

#### *Concluding considerations on the outcome of the appeal*

194. In the light of all the foregoing considerations, it must be found that, even though various of the objections raised by the Commission have proved to be founded, they are not enough to vitiate the conclusions arrived at by the Court of First Instance concerning the strengthening of Tetra's dominant position on the carton markets and the creation of a dominant position on the low- and high-capacity SBM machine markets.

<sup>151</sup> Paragraph 307 of the judgment.

a 195. In such a situation I must point out that, in accordance with settled case law—

‘where the grounds of a judgment of the Court of First Instance disclose an infringement of Community law but the operative part of the judgment is shown to be well founded for other legal reasons, the appeal must be dismissed.’<sup>152</sup>

b 196. Taking into account, therefore, that the operative part of the judgment under appeal, relating to the annulment of the decision, is certainly well founded on the many grounds of law that support the Court of First Instance’s conclusions as to the strengthening of Tetra’s dominant position on the carton markets and the creation of a dominant position on the low- and high-capacity SBM machine markets, I consider that the Commission’s appeal must be dismissed.

#### c Costs

d 197. In the light of art 69(2) of the Rules of Procedure, and having regard to the conclusions I have reached concerning the dismissal of the appeal, I consider that the Commission must bear the costs.

#### IV—CONCLUSION

198. In the light of the foregoing conclusions, I propose that the Court of Justice should declare that:

- e —the appeal is dismissed;  
—the Commission is to bear the costs.

15 February 2005. **THE COURT OF JUSTICE (Grand Chamber)** delivered the following judgment.

f 1. By its appeal, the Commission of the European Communities asks the Court of Justice to set aside the judgment of the Court of First Instance in *Tetra Laval BV v European Commission* Case T-5/02 [2003] All ER (EC) 762, [2002] ECR II-4381 (the judgment under appeal), by which the Court of First Instance annulled Commission Decision (EC) 2004/124 declaring a concentration to be incompatible with the common market and the EEA Agreement (Case No COMP/M.2416—*Tetra Laval/Sidel*) (OJ 2004 L43 p 13) (the contested decision).

#### g REGULATION (EEC) 4064/89

h 2. Article 2 of Council Regulation (EEC) 4064/89 (on the control of concentrations between undertakings) (OJ 1989 L395 p 1, corrected version in OJ 1990 L257 p 13), as amended by Council Regulation (EC) 1310/97 (OJ 1997 L180 p 1) (the regulation), provides:

‘1. Concentrations within the scope of this Regulation shall be appraised in accordance with the following provisions with a view to establishing whether or not they are compatible with the common market.

i In making this appraisal, the Commission shall take into account:

<sup>152</sup> See *European Commission v Camar Srl* Case C-312/00 P [2002] ECR I-11355 (para 57). To the same effect see *Lestelle v EC Commission* Case C-30/91 P [1992] ECR I-3755 (para 28), *Società Finanziaria Siderurgica Finsider SpA (in liq) v European Commission* Case C-320/92 P [1994] ECR I-5697 (para 37) and *Salzgitter AG (formerly Preussag Stahl AG) v European Commission* Case C-210/98 P [2000] ECR I-5843 (para 58).



(a) the need to preserve and develop effective competition within the common market in view of, among other things, the structure of all the markets concerned and the actual or potential competition from undertakings located either within or without the Community; a

(b) the market position of the undertakings concerned and their economic and financial power, the opportunities available to suppliers and users, their access to supplies or markets, any legal or other barriers to entry, supply and demand trends for the relevant goods and services, the interests of the intermediate and ultimate consumers, and the development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition. b

2. A concentration which does not create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it shall be declared compatible with the common market. c

3. A concentration which creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it shall be declared incompatible with the common market ... d

#### THE CONTESTED DECISION

3. It is apparent from the contested decision that four types of packaging are used for liquid food: carton packaging, plastic packaging (the material being either polyethylene terephthalate, PET, or high-density polyethylene, HDPE), cans and glass. The type of packaging used for a product is dependent on several factors. The most important factors are the technological characteristics of the product, those of the packaging material and those relating to the method of packaging. e

4. The contested decision focuses on 'sensitive' products. These include milk and liquid dairy products (LDPs), fruit juices and nectars, fruit-flavoured still drinks (FFDs) and tea and coffee drinks. In some cases, the products must be protected against light, as in the case of milk, or against oxygen, as in the case of fruit juices and, to a lesser extent, FFDs and tea and coffee drinks. Since PET is a porous resin through which oxygen and light can pass, it is less appropriate for such products than carton. Nevertheless, research is being carried out into methods of 'barrier' technology, that is to say, methods which ensure protection against oxygen and light. f

5. The packaging technology is also an important factor in choosing the type of packaging. Certain acidic products, such as milk and fruit juices, must either be packaged in aseptic conditions or distributed in chilled form. It is apparent from the file that aseptic conditions can be better maintained if those types of products are packaged in carton because the packaging process is carried out in a single step by the producer of the liquid food in question. In the majority of cases, the producer has an integrated packaging line. It purchases the carton in reels and then cuts, shapes, fills and seals the packaging. g

6. By contrast, the packaging of a liquid product in PET is, in most cases, carried out in several stages, which makes it more difficult to guarantee aseptic conditions. First of all, a plastic tube made of resin called a preform must be produced, then an empty bottle must be formed by placing the preform in a 'stretch blow moulding' machine (SBM machine) containing the appropriate mould for the desired shape and, in a final step only, the bottle must be filled and closed. These various stages may be carried out by different undertakings. h

i

a Thus, there are 'converters', who manufacture empty packaging and supply it to liquid producers. However, integrated production lines and production techniques whereby packaging in aseptic conditions can be more easily guaranteed are currently being developed.

b 7. By the contested decision, the Commission declared incompatible with the common market and the functioning of the Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L1 p 3) the acquisition of Sidel SA by Tetra Laval BV (the notified merger). Tetra Laval BV (Tetra) is a holding company of the Tetra group, which also includes the Tetra Pak company, which is the world leader in the carton packaging sector and is regarded as holding a dominant position in aseptic packaging on that market, whereas c Sidel SA (Sidel) is a leading company in the sector of production and supply of SBM machines and is active in the area of 'barrier' technology. The decision was adopted pursuant to art 8(3) of the regulation.

d 8. In the contested decision, the Commission concluded that the markets for carton and PET packaging systems are distinct but closely related and potentially converging markets which have a growing number of common customers. It also found that there are, in particular, distinct markets for high and low capacity SBM machines and that those markets can, in turn, be subdivided into markets for sensitive and non-sensitive products. This distinction according to end use can be explained by the differences in the specifications for those machines, since their producers may charge different prices according to the end use, which can be determined at the time of e purchase. Such price discrimination cannot be avoided by way of arbitrage.

f 9. According to the Commission, the notified merger would encourage Tetra to 'leverage' its dominant position on the market for equipment and consumables for carton packaging so as to persuade its customers on that market who are switching to PET in order to package certain sensitive products to choose Sidel's SBM machines, thereby excluding much smaller competitors and turning Sidel's leading position on the market for SBM machines for sensitive products into a dominant position. Tetra would be helped in this by its close and sustained relationship with its customers, its financial strength, its know-how and its reputation in the aseptic and ultra-clean sector, by Sidel's current strength, technology and reputation for quality and by the vertical integration from which the entity emerging from g the notified merger (the merged entity) will profit in relation to the three packaging systems (carton, PET and HDPE).

h 10. The Commission also concluded that, given the weak competition on the markets for equipment and consumables for carton packaging, the merger of Tetra with the leading producer on the growing market for PET equipment, a market which is closely related to that for carton, would eliminate an important source of potential competition. This would strengthen Tetra's dominant position on the carton packaging markets and reduce its incentive to adjust its prices and innovate to face the threat which PET poses to its position.

i 11. Tetra entered into a number of commitments, including a commitment to keep Tetra and Sidel separate for ten years, not to make joint offers for both its carton products and SBM machines made by Sidel and to comply with its obligations under Commission Decision (EEC) 92/163 (relating to a proceeding pursuant to art 86 of the EEC Treaty (now art 82 EC) (IV/31.043—Tetra Pak II)) (OJ 1992 L72 p 1). The Commission took the view that such commitments were insufficient to resolve the structural competition concerns raised by the notified merger and argued that it would be virtually

impossible to monitor compliance with them. Therefore, in art 1 of the contested decision, the Commission declared the merger incompatible with the common market and the functioning of the Agreement on the European Economic Area. a

#### THE JUDGMENT UNDER APPEAL

12. By application lodged at the Registry of the Court of First Instance on 15 January 2002, Tetra brought an action for annulment of the contested decision. In the judgment under appeal, the Court of First Instance held that the Commission had committed manifest errors of assessment in its findings as to leveraging and the strengthening of Tetra's dominant position in the carton sector and therefore annulled the contested decision. b

13. As regards the Commission's claims that the notified merger would have anti-competitive conglomerate effects and, in particular, give the merged entity the capacity and incentive to engage in leveraging by exploiting its overall position in the carton sector with a view to attaining a dominant position on the market for SBM machines, the Court of First Instance observed that the Commission itself had taken the view that such a dominant position would not arise from the merger itself but rather from the foreseeable conduct of the merged entity. However, the Court of First Instance held that, where the Commission takes the view that a merger should be prohibited because it will create or strengthen a dominant position within a foreseeable period, it is incumbent upon it to produce convincing evidence thereof. c

14. The Court of First Instance also stated that in order to assess the foreseeability of the merged entity's conduct the Commission must examine all the circumstances which might determine that conduct. Given that, in the case of a dominant undertaking such as Tetra, the supposed leveraging could constitute an abuse of the pre-existing dominant position, the Court of First Instance held that, when examining the likelihood of the adoption of anti-competitive conduct, the Commission must have regard not only to the incentives to adopt such conduct but also to the factors liable to reduce, or even eliminate, those incentives, such as the probability of legal action against and penalties for such conduct. Since the Commission had failed to carry out such an examination, its findings could not be upheld. Consequently, the Court of First Instance examined whether the Commission could nevertheless establish the merits of its argument in the absence of those findings. d

15. The Court of First Instance found that there was, in principle, a possibility of leveraging by the merged entity. Nevertheless, it also found that the Commission had overestimated the likely level of growth in the PET sector and that, for the reasons set out above, the leveraging methods which could be taken into consideration by the Court of First Instance were limited to those which do not infringe Community law. It concluded that the Commission had on the whole failed to fulfil its obligation to establish that the potential leveraging would lead to the creation or strengthening of a dominant position on the relevant markets by 2005. With regard, in particular, to SBM machines, the Court of First Instance held that the contested decision did not contain sufficient evidence to justify the definition by the Commission of distinct SBM machine markets for sensitive and for non-sensitive products. e

16. As regards the Commission's claim that '[Tetra's] current dominant position in carton packaging' would be strengthened by the elimination of a source of constraints on competition from neighbouring markets as a result of the elimination of competition from Sidel on the PET packing market, the f



a Court of First Instance held that the Commission had to prove that strengthening, which cannot be inferred automatically from the fact that there is a dominant position. It found that the Commission had failed to provide such proof.

b THE APPEAL

17. The Commission relies on five grounds of appeal. The first ground alleges an error in law as to the standard of proof which it is required to satisfy and as to the scope of the Court of First Instance's power of judicial review. The second ground alleges infringement of arts 2 and 8 of the regulation in so far as the Court of First Instance required the Commission, first, to take account of the impact which the illegality of certain conduct has on the incentives for the merged entity to engage in leveraging and, secondly, to assess, as a potential remedy, the commitments not to adopt any abusive conduct. The third ground alleges that the Court of First Instance erred in law by applying an erroneous test of judicial review and infringed art 2 of the regulation by failing to uphold the definition of distinct markets for SBM machines according to end use. The fourth ground alleges infringement of art 2 of the regulation, distortion of the facts and failure to take account of the Commission's arguments in that the Court of First Instance failed to recognise the merits of the Commission's finding that Tetra would strengthen its dominant position in the carton sector. The fifth ground alleges infringement of art 2(3) of the regulation in that the Court of First Instance rejected the Commission's conclusions as to the creation of a dominant position on the market for SBM machines.

e 18. In its reply, Tetra requested, as a measure of inquiry, an order that a French version of the appeal be produced. The court rejected that request by order of 24 July 2003.

f *The first ground of appeal*

19. By its first ground of appeal, the Commission complains that the Court of First Instance, whilst claiming to apply the test of manifest error of assessment, in fact applied a different test requiring the production of 'convincing evidence'. In doing so, the Court of First Instance infringed art 230 EC (formerly art 173 of the EC Treaty) by failing to take account of the discretion conferred on the Commission with regard to complex factual and economic matters. It also infringed art 2(2) and (3) of the regulation in that it applied a presumption of legality in respect of concentrations with conglomerate effect. Taking the example of the review of the Commission's forecast of significant growth in the use of PET packaging for sensitive products, the Commission claims that the Court of First Instance distorted the facts, failed to give adequate reasons for the rejection of its arguments and failed to take account of factors, arguments and evidence put forward by it in the contested decision and in its defence, and even refrained from referring to that defence.

i 20. In para 119 of the judgment under appeal, the Court of First Instance set out as follows the criteria for judicial review of a Commission decision on a concentration:

'As a preliminary point, it must be recalled that the substantive rules of the regulation, in particular art 2, confer on the Commission a certain discretion, especially with respect to assessments of an economic nature.'

Consequently, review by the Community judicature of the exercise of that discretion, which is essential for defining the rules on concentrations, must take account of the discretionary margin implicit in the provisions of an economic nature which form part of the rules on concentrations (see *France v European Commission* Joined cases C-68/94 and C-30/95 [1998] ECR I-1375 (paras 223, 224) (the *Kali and Salz* case), *Gencor Ltd v European Commission* (*Germany intervening*) Case T-102/96 [1999] All ER (EC) 289 at 315, [1999] ECR II-753, at 805 (paras 164, 165) and *Airtours plc v European Commission* Case T-342/99 [2002] All ER (EC) 783 at 796, [2002] ECR II-2585 (para 64)).'

21. In para 120 of the judgment under appeal, the Court of First Instance interpreted art 2(3) of the regulation as follows:

'It must also be recalled that under art 2(3) of Regulation 4064/89 a concentration which creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it must be declared incompatible with the common market. Conversely, the Commission is bound to declare a concentration falling within the scope of application of the regulation compatible with the common market where the two conditions laid down in that provision are not fulfilled (see *SA à Participation Ouvrière Cie Nationale Air France v European Commission* Case T-2/93 [1994] ECR II-323 (para 79); see also, to this effect, the *Gencor* case [1999] All ER (EC) 289 at 316, [1999] ECR II-753 at 807 (para 170) and the *Airtours* case [2002] All ER (EC) 783 at 794, 799–800, [2002] ECR II-2585 (paras 58, 82)). If, therefore, a dominant position is not created or strengthened, the transaction must be authorised and there is no need to examine the effects of the transaction on effective competition (see the *Air France* case (para 79)).'

22. The first ground of appeal relied on by the Commission relates to a number of paragraphs in the judgment under appeal. However, it is appropriate to reproduce the passages from that judgment which relate to the conglomerate nature of the notified merger, which is defined in para 142 of that judgment as 'a merger of undertakings which, essentially, do not have a pre-existing competitive relationship, either as direct competitors or as suppliers and customers', a merger which does not give rise to true horizontal overlaps between the activities of the parties to it or to a vertical relationship between the parties in the strict sense of the term and in respect of which it therefore cannot be presumed, as a general rule, that it produces anti-competitive effects.

23. In para 146 of the judgment under appeal, the Court of First Instance interpreted the regulation, in so far as it applies to conglomerates, as follows:

'It should be observed, first, that Regulation 4064/89, particularly at art 2(2) and (3), does not draw any distinction between, on the one hand, merger transactions having horizontal and vertical effects and, on the other hand, those having a conglomerate effect. It follows that, without distinction between those types of transactions, a merger can be prohibited only if the two conditions laid down in art 2(3) are met (see para 120, above). Consequently, a merger having a conglomerate effect must, like any other merger (see para 120, above), be authorised by the Commission if it is not established that it creates or strengthens a dominant position in

a the common market or in a substantial part of it and that, as a result, effective competition will be significantly impeded.'

24. With respect to the impact on competition of a conglomerate-type merger and to the Commission's analysis in that regard, the Court of First Instance held as follows:

b '148. It is necessary first to determine whether a merger transaction creating a competitive structure which does not immediately confer on the merged entity a dominant position may nevertheless be prohibited under art 2(3) of Regulation 4064/89, when in all likelihood it will allow that entity, as a result of leveraging by the acquiring party from a market in which it is already dominant, to obtain in the relatively near future a dominant position on another market in which the party acquired currently holds a leading position, and when the acquisition in question has significant anti-competitive effects on the relevant markets ...

c 150. The court observes that, in principle, a merger between undertakings which are active on distinct markets is not usually of such a nature as immediately to create or strengthen a dominant position due to the combination of the market shares held by the parties to the merger. The factors which are of significance for the relative positions of competitors within a given market are generally to be found within the market itself, namely in particular the market shares held by the competitors and the conditions of competition on the market. It does not follow, however, that the conditions of competition on a market can never be affected by factors external to that market.

d 151. Thus, by way of example, in a case where the markets in question are neighbouring markets and one of the parties to a merger transaction already holds a dominant position on one of the markets, the means and capacities brought together by the transaction may immediately create conditions allowing the merged entity to leverage its way so as to acquire, in the relatively near future, a dominant position on the other market. This could especially be the case where the relevant markets are tending to converge and where, in addition to the dominant position held by one of the parties to the transaction on a market, the other party, or one of the other parties, to the transaction holds a leading position on another market.

e 152. Any other interpretation of art 2(3) of the regulation could deprive the Commission of the power to exercise control over merger transactions which have solely or principally a conglomerate effect.

f 153. Consequently, in a prospective analysis of the effects of a conglomerate-type merger transaction, if the Commission is able to conclude that a dominant position would, in all likelihood, be created or strengthened in the relatively near future and would lead to effective competition on the market being significantly impeded, it must prohibit it (see, in this regard, the *Kali and Salz* case (para 221), the *Gencor* case [1999] All ER (EC) 289 at 315, [1999] ECR II-753 at 804 (para 162) and the *Airtours* case [2002] All ER (EC) 783 at 796, [2002] ECR II-2585 (para 63)).

g 154. In this context, it is also appropriate to distinguish, on the one hand, between a situation where a merger having conglomerate effects immediately changes the conditions of competition on the second market and results in the creation or strengthening of a dominant position on that market due to the dominant position already held on the first market and,



on the other hand, a situation where the creation or strengthening of a dominant position on the second market does not immediately result from the merger, but will occur, in those circumstances, only after a certain time and will result from conduct engaged in by the merged entity on the first market where it already holds a dominant position. In this latter case, it is not the structure resulting from the merger transaction itself which creates or strengthens a dominant position within the meaning of art 2(3) of the regulation, but rather the future conduct in question. a

155. The Commission's analysis of a merger producing a conglomerate effect is conditioned by requirements similar to those defined by the court with regard to the creation of a situation of collective dominance (see the *Kali and Salz* case (para 222) and the *Airtours* case [2002] All ER (EC) 783 at 796, [2002] ECR II-2585 (para 63)). Thus the Commission's analysis of a merger transaction which is expected to have an anti-competitive conglomerate effect calls for a particularly close examination of the circumstances which are relevant for an assessment of that effect on the conditions of competition in the reference market. As the court has already held, where the Commission takes the view that a merger should be prohibited because it will create or strengthen a dominant position within a foreseeable period, it is incumbent upon it to produce convincing evidence thereof (see the *Airtours* case (para 63)). Since the effects of a conglomerate-type merger are generally considered to be neutral, or even beneficial, for competition on the markets concerned, as is recognised in the present case by the economic writings cited in the analyses annexed to the parties' written pleadings, the proof of anti-competitive conglomerate effects of such a merger calls for a precise examination, supported by convincing evidence, of the circumstances which allegedly produce those effects (see, by analogy, the *Airtours* case (para 63)).' b

#### *Arguments of the parties*

25. The Commission claims that the Court of First Instance departed from principles laid down by the court in its judgment in the *Kali and Salz* case in terms of both the nature of the judicial review carried out by it and the standard of proof which it required the Commission to satisfy. It submits that the following paragraphs of that judgment are relevant in this regard: c

'220. As stated above, under Article 2(3) of the Regulation, concentrations which create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it must be declared incompatible with the common market. d

221. In the case of an alleged collective dominant position, the Commission is therefore obliged to assess, using a prospective analysis of the reference market, whether the concentration which has been referred to it leads to a situation in which effective competition in the relevant market is significantly impeded by the undertakings involved in the concentration and one or more other undertakings which together, in particular because of correlative factors which exist between them, are able to adopt a common policy on the market and act to a considerable extent independently of their competitors, their customers, and also of consumers. e

- a* 222. Such an approach warrants close examination in particular of the circumstances which, in each individual case, are relevant for assessing the effects of the concentration on competition in the reference market.
223. In this respect, however, the basic provisions of the Regulation, in particular Article 2 thereof, confer on the Commission a certain discretion, especially with respect to assessments of an economic nature.
- b* 224. Consequently, review by the Community judicature of the exercise of that discretion, which is essential for defining the rules on concentrations, must take account of the discretionary margin implicit in the provisions of an economic nature which form part of the rules on concentrations.'
- c* 26. The Commission concludes from the principles referred to in the *Kali and Salz* case and from the review carried out by the court in that case that it is required to examine the relevant market closely, weigh up all the relevant factors, and base its assessment on evidence which is factually accurate, is not clearly insignificant and is capable of substantiating the conclusions drawn from it and that it must reach its conclusions on the basis of consistent reasoning.
- d* 27. The Commission takes the view, first of all, that the standard of 'convincing evidence' differs substantially, in degree and in nature, both from the obligation to produce 'cogent and consistent' evidence, established in the *Kali and Salz* case, and from the principle that the Commission's assessment must be accepted unless it is shown to be manifestly wrong. The standard is different in degree because, unlike the standard of 'convincing evidence', that of cogent and consistent evidence does not rule out the possibility that another body might reach a different conclusion if it were competent to give a decision on the matter. The standard required is likewise different in nature inasmuch as it transforms the role of the Community courts into that of a different body
- e* which is competent to rule on the matter in all its complexity and which is entitled to substitute its views for those of the Commission. The Court of First Instance was inconsistent in that it referred to the test of manifest error of assessment yet applied a very different test.
- f* 28. Next, the Commission submits that a margin of discretion is inherent in any prospective analysis. The likelihood of certain market developments within a foreseeable time frame must be determined on the basis of the current market situation, observable trends and other appropriate indicators. To require that the Commission's assessment be, in effect, based on undisputed or virtually unequivocal evidence, irrespective of its merit, would deprive the Commission of its function of evaluating the evidence and attaching, for
- g* justifiable reasons, more weight to some sources than to others.
- h* 29. Finally, the Commission submits that the standard of proof required by the Court of First Instance means that it is placed under an obligation to authorise the transaction in cases in which the evidence does not meet the requisite standard, which is tantamount to a general, de facto presumption of the legality of certain concentrations or, at the very least, to the establishment
- i* of a bias in their favour. However, art 2(3) and (3) imposes on the Commission a double obligation, namely either to prohibit a concentration if it creates or strengthens a dominant position or, as a symmetrical but opposite obligation, to approve it if it neither creates nor strengthens such a position. That obligation reflects the intention of the Community legislature to protect equally the private interests of the parties to the concentration and the public

interest in maintaining effective competition and in consumer protection. This symmetrical double obligation calls for the application of a symmetrical test in relation to the standard of proof required of the Commission since it must prove the merits of its assessment equally in both cases. a

30. By way of illustration of the judicial review carried out by the Court of First Instance in the judgment under appeal, the Commission refers, in particular, to the assessment of the growth in the use of PET packaging for sensitive products. In that connection, the Court of First Instance held as follows: b

‘210. At the hearing, the Commission stated that its reasoning is not based on the precise accuracy of its forecasts, inasmuch as it is accepted that there will be significant future growth. It also acknowledged there that, in the light of the remaining uncertainties surrounding the commercial applicability of the necessary barrier technologies, it could not assume significant PET growth for the [non-flavoured] UHT milk market, and that even the weak growth predicted in the contested decision could turn out to be an overestimation. It did, however, emphasise that its forecasts for probable strong growth in the use of PET for fresh milk, juices, FFDs and particularly tea/coffee drinks in the period up to 2005 were entirely plausible. c

211. The court finds that the use of PET will not actually increase for UHT milk and, consequently, for approximately half of the LDP market. d

212. As regards the rest of the LDP market, it must be found that the PCI report, [entitled *The Potential for PET in the Packaging of Liquid Dairy Products* (2001)] (p 64), the only independent study to concentrate on the LDP market, predicts growth as a result of which PET use will be 9.2% of the fresh non-flavoured milk market in 2005. In addition there is the fact that, for aseptic packaging, the Warrick report [entitled *Warrick Research Report Packaging Markets—Aseptic Packaging Markets World & Western Europe—(2000)*] predicts only minimal growth, of 1%, for flavoured milk, and a slight decline for other milk-based drinks, whilst the Pictet report [entitled *Analysts’ Report Pictet—European Packaging Machinery, Move into PET*] does not give any specific forecasts for LDPs. On the basis of that evidence, the Commission has not shown what it claims to have shown in its defence, namely that its forecasts for LDPs are based on a prudent analysis of the independent studies or on a solid, coherent body of evidence obtained by it through its market investigation. The growth estimates adopted by the Commission (para 209, above) are not really very convincing. The PCI report (pp 63, 64), on the other hand, provides the only proof which might possibly support the forecast of a 25% market share for PET in other milk-based drinks (namely flavoured milk and drinks based on milk and yoghurt) by 2005. However, if that growth were to be realised, the relevant volume would increase only by 62,000 tonnes for 2000, to reach 92,800 tonnes in 2005, an increase which is not very significant in relation to the roughly 120 million tonnes of milk produced in the Community each year (PCI p 9). More generally, the contested decision does not explain adequately how PET could displace HDPE as the main material competing with carton by 2005, especially in the important fresh milk packaging segment. It must be pointed out that the Commission does not dispute either the overall figure of 17.3% for the use of HDPE for e  
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*a* LDPs given by [the consulting company] Canadean for 2000 (see table 3 in recital (66)) or the forecast that that figure could reach 19.5% by 2005 (see table 5 in recital (105)).

*b* 213. As regards juices, the Commission's forecast is even less convincing. Although the Commission itself acknowledged that the growth in question would be due mainly to a switch from glass to PET, it did not conduct any analysis of the glass market. In the absence of such an analysis, the court is unable to ascertain the accuracy of the Commission's forecasts for juices. An analysis of that kind would have been indispensable to enable the court to determine the likely level of switch from glass to carton, PET and HDPE. It was all the more indispensable given the differences between the relevant forecasts made in the Canadean and Warrick studies, on the one hand, and the Pictet study, on the other, as regards levels of growth and the time periods used in the analyses.

*c* 214. It follows that the growth forecasts for LDPs and juices as stated by the Commission in the contested decision have not been proven to the requisite legal standard. Although a certain amount of growth in those segments is likely, especially for premium products, convincing evidence of the extent of the growth is lacking.

*d* 215. By contrast, the independent studies do show that, by 2005, there will in all likelihood be a significant increase in the use of PET for packaging FFDs and tea/coffee drinks, including isotonic drinks. Since the level of growth forecast in the contested decision was not seriously called into question by the applicant at the hearing and is not overestimated compared with the forecast in the studies, the court finds that the Commission did not commit an error on this point.

*e* 31. The Commission complains, in essence, that the Court of First Instance failed to demonstrate that the Commission's estimates of the growth in use of PET were based, first, on factual errors, secondly, on findings of fact which were not established or on conclusions drawn from manifestly insignificant evidence, thirdly, on inconsistencies or errors in reasoning or, fourthly, on the omission of relevant factors. The Court of First Instance rejected, without explanation, the Commission's assessment of the evidence, distorted the factual evidence, for example in finding, in para 213 of the judgment under appeal, that the Commission had failed to analyse the glass market, and imposed its own findings, which were contrary to those of the Commission and manifestly wrong, for example in finding, in para 289 of the judgment, that '[f]resh milk is not a product for which the marketing advantages offered by PET have any particular importance' or, in paras 288 and 328, that PET is more expensive than carton.

*f* 32. Tetra contends that the Commission's first ground of appeal is merely a semantic discussion of the terms used in the judgment under appeal and does not relate to the substantive examination carried out by the Court of First Instance. The Commission's argument is to no avail since there is no consistent terminology with regard to the requisite standard of proof.

*g* 33. Tetra also points out that the terminology used by the court in the judgment in the *Kali and Salz* case, to which the Commission refers in connection with the rules on evidence, did not preclude the court, in that case, from examining in detail both the facts relied on by the Commission in support of its arguments and the conclusions which it had reached in the decision at issue.

34. According to Tetra, the Court of First Instance respected the Commission's margin of discretion and did not exceed the bounds of its power of judicial review by rejecting the statement of reasons for the contested decision, but merely found that the Commission had failed to establish leveraging. a

35. Tetra contends that the Commission has misinterpreted para 153 of the judgment under appeal in inferring from it that it establishes an asymmetrical standard of proof and a de facto presumption of the legality of concentrations. In that paragraph, the Court of First Instance merely set out the rules governing the obligation to prove the effects of concentrations. b

36. With regard to the example put forward by the Commission in relation to the Court of First Instance's analysis of the growth in the use of PET for packaging-sensitive products, Tetra carries out a comparative analysis of the appeal and the judgment under appeal with a view to showing that the Commission has misread or distorted the judgment and has quoted certain passages out of context. c

*Findings of the court as to the first ground of appeal* d

37. By its first ground of appeal, the Commission contests the judgment under appeal in so far as the Court of First Instance required it, when adopting a decision declaring a concentration incompatible with the common market, to satisfy a standard of proof and to provide a quality of evidence in support of its line of argument which are incompatible with the wide discretion which it enjoys in assessing economic matters. It thus complains that the Court of First Instance infringed art 230 EC by exceeding the limits of its power of review established by case law and, as a result, misapplied art 2(2) and (3) of the regulation by creating a presumption of legality in respect of certain concentrations. e

38. It should be observed that, in para 119 of the judgment under appeal, the Court of First Instance correctly set out the tests to be applied when carrying out judicial review of a Commission decision on a concentration as laid down in the judgment in the *Kali and Salz* case. In paras 223 and 224 of that judgment, the court stated that the basic provisions of the regulation, in particular art 2, confer on the Commission a certain discretion, especially with respect to assessments of an economic nature, and that, consequently, review by the Community courts of the exercise of that discretion, which is essential for defining the rules on concentrations, must take account of the margin of discretion implicit in the provisions of an economic nature which form part of the rules on concentrations. f

39. Whilst the court recognises that the Commission has a margin of discretion with regard to economic matters, that does not mean that the Community courts must refrain from reviewing the Commission's interpretation of information of an economic nature. Not only must the Community courts, inter alia, establish whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it. Such a review is all the more necessary in the case of a prospective analysis required when examining a planned merger with conglomerate effect. g

40. Thus, the Court of First Instance was right to find, in para 155 of the judgment under appeal, in reliance on, in particular, the judgment in the *Kali* h

*a* and *Salz* case, that the Commission's analysis of a merger producing a conglomerate effect is subject to requirements similar to those defined by the court with regard to the creation of a situation of collective dominance and that it calls for a close examination of the circumstances which are relevant for an assessment of that effect on the conditions of competition on the reference market.

*b* 41. Although the Court of First Instance stated, in para 155, that proof of anti-competitive conglomerate effects of a merger of the kind notified calls for a precise examination, supported by convincing evidence, of the circumstances which allegedly produce those effects, it by no means added a condition relating to the requisite standard of proof but merely drew attention to the essential function of evidence, which is to establish convincingly the merits of an argument or, as in the present case, of a decision on a merger.

*c* 42. A prospective analysis of the kind necessary in merger control must be carried out with great care since it does not entail the examination of past events—for which often many items of evidence are available which make it possible to understand the causes—or of current events, but rather a prediction of events which are more or less likely to occur in future if a decision prohibiting the planned concentration or laying down the conditions for it is not adopted.

*d* 43. Thus, the prospective analysis consists of an examination of how a concentration might alter the factors determining the state of competition on a given market in order to establish whether it would give rise to a serious impediment to effective competition. Such an analysis makes it necessary to envisage various chains of cause and effect with a view to ascertaining which of them are the most likely.

*e* 44. The analysis of a 'conglomerate-type' concentration is a prospective analysis in which, first, the consideration of a lengthy period of time in the future and, secondly, the leveraging necessary to give rise to a significant impediment to effective competition mean that the chains of cause and effect are dimly discernible, uncertain and difficult to establish. That being so, the quality of the evidence produced by the Commission in order to establish that it is necessary to adopt a decision declaring the concentration incompatible with the common market is particularly important, since that evidence must support the Commission's conclusion that, if such a decision were not adopted, the economic development envisaged by it would be plausible.

*f* 45. It follows from those various factors that the Court of First Instance did not err in law when it set out the tests to be applied in the exercise of its power of judicial review or when it specified the quality of the evidence which the Commission is required to produce in order to demonstrate that the requirements of art 2(3) of the regulation are satisfied.

*g* 46. With respect to the particular case of judicial review exercised by the Court of First Instance in the judgment under appeal, it is not apparent from the example given by the Commission, which relates to the growth in the use of PET packaging for sensitive products, that the Court of First Instance exceeded the limits applicable to the review of an administrative decision by the Community courts. Contrary to what the Commission claims, para 211 of the judgment under appeal merely restates more concisely, in the form of a finding by the Court of First Instance, the admission made by the Commission at the hearing, which is summarised in para 210 of the judgment, that its forecast in the contested decision with regard to the increase in the use of PET for packaging UHT milk was exaggerated. In para 212 of the judgment under



appeal, the Court of First Instance gave the reasons for its finding that the evidence produced by the Commission was unfounded by stating that, of the three independent reports cited by the Commission, only the PCI report contained information on the use of PET for milk packaging. It went on, in that paragraph, to show that the evidence produced by the Commission was unconvincing by pointing out that the increase forecast in the PCI report was of little significance and that the Commission's forecast was inconsistent with the undisputed figures on the use of HDPE contained in the other reports. In para 213 of the judgment under appeal, the Court of First Instance merely stated that the Commission's analysis was incomplete, which made it impossible to confirm its forecasts, given the differences between those forecasts and the forecasts made in the other reports. a  
b

47. Amongst the other examples given by it, the Commission challenges the Court of First Instance's finding, in para 289 of the judgment under appeal, that '[f]resh milk is not a product for which the marketing advantages offered by PET have any particular importance' and its conclusions as to the cost of PET in comparison to that of carton, which are set out in paras 288 and 328 of the judgment under appeal. It should be noted that these are findings of fact, which are not subject to review by the court in appeal proceedings. It is therefore unnecessary to give a ruling on the merits of those findings by the Court of First Instance and it need be stated only that the Court of First Instance was able to base those findings on various items in the contested decision. c  
d

48. It follows from these examples that the Court of First Instance carried out its review in the manner required of it, as set out in para 39 of this judgment. It explained and set out the reasons why the Commission's conclusions seemed to it to be inaccurate in that they were based on insufficient, incomplete, insignificant and inconsistent evidence. e

49. In doing so, the Court of First Instance observed the criteria to be applied in exercising the Community courts' power of judicial review and, accordingly, complied with art 230 EC. f

50. Consequently, the above analyses do not show that the Court of First Instance infringed art 2(2) or (3) of the regulation.

51. It follows from all of the above considerations that the first ground of appeal is unfounded. g

#### *The second ground of appeal*

52. By its second ground of appeal, the Commission complains that the Court of First Instance infringed arts 2 and 8 of the regulation in that it required the Commission to take account of the impact which the illegality of certain conduct would have on the incentives for the merged entity to engage in leveraging and to assess, as a possible remedy, the commitment not to engage in abusive conduct. h

53. The contested parts of the judgment under appeal are in the section examining the plea alleging a lack of foreseeable conglomerate effect, in which, more specifically, the Court of First Instance analysed the likelihood of leveraging. According to the Commission's line of argument, the merged entity would have been capable of exploiting its dominant position on the market for aseptic carton and would have been encouraged to do so in order to leverage its leading position on the market for PET equipment, in particular that for high and low capacity SBM machines used for sensitive products, so as to create a dominant position. i

a 54. The forms of leveraging are described as follows in recital (364) in the contested decision (reproduced in para 49 of the judgment under appeal):

b 'Leveraging [this position] ... in a number of ways ... Tetra/Sidel would have the ability to tie carton packaging equipment and consumables with PET packaging equipment and, possibly, preforms (in particular barrier-enhanced preforms). Tetra/Sidel would also have the ability to use pressure or incentives (such as predatory pricing or price wars and loyalty rebates) so that its carton customers buy PET equipment and, possibly, preforms from ... Tetra/Sidel and not from its competitors or converters.'

c 55. In response to the Commission's criticisms, Tetra proposed to enter into various commitments. However, the Commission took the view that those commitments could not be regarded as eliminating the competition concerns identified by it effectively. With respect to the behavioural commitments, the following reasons were stated for the contested decision in recitals (429)–(432), under the heading 'Separation of Sidel from Tetra and Article 82 Commitments':

d '(429) The behavioural commitment, namely the separation of Sidel from Tetra Pak, together with the confirmation of pre-existing Article 82 undertakings, are submitted in particular with regard to the concerns on the ability of the merged entity to leverage its dominant position in carton packaging to gain a dominant position in PET packaging equipment. This commitment and the pre-existing Article 82 commitments are, however, purely behavioural. As such, they are not suitable to restore conditions of effective competition on a permanent basis, since they do not address the permanent change in the market structure created by the notified operation that causes these concerns.

e (430) The "separation" of Sidel from Tetra Pak companies does not alter the fact that, as expressly acknowledged in the commitment itself, Sidel's board will "be held responsible directly by the Tetra Laval Group board". It cannot be expected that such separation will prevent Sidel from implementing the commercial strategy of the Tetra Laval Group. In addition Sidel's legal status could be changed, i.e. Sidel might be de-listed and turned into a private company like Tetra Laval which would make monitoring of "firewalls" virtually impossible.

f (431) The commitment not to "bundle" as well as the confirmation of the pre-existing Article 82 commitments, constitute pure promises not to act in a certain manner, indeed not to act in contravention of Community law. Such behavioural promises are in contrast with the Commission's stated policy on remedies and with the purpose of the Merger Regulation itself ... and are extremely difficult if not impossible to monitor effectively.

g (432) Overall, in addition to being complex in their implementation and in their monitoring, these commitments cannot be considered as capable of removing effectively the competition problems identified.

h 56. The Commission's argument challenges paras 156–162 of the judgment under appeal, which immediately follow paras 148–155, which were likewise challenged by the Commission and were examined by the court in connection with the first ground of appeal. In those paragraphs, the Court of First Instance held as follows:

i '156. In the present case, the leveraging from the aseptic carton market, as described in the contested decision, would manifest itself—in addition to

the possibility of the merged entity engaging in practices such as tying sales of carton packaging equipment and consumables to sales of PET packaging equipment and forced sales (recitals (345), (365))—firstly, by the probability of predatory pricing by the merged entity (recital (364), cited in para 49, above); secondly, by price wars; and, thirdly, by the granting of loyalty rebates. Engaging in these practices would enable the merged entity to ensure, as far as possible, that its customers on the carton markets obtain from Sidel any PET equipment they may require. The contested decision (recital (231)) finds that Tetra holds a dominant position on the aseptic carton markets, that is to say, the markets for aseptic carton packaging systems and aseptic cartons (see para 40, above), a finding which is not disputed by the applicant.

157. It should be recalled that, according to settled case law, where an undertaking is in a dominant position it is in consequence obliged, where appropriate, to modify its conduct so as not to impair effective competition on the market regardless of whether the Commission has adopted a decision to that effect (see *NV Nederlandsche Banden-Industrie Michelin v EC Commission* Case 322/81 [1983] ECR 3461 (para 57), *Tetra Pak International SA v EC Commission* Case T-51/89 [1990] ECR II-309 (para 23) and *Coca-Cola Co v European Commission* (supported by *The Virgin Trading Co Ltd and anor, interveners*) joined cases T-125/97 and T-127/97 [2000] All ER (EC) 460, [2000] ECR II-1733 (para 80)).

158. Moreover, in response to the questions put by the court at the hearing, the Commission did not deny that leveraging by Tetra through the conduct described above could constitute abuse of Tetra's pre-existing dominant position in the aseptic carton markets. This could also be the case, according to the concerns expressed by the Commission in its defence, in circumstances where the merged entity refused to participate in the installation and any necessary conversion of Sidel SBM machines, to provide after-sales service or to honour the guarantees for such machines when sold by converters. However, the Commission went on to state that the fact that a type of conduct may constitute an independent infringement of art 82 EC [formerly art 86 of the EC Treaty] does not preclude that conduct from being taken into account in the Commission's assessment of all forms of leveraging made possible by a merger transaction.

159. In this regard, it must be stated that, although Regulation 4064/89 provides for the prohibition of a merger creating or strengthening a dominant position which has significant anti-competitive effects, these conditions do not require it to be demonstrated that the merged entity will, as a result of the merger, engage in abusive, and consequently unlawful, conduct. Although it cannot therefore be presumed that Community law will not be complied with by the parties to a conglomerate-type merger transaction, such a possibility cannot be excluded by the Commission when it carries out its control of mergers. Accordingly, when the Commission, in assessing the effects of such a merger, relies on foreseeable conduct which in itself is likely to constitute abuse of an existing dominant position, it is required to assess whether, despite the prohibition of such conduct, it is none the less likely that the entity resulting from the merger will act in such a manner or whether, on the contrary, the illegal nature of the conduct and/or the risk of detection will make such a strategy unlikely. While it is appropriate to take account,



a in its assessment, of incentives to engage in anti-competitive practices, such  
as those resulting in the present case for Tetra from the commercial  
advantages which may be foreseen on the PET equipment markets (recital  
(359)), the Commission must also consider the extent to which those  
incentives would be reduced, or even eliminated, owing to the illegality of  
b the conduct in question, the likelihood of its detection, action taken by the  
competent authorities, both at Community and national level, and  
the financial penalties which could ensue.

c 160. Since the Commission did not carry out such an assessment in the  
contested decision, it follows that, in so far as the Commission's assessment  
is based on the possibility, or even the probability, that Tetra will engage in  
such conduct in the aseptic carton markets, its findings in this respect  
cannot be upheld.

d 161. Moreover, the fact that the applicant offered commitments  
regarding its future conduct is also a factor which the Commission should  
have taken into account in assessing whether it was likely that the merged  
entity would act in a manner which could result in the creation of a  
dominant position on one or more of the relevant PET equipment  
markets. There is no indication in the contested decision that the  
Commission took account of the implications of those commitments  
when it assessed the creation of such a position in future through  
leveraging.

e 162. It follows from the foregoing that it is necessary to examine whether  
the Commission based its analysis of the likelihood of leveraging from the  
aseptic carton markets, and of the consequences of such leveraging by  
the merged entity, on sufficiently convincing evidence. In the course of  
that examination it is necessary, in the present case, to take account only  
of conduct which would, at least probably, not be illegal. In addition, since  
f the anticipated dominant position would only emerge after a certain lapse  
of time, by 2005 according to the Commission, its analysis of the future  
position must, whilst allowing for a certain margin of discretion, be  
particularly plausible.'

57. Examining the forms of leveraging in detail, the Court of First Instance  
held as follows:

g '217. The leveraging methods referred to in recital (364) of the contested  
decision (cited in para 49, above) are based on Tetra's dominant position on  
the aseptic carton markets. Given, in particular, Tetra's commitment to  
divest itself of its preforms operations, the leveraging would be carried out  
by two types of measures: first, through pressure leading to tied sales or  
h sales which bundle equipment and consumables for carton packaging  
jointly with PET packaging equipment. That pressure could be put on  
Tetra customers needing to continue to use carton packaging for some of  
their production and especially those customers with long-term  
agreements with Tetra for their carton packaging needs (recital (365), cited  
in para 50, above). Second, measures could be adopted to offer incentives,  
i such as predatory pricing, price wars and loyalty rebates.

218. However, the use, by an undertaking with a dominant position like  
Tetra's on the aseptic carton markets, of pressure in the form of tied sales  
or incentives such as predatory pricing or loyalty rebates that are not  
objectively justified, would usually constitute an abuse of that position. As  
this court has already held, the possible recourse to such strategies cannot

be presumed by the Commission, as it has done in the contested decision, in order to justify a decision prohibiting a merger transaction which has been notified to it in accordance with the regulation (see paras 154–162, above). It follows that the leveraging practices which may be taken into consideration by the court are limited to those which, at least probably, do not constitute an abuse of a dominant position on the aseptic carton markets. a

219. It is, therefore, necessary merely to consider strategies for tied or bundled sales which are not in themselves forced, for loyalty rebates that are objectively justified on the carton markets, and for offers of reduced prices for carton or PET packaging equipment that are not predatory within the meaning of well-established case law (see *AKZO Chemie BV v EC Commission* Case C-62/86 [1991] ECR I-3359 (particularly paras 102, 115, 156, 157), judgment in *Tetra Pak International SA v EC Commission* Case C-333/94 P [1996] ECR I-5951 (paras 41–44), upholding the judgment in [*Tetra Pak International SA v EC Commission* Case T-83/91 [1994] ECR II-755] and the opinion of Advocate General Fennelly in *Cie Maritime Belge Transports SA v European Commission* Joined cases C-395/96 P and C-396/96 P [2000] All ER (EC) 385 at 420–423, [2000] ECR I-1365 at 1414–1417 (particularly paras 123–130)). Against that background, it is necessary to examine whether the Commission took account of the commitment concerning separation between Sidel and Tetra Pak companies, agreed in principle for a ten-year period, according to which “no joint offerings of any of Tetra Pak’s carton products together with Sidel’s SBM machines” are to be made. b

220. It is apparent from the contested decision that Tetra asked the Commission to take note of its existing obligations under art 3(3) of ... Decision 92/163 ... which provides: c

“Tetra Pak shall not practice predatory or discriminatory prices and shall not grant to any customer any form of discount on its products or more favourable payment terms not justified by an objective consideration. Thus, discounts on cartons should be granted solely according to the quantity of each order, and orders for different types of carton may not be aggregated for that purpose ...” d

221. It follows that Tetra gave a clear indication of its willingness to comply fully with the special obligations imposed on it by art 82 EC as a result of the dominant position it holds on the aseptic carton markets. It also reiterated its acceptance of all of the relevant obligations imposed on it following the finding in Decision 92/163 of an infringement of art 82 EC as regards those markets. It also undertook, in the context of the present proceedings, to make no joint offers of its carton products together with Sidel’s SBM machines. e

222. Consequently, the only methods of tied or bundled sales which would actually be feasible for the merged entity would be offers made by Tetra to its current customers on the carton markets which would not be compulsory or forced and which would only be in respect of carton packaging equipment and/or carton products, on the one hand, and PET packaging equipment other than SBM machines, on the other. It must also be observed that, notwithstanding the emphasis placed by the Commission in the contested decision (recitals (177), (369)), in its written observations and oral pleadings on the significance of the merged entity’s ability to offer almost all of the equipment necessary for setting up an f

a integrated PET production line, it is clear from the commitments that it would not be possible for that entity to make a joint offer to a customer for carton packaging equipment and an integrated PET production line, at least not one containing a Sidel SBM machine.

b 223. Moreover, although the finding in the contested decision regarding the price discrimination allegedly practised in the past by Sidel is not, having regard to the parties' written pleadings and the oral pleadings of the Commission concerning the underlying econometric analysis, vitiated by a manifest error of assessment, it cannot constitute sufficiently convincing evidence that the merged entity will continue to behave in a similar way. Unlike Sidel prior to the merger, the merged entity would be bound not only by the commitments but also by the various obligations limiting Tetra's conduct.

c 224. It must therefore be found that the merged entity's possible means of leveraging would be quite limited. An examination of the foreseeable consequences of its resorting to such conduct must take account of this.'

d *Arguments of the parties*

58. The Commission submits, first, that the approach taken by the Court of First Instance with regard to the conglomerate effects and the unlawful conduct of Tetra is contrary to art 2 of the regulation and to merger control in general.

e 59. It argues, first of all, that that approach runs counter to a meaningful interpretation of art 2. If art 82 EC were sufficient to prevent abuses, it would not have been necessary to make provision for ex ante control of concentrations. More specifically, the Commission challenges para 218 of the judgment under appeal, in which the Court of First Instance held that 'the possible recourse to such [abusive] strategies cannot be presumed by the Commission', and submits that, on the contrary, the presumption that a dominant undertaking may find it rational to exclude competitors and/or exploit customers and thus, in some cases, actually to violate art 82 EC is enshrined in the regulation.

f 60. The Commission submits, moreover, that the Court of First Instance's approach is mistaken in that it is based on unwarranted distinctions between different types of mergers, which are contrary to art 2 of the regulation. It criticises para 154 of the judgment under appeal, in which the Court of First Instance took the view that it is not the structure resulting from the merger transaction itself which creates or strengthens a dominant position within the meaning of art 2(3) but rather the future conduct of the merged entity. The Commission argues that that finding is inconsistent with para 94 of the *Gencor* judgment, in which the Court of First Instance held that a merger would have had an immediate effect where it—

g 'would have had the direct and immediate effect of creating the conditions in which abuses were not only possible but economically rational, given that the concentration would have significantly impeded effective competition in the market by giving rise to a lasting alteration to the structure of the markets concerned.'

i It submits that there is no justification for drawing a distinction, as the Court of First Instance did in the judgment under appeal, according to whether the dominant position on the second market is created immediately or in the medium term. Otherwise, there would be a risk that vertical mergers or



those with conglomerate effect might escape the scope of the regulation because those types of merger give the merged entity the potential to use—and abuse—its dominant position on a market and the incentives to do so in order to exclude its competitors on a second market. The Commission concludes that, in the present case, it ought to have been found that the merger would immediately alter the structure and conditions of competition. a

61. Finally, the Commission submits that there are insuperable legal and practical obstacles to engaging in the analysis of the disincentives created by the illegal nature of certain abusive commercial practices. The Commission would be required to examine, not the structural aspects of an undertaking, but rather its propensity to comply with the law. Such an analysis would constitute a breach of the principle of equality and the presumption of innocence. It would also be impossible to apply the test because it could be difficult to quantify the risk, which would vary according to the strictness of the competition policy in each member state. Given the standard of proof required by the Court of First Instance, the Commission concludes that it would be impossible for it to control vertical mergers and those with conglomerate effect properly in accordance with the regulation. b

62. Secondly, the Commission alleges that the Court of First Instance infringed arts 2 and 8(2) of the regulation by finding that it ought to have taken account of the behavioural commitments entered into by Tetra. It compares the position adopted by the Court of First Instance in para 161 of the judgment under appeal with that taken in paras 316 and 317 of the *Gencor* judgment, in which the Court of First Instance ruled out the consideration of behavioural commitments where the merger appears likely to create or strengthen a dominant position. The Commission argues that, even though non-structural commitments may be acceptable in certain cases, commitments that amount to a mere promise to behave in a certain way, for example a commitment not to abuse a dominant position created or strengthened by the proposed concentration, are not as such regarded as suitable to render the concentration compatible with the common market. c

63. The Commission submits that the Court of First Instance distorted the contested decision by finding, in para 161 of the judgment under appeal, that it was not apparent from that decision that the Commission had taken account of the implications of Tetra's commitments in its assessment. The Commission asserts that it assessed those commitments but rejected them (recitals (423)–(451) in the contested decision). The Court of First Instance cannot properly claim that the contested decision is vitiated by a manifest error of assessment as regards the conclusion that the concentration must be prohibited if it has not examined the Commission's arguments that the commitments are unviable and, in any event, insufficient to address the competitive concerns raised by the notified merger. d

64. By contrast, Tetra contends, first, that the Court of First Instance did not err in law by requiring the Commission to take account of the unlawfulness of the abusive conduct. The test applied by the Court of First Instance in para 159 of the judgment under appeal is that of the rational and foreseeable conduct of an undertaking. When assessing such conduct, account must be taken both of the incentives to engage in unlawful conduct and the factors which might diminish, or even eliminate, such incentives. e

65. Tetra contends that the comparisons drawn with the *Gencor* case are irrelevant. It submits that, in that case, the collective dominant position was created immediately by the horizontal merger, which is not the situation in the f

- a present case, in which a dominant position can arise only after a certain period of time and requires prior abusive conduct.

66. According to Tetra, the Commission's interpretation of the regulation is based on the false premise that its purpose is to prevent abuses. However, it follows from the wording of art 2(2) of that regulation that its purpose is to prohibit the creation of any dominant position which, by itself and without any abuse, would result in the creation of a significant impediment to competition.

67. Tetra does not see why there are insuperable legal and practical obstacles to assessing the impact of the illegal nature of certain conduct or how such an assessment poses difficulties different from those relating to the assessment of incentives to adopt abusive conduct. It observes that the Commission considers itself perfectly capable of quantifying the probability of detecting an infringement of art 81 EC (formerly art 85 of the EC Treaty) and art 82 EC and takes account of that assessment when fixing fines.

68. Secondly, with respect to consideration of its commitments, Tetra submits that para 161 of the judgment under appeal contains no more than a finding that the Commission ought to have taken account of the commitments offered when assessing the foreseeable future conduct of the merged entity. It states that the Court of First Instance did not itself assess the commitments offered and that at no point in the judgment under appeal did it, contrary to what the Commission claims, require the Commission to 'take into account behavioural commitments consisting of mere promises not to engage in abusive conduct'.

69. Tetra argues that the Commission has misinterpreted the judgment in the *Gencor* case. Contrary to the Commission's interpretation, the Court of First Instance, in para 319 of that judgment, found that the categorisation of commitments was immaterial and that behavioural commitments may be equally capable of preventing the emergence or strengthening of a dominant position.

70. Finally, Tetra contends that, contrary to its claims, the Commission did not carry out an assessment in concreto of the impact of the commitments offered by the company but merely expressed an objection in principle to the treatment of behavioural commitments as measures capable of constituting a valid means of remedying the creation of a dominant position within the meaning of the regulation.

*Findings of the court as to the second ground of appeal*

71. It should be observed, first of all, that paras 148–162 of the judgment under appeal, which the Commission challenges under both its first and its second ground of appeal, form a section in which the Court of First Instance described certain specific aspects of conglomerate effects, in particular temporal aspects, and inferred from them certain general rules as to the evidence which the Commission must produce when it considers that a proposed concentration must be declared incompatible with the common market.

72. It was in the context of this reminder of the need for 'convincing evidence' that the Court of First Instance made reference to the obligation to examine all the relevant information.

73. Such an examination must be carried out in the light of the purpose of the regulation, which is to prevent the creation or strengthening of dominant

positions capable of significantly impeding effective competition in the common market or a substantial part thereof. a

74. Since the view is taken in the contested decision that adoption of the conduct referred to recital (364) in that decision is an essential step in leveraging, the Court of First Instance was right to hold that the likelihood of its adoption must be examined comprehensively, that is to say, taking account, as stated in para 159 of the judgment under appeal, both of the incentives to adopt such conduct and the factors liable to reduce, or even eliminate, those incentives, including the possibility that the conduct is unlawful. b

75. However, it would run counter to the regulation's purpose of prevention to require the Commission, as was held in the last sentence in para 159 of the judgment under appeal, to examine, for each proposed merger, the extent to which the incentives to adopt anti-competitive conduct would be reduced, or even eliminated, as a result of the unlawfulness of the conduct in question, the likelihood of its detection, the action taken by the competent authorities, both at Community and national level, and the financial penalties which could ensue. c

76. An assessment such as that required by the Court of First Instance would make it necessary to carry out an exhaustive and detailed examination of the rules of the various legal orders which might be applicable and of the enforcement policy practised in them. Moreover, if it is to be relevant, such an assessment calls for a high probability of the occurrence of the acts envisaged as capable of giving rise to objections on the ground that they are part of anti-competitive conduct. d

77. It follows that, at the stage of assessing a proposed merger, an assessment intended to establish whether an infringement of art 82 EC is likely and to ascertain that it will be penalised in several legal orders would be too speculative and would not allow the Commission to base its assessment on all of the relevant facts with a view to establishing whether they support an economic scenario in which a development such as leveraging will occur. e

78. Consequently, the Court of First Instance erred in law in rejecting the Commission's conclusions as to the adoption by the merged entity of anti-competitive conduct capable of resulting in leveraging on the sole ground that the Commission had, when assessing the likelihood that such conduct might be adopted, failed to take account of the unlawfulness of that conduct and, consequently, of the likelihood of its detection, of action by the competent authorities, both at Community and national level, and of the financial penalties which might ensue. Nevertheless, since the judgment under appeal is also based on the failure to take account of the commitments offered by Tetra, it is necessary to continue the examination of the second ground of appeal. f

79. With respect to the argument that the Court of First Instance departed from the approach taken by it in the *Gencor* judgment, it must be held that, contrary to what the Commission claims, the Court of First Instance did not depart from the position taken by it in para 94 of that judgment, namely that there will be a significant impediment to effective competition if there is a lasting alteration of the structure of the relevant markets as a result of a concentration having the direct and immediate effect of creating conditions in which abusive conduct is possible and economically rational. g

80. The situation in the *Gencor* case was entirely different from that addressed in the contested decision. As is clear from para 91 of the judgment in that case, the concentration would have led to the creation of a dominant duopoly in the h

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a platinum and rhodium markets, as a result of which effective competition would have been significantly impeded in the common market.

81. It was therefore the concentration which would have given rise to a lasting alteration of the structure of the relevant markets in that case and thus would have made abuses possible and economically rational.

b 82. In the present case, it is true that the notified merger was capable of slightly altering the structure of the market for carton inasmuch as the merged entity could strengthen the dominant position which Tetra had held for some time on that market and which, moreover, had been the subject of a Commission decision pursuant to art 82 EC. However, it was not effective competition on the carton market which the Commission intended to protect by prohibiting the merger but competition on the market for PET equipment, c in particular that for low- and high-capacity SBM machines used for sensitive products.

83. The structure of that market would not have been immediately and directly affected by the notified merger but it could have been so affected only as a result of leveraging and, in particular, abusive conduct by the merged d entity on the carton market.

84. It follows from the above considerations that the situation examined in the *Gencor* case is not sufficiently comparable to that on which the Court of First Instance ruled by the judgment under appeal for that court to have been able to draw any useful inferences from it. The structure of the market on which the Commission intended, by the contested decision, to preserve e effective competition was, in the *Gencor* case, directly altered by the merger whereas, in the present case, it could be altered only by leveraging.

85. With respect to consideration of the behavioural commitments offered by Tetra, the Court of First Instance was right to hold, in para 161 of the judgment under appeal, that the fact that Tetra had, in the present case, offered f commitments relating to its future conduct was a factor which the Commission had to take into account when assessing the likelihood that the merged entity would act in such a way as to make it possible to create a dominant position on one or more of the relevant markets for PET equipment.

86. In that regard, the court points to the considerations set out by the Court of First Instance in paras 318 and 319 of the judgment in the *Gencor* case. g Contrary to what the Commission claims, it is not apparent from that judgment that the Court of First Instance ruled out consideration of behavioural commitments. On the contrary, the Court of First Instance (at para 318) laid down the principle that the commitments offered by the undertakings concerned must enable the Commission to conclude that the concentration at issue will not create or strengthen a dominant position h within the meaning of art 2(2) and (3) of the regulation. Then (at para 319) it inferred from that principle that the categorisation of a proposed commitment as behavioural or structural is immaterial and that the possibility cannot automatically be ruled out that commitments which are *prima facie* behavioural, for instance a commitment not to use a trade mark for a certain period or to make part of the production capacity of the entity arising from the concentration available to third party competitors or, more generally, to grant i access to essential facilities on non-discriminatory terms, may also be capable of preventing the emergence or strengthening of a dominant position.

87. With respect to the Commission's consideration of the behavioural commitments, the Court of First Instance merely found, in para 161 of the judgment under appeal, that there is no indication in the contested decision

that the Commission took account of the implications of those commitments when it assessed the possibility that a dominant position might be created in future through leveraging. a

88. Nevertheless, it is not apparent that the Court of First Instance distorted the contested decision or failed to give sufficient reasons for the judgment under appeal in that regard. It is clear from recitals (429)–(432) in the contested decision, the only ones concerning the behavioural commitments submitted by Tetra, that the Commission refused to accept such commitments, as a matter of principle, and found, in recital (429), that '[a]s such, they are not suitable to restore conditions of effective competition on a permanent basis ... since they do not address the permanent change in the market structure created by the notified operation that causes these concerns' and, in recital (431), that 'such behavioural promises are in contrast with the Commission's stated policy on remedies and with the purpose of the Merger Regulation itself ... and are extremely difficult if not impossible to monitor effectively'. b

89. It follows from the examination of the second ground of appeal as a whole that, although the Court of First Instance erred in law by rejecting the Commission's conclusions as to the adoption by the merged entity of conduct likely to result in leveraging, it was nevertheless right to hold, in para 161 of the judgment under appeal, that the Commission ought to have taken account of the commitments submitted by Tetra with regard to that entity's future conduct. Accordingly, whilst the ground of appeal is well founded in part, it cannot call into question the judgment under appeal in so far as it annulled the contested decision since that annulment was based, *inter alia*, on the Commission's refusal to take account of those commitments. c  
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### *The third ground of appeal*

90. By its third ground of appeal, the Commission submits that the Court of First Instance erred in law by applying an erroneous test of judicial review and infringed art 2 of the regulation in so far as it held, in para 269 of the judgment under appeal, that 'the contested decision does not provide sufficient evidence to justify the definition of distinct sub-markets among SBM machines with reference to their end use' and that '[c]onsequently, the only sub-markets it is necessary to consider are those for low- and high-capacity machines'. f

### *Arguments of the parties*

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91. The Commission points out that the definition of the markets for SBM machines is a key aspect of the contested decision. It submits that the proportion of the relevant market represented by a common PET carton customer base, in respect of which Tetra is likely to exploit its dominant position on the carton markets by leveraging, has a decisive influence on the likelihood of foreclosure of competitors and domination of that market by the merged entity. h

92. The Commission states that, in recitals (176)–(183) in the contested decision, which are supplemented by recitals (347)–(358) and (381)–(383), it defined distinct markets for SBM machines according to whether they are used to package-sensitive or non-sensitive products and, in doing so, relied on both supply-side and demand-side factors. In regard to the latter, recital (178) in the contested decision is worded as follows: i

'In any event, a distinct group of customers for the relevant product may constitute a narrower, distinct product market when such a group could be

*a* subject to price discrimination. This will usually be the case when two conditions are met: (a) it is possible to identify clearly the group to which an individual customer belongs at the moment it purchases the relevant products and (b) trade among customers or arbitrage by third parties should not be feasible.’

*b* 93. In para 259 of the judgment under appeal, the Court of First Instance summarised the Commission’s line of argument in the contested decision, a summary not contested by the Commission, as follows:

*c* ‘In the contested decision (recital (43)), the Commission finds, firstly, that “even for an allegedly ‘generic’ piece of equipment such as an SBM machine it is justified to examine the equipment market with reference to the end-use segments”, which is “even more relevant when comparing whole packaging systems in order to assess whether or not they may belong in the same product market”. It goes on to state that each liquid product intended for packaging has its “very particular characteristics which dictate the availability of a given form of packaging”, before

*d* concluding that end-use segmentation constitutes a meaningful analytical tool for assessing the liquid food packaging equipment market (recital (44), cited in para 30, above). Thus it distinguishes between sensitive products belonging to “common product segments” and other products, on the basis of the ability of the former to be packaged, at least from a technical standpoint, in either carton or PET, unlike non-sensitive products such as

*e* water and carbonated drinks, which cannot be packaged in carton (recital (58)). Whilst accepting that “the majority of SBM machines are ‘generic’” (recital (177)), the Commission states in the same recital that “a PET packaging line, of which the SBM machine is only one component, is usually tailored to the specific products filled by the customer”, which is especially the case for sensitive products, an argument reiterated in its

*f* assessment of the consequences of leveraging (recital (369)). It refers by way of example to Sidel’s SRS G Combi, which is “designed for carbonated drinks [and] cannot be a substitute for a beverage producer wanting to fill juices” (recital (177)), for which an aseptic Combi SRA machine is required. Referring to the Commission Notice (on the definition of relevant market for the purposes of Community competition law) (OJ 1997 C372 p 5,

*g* point 43), it then finds that the two conditions which normally must be met for a finding of a distinct group of customers and thus of a narrower product market are met in the present case: it is possible to identify clearly which group an individual customer belongs to at the moment it purchases an SBM machine, and the trade in the machines among customers or

*h* arbitrage by third parties is not feasible (recital (178)).’

94. In paras 260–269 of the judgment under appeal, the Court of First Instance held as follows:

*i* ‘260. The court finds, firstly, that the emphasis placed in the contested decision on sensitive products belonging to “common product segments” is based on an objective criterion, namely the fact that these products belong to the category of carton-packaged products and the possibility, at least from a technical standpoint, of them being packaged in PET, which, in the light of the growth to be expected (see paras 201–216, above), is likely to become a fairly widespread commercial reality by 2005, at least for FFDs and tea/coffee drinks.



261. However, the contested decision fails to provide sufficiently convincing evidence to demonstrate the allegedly specific characteristics of SBM machines used for packaging sensitive products. Admittedly, a combined machine specifically designed for filling carbonated drinks cannot be used for juices. However, that far from proves that low- and high-capacity SBM machines, even ones tailored before sale to the specific wishes of their purchasers, do not remain generic machines, as argued in essence by the applicant, that is to say, capable of packaging several types of products. a

262. As for the alleged specificity of packaging moulds according to the product intended for them, as argued by the Commission, whilst the applicant does not dispute that the number of moulds determines the capacity of the machine, this specific fact does not prove that SBM machines, of which moulds are merely a component, differ significantly from each other. It is clear from the notification that moulds last on average for three years, whilst an SBM machine lasts for up to 15 years (recital (304)). Although Sidel makes its own moulds, the contested decision (recital (309)) does not dispute the information on the moulds market provided in the notification, according to which Sidel is not active in that market (that is, as a supplier of moulds to third parties) and the competition amongst those undertakings which are active is very strong, especially from SIG, which claims on its internet site that it is a world leader. b

263. Nor does the contested decision call into question the statement in the notification that, in a large facility, a customer can use several SBM machines in order to combine them for its various production needs. The contested decision does not contain any examination of whether the flexibility required by some customers for SBM machine moulds can be explained by needs relating to such uses. c

264. In its defence, the Commission refers to a number of changes which can be made to an SBM machine to enhance its performance or make it more useful in an integrated PET production line, such as the addition of a special blow air filtration system or ultraviolet treatment to reduce the risk of contamination before the preforms enter the SBM machine. At the hearing, the Commission stated that these changes are evidence of the very specific characteristics of an SBM machine used in a PET packaging line to which the contested decision refers (recital (177)). Tetra, whilst disputing the Commission's approach of attributing specific characteristics of other components of a PET production line to SBM machines, none the less stated that these changes represented a mere 5% of the cost of an SBM machine. d

265. The court finds, first, that the contested decision makes no reference to this information. Although the decision correctly stresses the importance of the individual needs of customers who require an aseptic PET filling line in particular, namely a basic guarantee of aseptic conditions, this cannot justify the definition of a distinct sub-market for SBM machines used in filling lines for the sensitive products at issue here. The mere fact that each SBM machine must be installed in a PET line in order to be useful to its purchaser does not justify that specific characteristics of other PET equipment in that line should be attributed to the SBM machines themselves. e

a 266. There is all the more reason to accept the generic nature of SBM machines, inasmuch as at the hearing the Commission was unable to rebut Tetra's assertion regarding the relatively low cost, when compared to the cost of a so-called "standard" SBM machine, especially a high-capacity SBM machine, of making any necessary changes to render the machine more compatible for use with aseptic and non-aseptic PET filling machines, or possibly with aseptic filling machines capable of conversion from PET to HDPE.

b 267. The parties agree, moreover, that combined machines, which are still only rarely used for aseptic filling (see paras 248, 249, above), do not constitute a distinct market, as is also clear from the contested decision.

c 268. As regards the possibility of determining exactly which group a given customer belongs to when he purchases an SBM machine and whether or not that customer may, at least currently within the [European Economic Area], be able to find a better price through arbitrage between the available suppliers, it is clear that those possibilities, if established, would apply as much to SBM machines used for non-sensitive products as to those used to package sensitive products. The possibility for the merged entity to identify the group to which a customer belongs is due to the fact that many customers in the carton markets who will switch to PET will be current Tetra customers. However, this possible benefit, resulting from the "first-mover advantage" which the merged entity will foreseeably have, does not preclude those customers from turning to other suppliers of SBM machines if they become dissatisfied with the conditions offered by the merged entity.

d 269. Therefore, on the basis of the evidence in the contested decision, the Commission (recital (177)) committed an error, first, by finding that "the majority of SBM machines are 'generic'" and, second, by distinguishing between them according to end use. The contested decision does not provide sufficient evidence to justify the definition of distinct sub-markets among SBM machines with reference to their end use. Consequently, the only sub-markets it is necessary to consider are those for low- and high-capacity machines.'

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g 95. The Commission takes the view that the Court of First Instance erred in law in requiring, in para 265 of the judgment under appeal, that it set out in the contested decision all of the technical information gathered in the course of its investigation. It observes that the question whether the statement of reasons for a decision meets the requirements of art 253 EC (formerly art 190 of the EC Treaty) must be assessed in the light not only of its wording but also its context and, in particular, the degree of prior knowledge of the relevant facts and the period available for adoption of that decision.

h 96. Moreover, the Court of First Instance failed to observe the limits of its power of judicial review, distorted the contested decision and substituted its own assessment for that of the Commission, without even explaining the reasons for the rejection of the latter's analysis, by holding, in para 265, that the need for a guarantee of aseptic conditions does not justify the definition of a distinct sub-market for the SBM machines used in filling lines for the sensitive products at issue. Similarly, in para 266 of the judgment under appeal, the Court of First Instance rejected the Commission's findings as to the importance of the adaptation of SBM machines to use for aseptic packaging on the sole basis of the information on the cost of the necessary

adaptation, without examining the other factors taken into account by the Commission, which include the question whether suppliers of SBM machines to traditional customers in the water and carbonated soft drink sectors have the necessary expertise to thus adapt the machines and to offer the necessary guarantees. a

97. The Commission likewise challenges the rejection of its argument that price discrimination may constitute evidence of distinct sub-markets. In para 223 of the judgment under appeal, the Court of First Instance took the view that such discrimination, allegedly practised by Sidel in the past, cannot constitute sufficiently convincing evidence that the merged entity will continue to behave in a similar way since that entity, unlike Sidel prior to the merger, would be bound not only by the commitments but also by the various obligations limiting Tetra's conduct. The Commission submits that the Court of First Instance erred in law for three reasons. The first is that, according to the Commission, price discrimination is in itself evidence of the existence of distinct conditions of supply and demand in respect of the sale of a product to different customers and therefore the evidence of the existence of distinct markets. The second reason lies in the fact that the Court of First Instance required the Commission not to take account of unlawful conduct, even if it would be economically rational. The third reason put forward by the Commission is that, as follows from paras 161 and 162 of the judgment under appeal, the Court of First Instance failed to take account of Tetra's dominant position on the carton market and ruled on the basis that the merged entity will not have a dominant position on the PET market and that, therefore, any price discrimination on that market cannot constitute an abuse of a dominant position within the meaning of art 82 EC. b  
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98. Finally, the Commission criticises the Court of First Instance's finding that it will be possible for customers to turn to suppliers other than Tetra. It submits that the Court of First Instance ignored its arguments relating to the impossibility of arbitrage in respect of machines of the same supplier (purchase of secondhand machines and in-house transfer of a machine from a 'non-sensitive production' to a 'sensitive production' division). f

99. Tetra contends, generally, that this ground of appeal must be declared inadmissible inasmuch as it relates to findings of fact.

100. It points out that the Commission itself acknowledged, in recital (177) in the contested decision, that SBM machines are 'generic' and that it is the PET packaging line which is specially adapted to the products packaged by the customer. It argues that it is pointless for the Commission to rely on information not contained in the contested decision because, as is clear from case law, a decision must contain all the factual and legal elements on which the Commission has based its findings so as to allow effective judicial review of that decision. The contested decision contains no reference to the need to regard the SBM machine as a component of a particular type of packaging line. In any event, the Court of First Instance responded to all the arguments put forward by the Commission during the judicial proceedings. Thus, para 226 of the judgment under appeal contains a response to a new argument relied on by the Commission in its defence. g  
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101. Tetra submits that the Commission has taken para 223 of the judgment under appeal out of context. In that paragraph, the Court of First Instance did not address whether it is possible to rely on price discrimination to prove that there are distinct markets but merely examined whether Sidel's past conduct constituted sufficiently convincing evidence that the merged entity would



- a continue to behave in the same way. Not until paras 258–269 of that judgment did the Court of First Instance examine the definition of the market.

*Findings of the court as to the third ground of appeal*

- b 102. First of all, the Commission's argument based on the fact that the Court of First Instance found, in para 265 of the judgment under appeal, that there was no reference in the contested decision to certain technical explanations of the allegedly highly individual features of the SBM machines used in PET packaging lines, which the Commission supplied only in its defence and at the hearing, must be rejected as immaterial. On reading paras 266 and 267 of the judgment under appeal, it is clear that the Court of First Instance did not base its findings solely on the fact that there was insufficient convincing evidence in the contested decision of the allegedly individual features of those machines but that it took account of the arguments put forward by the Commission in its defence and at the hearing and responded to them.

- c 103. The argument alleging that the Court of First Instance held that price discrimination was not proof of the existence of distinct sub-markets must likewise be rejected as irrelevant. On reading the final sentence of para 259 and para 268 of the judgment under appeal, it is clear that, in connection with the definition of distinct markets, the Court of First Instance did not give a ruling on the direct probative value of price discrimination but focused its analysis on the circumstances in which a possibility of price discrimination may be regarded as proven, those circumstances having been defined in recital (178) in the contested decision as being (i) that it is possible to identify clearly the group to which a given customer belongs and (ii) that trade among customers or arbitrage by third parties is not feasible.

- d 104. The other arguments raised by the Commission in support of its third ground of appeal, by which it challenges the Court of First Instance's findings as to the generic nature of SBM machines, the possibility of identifying the group to which a customer belongs and the impossibility of trade among customers or arbitrage by third parties in relation to those machines, must be declared inadmissible since they call into question the Court of First Instance's assessment of the evidence, which cannot be the subject of review by the court in appeal proceedings.

- e 105. It follows from those considerations that the third ground of appeal is, in part, inadmissible and, in part, unfounded.

*The fourth ground of appeal*

- f 106. By its fourth ground of appeal, the Commission submits that the Court of First Instance infringed art 2 of the regulation, distorted the facts and failed to take account of certain of its arguments by refusing to recognise the merits of its finding that Tetra would strengthen its dominant position in the carton sector.

- g 107. Recitals (390)–(401) in the contested decision are intended to show that the dominant position held by Tetra in the carton sector could be strengthened by the notified merger as a result of the elimination, on the market for sensitive product packaging, of the potential competition provided by Sidel, the largest supplier on the PET market. Thus faced with weaker competition, Tetra would have no incentive to lower the price of its carton packaging and might be encouraged to cease innovation.

- i 108. As the Court of First Instance observed in paras 311 and 317 of the judgment under appeal, the Commission relied on the judgment in *Tetra Pak v*

*Commission Case T-51/89*, cited above, which was upheld by the court on appeal in *Tetra Pak v Commission Case C-333/94*, cited above (*Tetra Pak II*), in support of its argument that the weakening of potential competition would enable Tetra to feel less threatened on the markets for aseptic carton, which had to be regarded as a strengthening of its dominant position on those markets for the purposes of art 2 of the regulation. a

109. In para 312 of the judgment under appeal, the Court of First Instance held as follows: b

‘... when the Commission relies on the elimination or significant reduction of potential competition, even of competition which will tend to grow, in order to justify the prohibition of a notified merger, the factors which it identifies to show the strengthening of a dominant position must be based on convincing evidence. The mere fact that the acquiring undertaking already holds a clear dominant position on the relevant market may constitute an important factor, as the contested decision finds, but does not in itself suffice to justify a finding that a reduction in the potential competition which that undertaking must face constitutes a strengthening of its position.’ c  
d

110. In para 322 of the judgment under appeal, the Court of First Instance found that there is, in principle, nothing to prevent the application in merger control of the ‘associative links’ theory, which was recognised in the context of applying art 82 EC in *Tetra Pak II*. The case underlying *Tetra Pak II* concerned conduct on a given market which was considered to constitute an abuse of a dominant position on an associated market. The present case concerns neighbouring markets. However, in para 323 of the judgment under appeal, the Court of First Instance held that the reference to *Tetra Pak II* was irrelevant since ‘the present case concerns simply the effect of the elimination, or the significant reduction, of potential competition which is, according to the Commission, sizeable and growing’. e  
f

111. The Court of First Instance (at para 323) also pointed out that—

‘amongst the criteria laid down in art 2(1) of Regulation 4064/89, which the Commission is bound to apply in assessing notified merger transactions, are “the structure of all the markets concerned and the ... potential competition from undertakings”.’ g

The Court of First Instance went on to hold as follows:

‘Thus the Commission did not commit any error in examining the significance for the carton markets of a reduction of potential competition from the PET equipment markets. It does have to show, however, that such a reduction, if it exists, would tend to strengthen Tetra’s dominant position in relation to its competitors on the aseptic carton markets.’ h

112. In para 324 of the judgment under appeal, the Court of First Instance stated that, as its own analysis shows, the growth in the use of PET to package sensitive products would probably be much less marked than the Commission believes. Therefore, it was no longer possible, on the basis of the evidence relied on in the contested decision, to determine, with the certainty required to justify the prohibition of a merger, whether implementation of the notified merger would place Tetra in a situation in which it could be more independent in relation to its competitors on the aseptic carton markets than has been the case in the past. i

a 113. In para 325 of the judgment under appeal, the Court of First Instance examined the two pieces of factual evidence relating to the future conduct of Tetra on which the Commission had relied in order to prove the alleged negative effects of the notified merger on the markets for aseptic carton.

b 114. The Court of First Instance (at paras 326–328) examined the evidence produced by the Commission in relation to price competition and found, in the final sentence of para 328, that the finding in the contested decision that, if it were authorised to acquire Sidel, Tetra would be exposed to less pressure to lower its carton prices is not based on convincing evidence.

c 115. The Court of First Instance (at paras 329–331) examined the evidence submitted by the Commission to substantiate its claim that the notified merger would reduce Tetra's incentive to innovate. It found (at para 332) that the contested decision did not establish to the requisite legal standard that the merged entity would have less incentive than Tetra at present to innovate in the carton sector.

116. The Court of First Instance (at para 333) concluded as follows:

d 'It follows that the evidence relied on in the contested decision does not establish to the requisite legal standard that the effects of the [notified] merger on Tetra's position, principally on the aseptic carton markets, would, by eliminating Sidel as a potential competitor, be such as to fulfil the conditions of art 2(3) of Regulation 4064/89. It follows from the foregoing that it has not been shown that the merged entity's position would be strengthened vis-à-vis its competitors on the carton markets.'

e *Arguments of the parties*

f 117. By its fourth ground of appeal, which consists of several parts, the Commission contests paras 312 and 323 of the judgment under appeal. It submits, first of all, that the way in which the Court of First Instance presented the question of the relevance of potential competition resulted in a distortion of the facts. According to the Commission, potential competition is unrelated to the competitive relationship between the undertaking regarded as dominant and other undertakings active on the relevant market. The relevant question is whether the structural elimination of a significant source of potential competition frees the dominant undertaking to an even greater extent of any constraint, in particular with regard to its customers and consumers.

g 118. The Commission goes on to argue that the two factors referred to in para 312 of the judgment under appeal, namely the elimination or significant reduction of potential competition and the fact that the undertaking benefiting from the merger already occupies a dominant position on the relevant market, are sufficient to justify a finding that such a position would be strengthened.

h 119. The Commission takes the view, moreover, that the Court of First Instance erred in law in rejecting its assessment of the likely growth in the use of PET for packaging-sensitive products and in relying exclusively on its own forecast that 'this growth ... will probably be much less marked than the Commission believes'.

i 120. Finally, the Commission claims that the Court of First Instance erred in law, in paras 316–328 of the judgment under appeal, by failing to take account of its arguments regarding the effects on prices of the elimination of Sidel and, in paras 329–332, by rejecting its conclusion that the merged entity would have less incentive than Tetra at present to innovate in the carton sector.

121. Tetra contends that no error was made in para 312 of the judgment under appeal. It observes that, according to the regulation, a concentration



may be prohibited if it leads to the creation or strengthening of a dominant position. Given that, by definition, a dominant position relates to the dominant undertaking's position on a given market, that is to say, its position relative to its competitors, it is impossible to see how the Commission can take the view that the dominant undertaking's dominant position can be dissociated from the position of its competitors on the same market. a

122. In Tetra's view, to claim that the two factors referred to in para 312 of the judgment under appeal are sufficient to justify a finding that a dominant position is strengthened is tantamount to establishing a per se rule by virtue of which any reduction in potential competition will always strengthen a dominant position. Article 2(3) of the regulation, however, requires that it be shown not only that a dominant position will be strengthened by the concentration, but also that effective competition will be significantly impeded as a result of that strengthening. Neither of those two requirements can be presumed to be satisfied, particularly in a case in which, like that at hand, the potential competition in question is that exercised by one market on a second, distinct but neighbouring, market. b

123. In any event, the Commission relied on a number of factors in the contested decision and, therefore, it cannot complain that the Court of First Instance analysed those factors in the judgment under appeal. With regard to the likely growth in the use of PET, Tetra refers to the line of argument which it has already put forward on that point. c

124. Finally, with respect to the arguments based on the fact that the Court of First Instance failed to uphold the Commission's findings concerning the effect of the merger on Tetra's incentives with regard to prices and innovation, Tetra submits that the Commission is challenging the Court of First Instance's assessment of the facts, which is not subject to review by the court in appeal proceedings. d

#### *Findings of the court as to the fourth ground of appeal*

125. As is clear from art 2(1) of the regulation, the Commission, when assessing the compatibility of a concentration with the common market, must take account of a number of factors, such as the structure of the relevant markets, actual or potential competition from undertakings, the position of the undertakings concerned and their economic and financial power, possible options available to suppliers and users, any barriers to entry and trends in supply and demand. e

126. The Court of First Instance was therefore right to point out in para 312 of the judgment under appeal—and, in doing so, did not infringe art 2 of the regulation—that, although constituting an important factor, as the contested decision finds, the mere fact that the acquiring undertaking already holds a clear dominant position on the relevant market does not in itself suffice to justify a finding that a reduction in the potential competition which that undertaking must face constitutes a strengthening of its position. f

127. The potential competition represented by a producer of substitute products on a segment of the relevant market (namely in the present case the competition, in relation to aseptic carton packaging, from Sidel, as a supplier of PET packaging, on the market segment for sensitive products) is only one of the set of factors which must be taken into account when assessing whether there is a risk that a concentration might strengthen a dominant position. It cannot be ruled out that a reduction in that potential competition might be g

a compensated by other factors, with the result that the competitive position of the already dominant undertaking remains unchanged.

128. It is apparent from the Court of First Instance's summary of the parties' arguments in paras 313–320 of the judgment under appeal that Tetra challenged the argument that the merged entity's dominant position on the aseptic carton markets would be strengthened, by claiming, *inter alia*, that a lack of innovation in the carton sector would essentially benefit Tetra's current competitors on the carton markets. The Court of First Instance was therefore right to state, in para 323 of the judgment under appeal, in connection with the discussion and assessment of the parties' arguments in that regard, that the Commission has to show that, if there is a reduction in potential competition, this will tend to strengthen Tetra's dominant position in relation to its competitors on the aseptic carton markets.

129. Thus, the Court of First Instance relied on the potential reactions of Tetra's competitors on the carton markets, which are also active on the PET market, as a basis for refuting, in para 327 of the judgment under appeal, the Commission's argument that Tetra might be encouraged, once the merger has been completed, to increase its prices on the aseptic carton markets and, in para 330, the argument that the merged entity might decide to innovate less.

130. Accordingly, the part of the fourth ground of appeal in which the Commission claims that the potential competition is unrelated to the competitive relationship between the undertaking regarded as dominant and other undertakings active on the relevant market cannot be regarded as well founded.

131. It should be observed that the Commission's line of argument with respect to the likely growth in the use of PET for packaging sensitive products was examined in connection with the first ground of appeal, in para 46 of this judgment, with a view to establishing whether the Court of First Instance had infringed art 230 EC by failing to apply the test of manifest error of assessment and failing to respect the margin of discretion enjoyed by the Commission in relation to complex factual and economic matters. In so far as the Commission, by this part of the ground of appeal, contests the Court of First Instance's findings in that regard, it must be held that it calls into question the Court of First Instance's assessment of the evidence, which is not subject to review by the court in appeal proceedings.

132. The same applies to the part of the ground of appeal by which the Commission challenges paras 316–328 and 329–332 of the judgment under appeal, in which the Court of First Instance assessed the evidence submitted by the Commission in relation to the effect on prices of the elimination of Sidel and to the lesser incentive for the merged entity to innovate in the carton sector.

133. It follows from all of the above considerations that the fourth ground of appeal is, in part, inadmissible and, in part, unfounded.

#### *The fifth ground of appeal*

134. By its fifth ground of appeal, the Commission claims that the Court of First Instance infringed art 2(3) of the regulation by rejecting its findings as to the creation of a dominant position on the market for SBM machines.

#### *Arguments of the parties*

135. The Commission submits that the Court of First Instance's finding, in para 307 of the judgment under appeal, that 'the contested decision does not

prove to the requisite legal standard that by 2005 the merged entity could acquire a dominant position on the market for low- and high-capacity machines' is based on errors of law challenged in connection with the preceding grounds of appeal, namely the inclusion of SBM machines for non-sensitive products and for beer in the same market as that for SBM machines used for sensitive products and the finding that Tetra's commitment not to link the sale of those machines to the sale of carton products was sufficient. To complete its line of argument, the Commission deems it necessary to demonstrate the errors made by the Court of First Instance in relation to the creation of a dominant position on the market for SBM machines. a

136. With respect to low-capacity SBM machines, the Commission submits, first of all, that the Court of First Instance failed to take account of certain relevant factors set out in the contested decision, such as the growth in the market share held by Sidel (recital (266) in the contested decision) and the immediate strengthening of its position as a result of the combination of its leading position, in terms of market shares, with the financial strength, sales force, established superiority in the field of aseptic packaging, the first mover advantage with customers in the carton packaging sector and the dominant position already enjoyed by Tetra in that sector (recitals (376)–(387)). b

137. Moreover, the Commission claims that the Court of First Instance based its findings on irrelevant facts. Thus, the importance of low-capacity SBM machines for the packaging of non-sensitive products is irrelevant if the definition of the market proposed by the Commission is upheld. Similarly, the Court of First Instance's finding, in para 279 of the judgment under appeal, that 'a significant proportion of the SBM machines used to package sensitive products will, in all likelihood, be low-capacity machines' is irrelevant in assessing whether Tetra might exploit its dominant position in the carton packaging sector to acquire a dominant position in the sector of low-capacity SBM machines. c

138. As regards high-capacity SBM machines, the Commission submits that the Court of First Instance failed to take account of the relevant factors, particularly, in para 284 of the judgment under appeal, the growth in Sidel's market share as a result of the notified merger. It also claims that the Court of First Instance was wrong to take account of the possibility that the growth in the use of PET for sensitive products might be lower than predicted and of the possibility that customers producing sensitive products might switch to HDPE rather than to PET, even though those factors are irrelevant in determining whether Tetra will enjoy a first mover advantage in its dealings with customers opting for PET. d

139. Similarly, with respect to customers switching from glass packaging, the Court of First Instance's reasoning overlooks certain factors and distorts the facts. First, the Court of First Instance failed to take account of the fact that a customer using that type of packaging only rarely packages his products exclusively in glass. Secondly, the Court of First Instance misrepresents the facts in asserting that Tetra/Sidel's competitors in the glass-packaging sector will benefit from the first mover advantage, because, in so finding, it overlooks the fact that suppliers of glass and can equipment do not have close ongoing relations with beverage producers because virtually all glass and can manufacturing is carried out by converters. e

140. With regard to competitors' positions, the Commission argues that the Court of First Instance distorted the contested decision in holding, in para 294 f



- a of the judgment under appeal, that the decision did not adequately examine the competition to be faced by Sidel on the market for high-capacity machines and underestimated the competition provided by its three major competitors. According to the Commission, the contested decision contains a detailed analysis of the relative positions of the merged entity and its competitors, in particular in recitals (232)–(248), (293)–(300), (303)–(310) and (369)–(387) in that decision. Moreo-
- b ver, the Court of First Instance's findings of fact are inaccurate in that it held, first, that the competitor SIG has an advantage because it is active on the downstream preform market even though, according to the Commission, it is not active on the downstream market as a supplier of preforms to undertakings using PET bottling and, secondly, that SIG enjoys a first mover advantage on account of its activities in the glass sector even though it manufactures machines and is not active on the downstream market for glass bottles.
- c

141. Finally, the Commission takes the view that the Court of First Instance's statement, in para 305 of the judgment under appeal, that 'the finding of the converters' dependency on Sidel is not convincing', which is based solely on the 'current level of existing competition', does not contain clear or adequate reasoning for overturning the Commission's complex assessment of this point in recitals (303)–(310) in the contested decision.

- d
142. Tetra contends that the various—apparently unrelated—criticisms raised by the Commission under its fifth ground of appeal must be declared inadmissible for two reasons. First, the Commission relies on factors which were not referred to in the contested decision and, secondly, it is directly challenging the Court of First Instance's assessment of the facts.
- e

*Findings of the court as to the fifth ground of appeal*

- f
143. Assessment of the arguments put forward by the Commission shows that the majority of them relate to the Court of First Instance's assessment of the evidence, which is not subject to review by the court in appeal proceedings. This is true of the Commission's complaint that the Court of First Instance failed to take account of certain factors which it considers to be relevant or took account of other factors which it considers to be irrelevant, whether that be in relation to low- or high-capacity SBM machines or to the consideration of customers switching from glass packaging.
- g

144. By other arguments advanced in support of its fifth ground of appeal, the Commission expressly challenges factual findings or assessments made by the Court of First Instance. This is true of the argument relating to Tetra/Sidel's competitors in glass packaging and of the assessment of the position of the competitor SIG.

- h
145. With respect to the alleged distortion of the contested decision in para 294 of the judgment under appeal, the Commission fails to refer to any specific recital whose content was distorted by the Court of First Instance and, in reality, the argument is directed at the Court of First Instance's assessment of the facts and evidence.

- i
146. Finally, with regard to the argument alleging a failure to state reasons for the finding, in para 305 of the judgment under appeal, that the converters' dependency on Sidel had not been established convincingly, it need be stated only that the Court of First Instance gave concise but adequate reasons for that finding in the final sentence of para 305.

147. It follows from those considerations that the fifth ground of appeal is, in part, inadmissible and, in part, unfounded.

*Conclusion**a*

148. Since none of the grounds of appeal raised by the Commission in support of its appeal could be upheld, the appeal must be dismissed.

*COSTS*

149. Under art 69(2) of the Rules of Procedure, which is applicable to the procedure on appeal by virtue of art 118, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since Tetra has applied for costs and the Commission has been unsuccessful in all its grounds of appeal, the latter must be ordered to pay the costs.

*b*

On those grounds, the Court of Justice (Grand Chamber) hereby:

*c*

- (1) Dismisses the appeal;
- (2) Orders the Commission of the European Communities to pay the costs.

**a** Van de Walle v Texaco Belgium SA  
(Région de Bruxelles-Capitale,  
intervening)  
**b** (Case C-1/03)

COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES (SECOND CHAMBER)

JUDGES TIMMERMANS (PRESIDENT OF THE CHAMBER), PUISSOCHET (RAPPORTEUR),  
SCHINTGEN, MACKEN AND COLNERIC

**c** ADVOCATE GENERAL KOKOTT

29 JANUARY, 7 SEPTEMBER 2004

**d** *European Community – Environment – Waste – Soil infiltrated by hydrocarbons spilled accidentally from petroleum service station – Service station belonging to petroleum undertaking, but operated independently – Meaning of ‘waste’, ‘producer’ of waste and ‘holder’ of waste – Whether spilled hydrocarbons ‘waste’ – Whether contaminated soil ‘waste’ – Whether petroleum undertaking ‘producer’ or ‘holder’ of such waste – Council Directive (EEC) 75/442, arts 1(a), (b), (c).*

**e** As the result of defects in a petroleum service station’s storage facilities, water saturated with hydrocarbons was found to be leaking into an adjacent building. The service station was covered by a commercial lease with a petroleum undertaking as lessee. The petroleum undertaking supplied the service station with petroleum products, but the service station was operated by a manager on his own behalf, who did not have the right to make changes to the premises without permission from the petroleum undertaking. The main proceedings  
**f** were an appeal against the acquittal—in criminal proceedings alleging an offence of abandoning waste—of senior staff and the petroleum undertaking. In due course, the national appellate court decided to stay the proceedings and refer questions to the Court of Justice of the European Communities for a preliminary ruling under art 234 EC (formerly art 177 of the EC Treaty) concerning: (i) whether hydrocarbons, which had been spilled unintentionally and which had caused soil and groundwater contamination, and contaminated soil, which had not been excavated, might be considered to be ‘waste’ within the meaning of art 1(a)<sup>a</sup> of Council Directive (EEC) 75/442 (on waste); and (ii) whether, in the particular circumstances of the main proceedings, the petroleum undertaking which had supplied the service station might be  
**g** considered to be the ‘producer’ or ‘holder’ of waste within the meaning of art 1(b)<sup>b</sup> and (c)<sup>c</sup> of the directive.  
**h**

**Held** – (1) Unintentionally spilled hydrocarbons, which had caused soil and groundwater contamination, and contaminated soil, which had not been

**i** **a** Article 1(a) of the directive, which is set out at judgment para 3, below, defines ‘waste’ as any substance or object set out in Annex 1 to the directive which the holder discards or intends to discard.

**b** Article 1(b) of the directive, which is set out at judgment para 3, below, defines ‘producer’ as anyone whose activities produce waste and/or anyone who carries out pre-processing, mixing or other operations resulting in a change in the nature or composition of this waste.

**c** Article 1(c) of the directive, which is set out at judgment para 3, below, defines ‘holder’ as the producer of waste or the natural or legal person who was in possession of it.



excavated, were 'waste' within the meaning of art 1(a) of the directive. The mere fact that Annex I to the directive referred to material spilled, lost or having undergone any other mishap including any materials or equipment contaminated as a result of the mishap, did not suffice to classify as waste hydrocarbons which had been spilled by accident and which had contaminated soil and groundwater. What was important was whether that accidental spill of hydrocarbons had been an act by which the holder had discarded them. In that regard, it was clear that accidentally spilled hydrocarbons which caused soil and groundwater contamination were not a product which might be re-used without processing. Further, their marketing was very uncertain and, even if it were possible, implied preliminary operations would be uneconomical for their holder. Therefore, those hydrocarbons were substances which the holder did not intend to produce and which he discarded, albeit involuntarily, at the time of production or distribution operations which related to them. Moreover, if hydrocarbons which caused contamination were not considered to be waste on the ground that they had been spilled by accident, their holder would be excluded from the obligations which the directive required member states to impose on him, in contradiction to the prohibition on the abandonment, dumping or uncontrolled disposal of waste. It followed that the holder of hydrocarbons, which had been spilled accidentally and which had contaminated soil and groundwater, discarded those substances such that they were to be classified as 'waste' within the meaning of the directive. So far as the contaminated soil was concerned, the hydrocarbons could not be separated from the land which they had contaminated and could not be disposed of unless the land was also subject to the necessary decontamination. Accordingly, the classification of the soil contaminated by hydrocarbons as 'waste' depended on the obligation on the person who had caused the accidental spill of those substances to discard them. Further, since contaminated soil was to be considered to be waste by the mere fact of its accidental contamination by hydrocarbons, its classification as such did not depend on other operations being carried out which were the responsibility of its owner or which the latter had decided to undertake. The fact that the soil was not excavated had no bearing on its classification as waste (see judgment paras 43, 44, 47-50, 52, 53, below).

(2) In circumstances such as those in the main proceedings, the petroleum undertaking which had supplied the service station might be considered to be the holder of that waste within the meaning of art 1(c) of the directive where the leak from which the service station's storage facilities which had given rise to the waste was attributable to the conduct of that undertaking. The directive defined the 'holder' of waste broadly, without specifying whether the obligation to dispose of or recover was, as a general rule, a matter for the producer or the possessor of the waste. Further, the directive distinguished between practical recovery or disposal operations, which it made the responsibility of any 'holder' of waste, whether producer or possessor, and the financial burden of those operations, which, in accordance with the 'polluter pays' principle, were imposed on the person who had produced the waste. In the main proceedings, the hydrocarbons had been purchased by the service station to meet its operating needs and, therefore, had been in the possession of the service station's manager, who had had them in stock when they had become waste and who might therefore be considered to be the holder and the producer of the waste within the meaning of arts 1(b) and (c) of the directive. Nevertheless, if it appeared to the national court that the poor

- a* condition of the service station's storage facilities and the leak of hydrocarbons was attributable to a disregard of contractual obligations by the petroleum undertaking which had supplied the service station, or to any actions which might render that undertaking liable, the activities of that undertaking could be considered to have 'produced' waste within the meaning of art 1(b) of the directive and the petroleum undertaking might therefore also be regarded as
- b* being the holder of the waste (see judgment paras 55, 58–60, below).

### Notes

For the meaning of 'waste', see 38 *Halsbury's Laws* (4th edn reissue) para 173.

### Cases cited

- c* *ARCO Chemie Nederland Ltd v Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer, Vereniging Dorpsbelang Hees v Directeur van de dienst Milieu en Water van de provincie Gelderland* Joined cases C-418/97 and C-419/97 [2003] All ER (EC) 237, [2002] QB 646, [2002] 2 WLR 1240, [2000] ECR I-4475, ECJ.
- European Commission v Italy* Case C-365/97 [1999] ECR I-7773, ECJ.
- d* *Inter-Environnement Wallonie ASBL v Région Wallonie* Case C-129/96 [1998] All ER (EC) 155, [1997] ECR I-7411, ECJ.
- Palin Granit Oy (Application by)* Case C-9/00 [2003] All ER (EC) 366, [2002] 1 WLR 2644, [2002] ECR I-3533, ECJ.
- Staatssecretaris van Financiën v Shipping and Forwarding Enterprise Safe BV* Case C-320/88 [1990] ECR I-285, ECJ.
- e* *Vessoso (Criminal proceedings against)* Joined cases C-206/88 and C-207/88 [1990] ECR I-1461, ECJ.
- Weidacher (as administrator of the insolvent company Thakis Vertriebs- und Handels GmbH) v Bundesminister für Land- und Forstwirtschaft* Case C-179/00 [2002] ECR I-501, ECJ.

### *f* Reference

- By decision of 3 December 2002, the Cour d'Appel de Bruxelles, Belgium, referred to the Court of Justice of the European Communities for a preliminary ruling under art 234 EC (formerly art 177 of the EC Treaty) two questions (set out at judgment para 22, below) concerning the interpretation of art 1(a), (b) and (c) of Council Directive (EEC) 75/442 (on waste), as amended
- g* by Council Directive (EEC) 91/156. The reference was made in the course of proceedings brought against Paul Van de Walle, Daniel Laurent and Thierry Mersch, senior staff of Texaco Belgium SA (Texaco), and against Texaco itself (together Mr Van de Walle and others), who, as the result of an accidental leak of hydrocarbons from a service station under that company's sign, are charged
- h* with the offence of abandoning waste. Observations were submitted on behalf of: P Van de Walle, D Laurent and Texaco, by M Mahieu, Avocat; T Mersch, by O Klees, Avocat; Région de Bruxelles-Capitale, by E Gillet, L Levi and P Boucquoy, Avocats; the Commission of the European Communities, by F Simonetti and M Konstantinidis, acting as agents. The language of the case was French. The facts are set out in the opinion of the Advocate General.

*i*

29 January 2004. **The Advocate General (J Kokott)** delivered the following opinion<sup>1</sup>. a

## I—INTRODUCTION

1. This case concerns the interpretation of Council Directive (EEC) 75/442 (on waste)<sup>2</sup>, as amended by Council Directive (EEC) 91/156<sup>3</sup>, (the framework waste directive) with respect to fuel which leaked from a storage tank and contaminated the surrounding soil. The Cour d'Appel (Court of Appeal), Brussels, wishes to know whether the fuel and the contaminated soil constitute waste and whether the petroleum company which leased the service station, signed an operating agreement with the operator and supplied her with the fuel can be regarded as the producer or holder of the waste. b  
c

## II—APPLICABLE LEGISLATION

2. Article 1 of the framework waste directive contains the following definitions:

‘For the purposes of this Directive:

(a) “waste” shall mean any substance or object in the categories set out in Annex I which the holder discards or intends or is required to discard ... d

(b) “producer” shall mean anyone whose activities produce waste (“original producer”) and/or anyone who carries out pre-processing, mixing or other operations resulting in a change in the nature or composition of this waste;

(c) “holder” shall mean the producer of the waste or the natural or legal person who is in possession of it; e

(d) ...’

3. Annex I defines various categories of waste, including the following two categories:

‘Q4 Materials spilled, lost or having undergone other mishap, including any materials, equipment, etc., contaminated as a result of the mishap ...’ f

and

‘Q15 Contaminated materials, substances or products resulting from remedial action with respect to land ...’ g

4. Article 15 of the framework waste directive establishes liability for the cost of disposing of waste:

‘In accordance with the “polluter pays” principle, the cost of disposing of waste must be borne by:

—the holder who has waste handled by a waste collector or by an undertaking as referred to in Article 9, h  
and/or

—the previous holders or the producer of the product from which the waste came.’

5. The relevant provisions of Belgian law incorporate art 1(a) and Annex I of the framework waste directive. i

<sup>1</sup> Original language: German.

<sup>2</sup> OJ 1975 L194 p 39.

<sup>3</sup> OJ 1991 L78 p 32.



**a** III—FACTS, PROCEDURE AND QUESTIONS REFERRED FOR A PRELIMINARY RULING

6. Mr Van de Walle, Mr Laurent and Mr Mersch (the defendants) are officers of the company Texaco SA (Texaco). In the main proceedings they are charged with criminal offences under certain provisions of the law on waste. Texaco participated in the proceedings as the civil party liable.

**b** 7. Texaco leased the service station at issue in 1981 and in 1988 signed an operating agreement with the operator. In January 1993, it was found that fuel had leaked from the service station's storage tanks. It had contaminated the earth around the tanks and infiltrated the cellars of the adjacent building.

**c** 8. Tests showed that there had been leakage from the pipes of the diesel tank and the tank containing unleaded 98 Ron petrol, which had holes in it. A stock check showed that about some 800 litres of unleaded 98 Ron petrol had been lost since the beginning of October 1992.

9. In February 1993, the service station was taken out of use, following the termination of both the operating agreement with the operator and the lease with the owner of the property, and after the summer of 1993 Texaco paid no more rent.

**d** 10. Texaco—without admitting liability—had various work done to decontaminate the soil up to May 1994. However, subsequent analyses of groundwater samples showed that it was still contaminated with fuel.

**e** 11. Since Texaco did not pursue decontamination after May 1994, on 10 September 1998 the Public Prosecutor brought charges against the three accused, in their capacity as officers of Texaco, and against the company, in its capacity as the civil party liable, for having infringed the regulations on waste. The Brussels-Capital Region participated in the proceedings as joint plaintiff. At first instance, the accused were acquitted and the civil claim against Texaco was struck out on the grounds that, in view of the acquittal, the court had no jurisdiction.

**f** 12. The Public Prosecutor and the Brussels-Capital Region appealed to the Cour d'Appel. That court is uncertain as to whether the contaminated soil can be regarded as waste and notes in this connection that there is disagreement concerning the scope of the concept of 'abandonment of waste'.

13. It has therefore referred the following questions to the Court of Justice of the European Communities for a preliminary ruling:

**g** '(1) Are Article 1(a) of Council Directive 75/442/EEC ..., which defines waste as "any substance or object which the holder disposes of or is required to dispose of pursuant to the provisions of national law in force", and Article 1(b) and (c) of the Directive, which defines "producer of waste" as "anyone whose activities produce waste ('original producer') and/or anyone who carried out pre-processing, mixing or other operations resulting in a change in the nature or composition of this waste" and "holder" as "the producer of the waste or the natural or legal person who is in possession of it", to be interpreted as being applicable to a petroleum company which produces hydrocarbons and sells them to a manager operating one of its service stations under a contract of independent management excluding any relationship of subordination to the company, if such hydrocarbons seep into the ground, thus contaminating the soil and groundwater?

**h**

**i**

(2) Or must it be considered that the classification as waste within the meaning of the abovementioned provisions applies only if the contaminated soil has been excavated?' a

#### IV—LEGAL ANALYSIS

14. The Cour d'Appel's questions seek to know whether soil contaminated by leaked fuel can be regarded as waste and whether Texaco can be regarded as the producer or holder of any such waste. b

#### A—Meaning of waste

##### 1. Arguments of the parties

15. The parties all agree that the leaked fuel and contaminated soil can only be regarded as waste if the holder discards or intends or is required to discard them. c

16. The Brussels-Capital Region takes the view that the holder of the fuel discarded it when it leaked. This, it argues, is precisely the situation covered by waste category Q4. Categories Q5, Q12 and Q13<sup>4</sup> indicate that contaminated soil is also waste. Irrespective of whether the holder discarded or intended to discard the soil, the property of being waste can follow from the obligation to discard it. Such an obligation is consistent with the objective of the waste directive to protect health and the environment and with the high level of environmental protection called for in art 174(2) EC (formerly art 130r(2) of the EC Treaty). It would prevent the obligations under the waste regulations from being evaded by mixing waste with soil. If contaminated soil were not waste, the obligations to protect health and safeguard the environment under art 4 of the waste directive would be ineffective. d

17. It continues by arguing that an obligation to discard the contaminated soil can also be derived from national law. In the Brussels-Capital Region there is no specific obligation to clean up contaminated soil, but one can be derived from civil law. Such an obligation is also assumed by some authors to exist when there is no possible lawful and technically permissible use for the material in question. This, it is claimed, applies in particular to leaked fuel. e

18. The accused and Texaco consider the question of whether the contaminated soil constitutes waste to be irrelevant in the main proceedings, since in any event they were not the holder or producer of any waste there might be. f

19. They stress that, like the operator, they were unaware that fuel was leaking, whereas a thing can only knowingly be discarded. This, they say, is not inconsistent with the judgment in *Criminal proceedings against Vessoso*<sup>5</sup>, according to which the term 'waste' does not presume that the holder disposing of a substance or an object intended to exclude all economic re-utilisation of the substance or object by others. Ignorance of the fact that fuel has leaked is not comparable with this situation. Where fuel has leaked, therefore, there cannot yet be any question of waste. g

20. The accused and Texaco concede that waste would be present as soon as a holder, aware of the pollution of the soil, began to discard it. In the present case, this could be assumed to be the moment at which the pollution of the soil h

<sup>4</sup> Q5 and Q12 concern contaminated materials, Q13 concerns '[a]ny materials, substances or products whose use has been banned by law'.

<sup>5</sup> Joined cases C-206/88 and C-207/88 [1990] ECR I-1461. i

a was discovered and the initial clean-up measures were taken. However, in this respect, they insist that they were not the holder or producer of this waste.

21. The Commission of the European Communities observes that the definition of waste follows from art 1 of the framework waste directive, while Annex I to the directive and the European Waste Catalogue illustrate this definition. Leaked fuel would fall in waste category Q4, the wording of which  
b shows that the legislature intended to include mishaps within the scope of the term 'discard'. Leaked fuel is therefore waste.

22. According to the Commission, waste category Q4, as defined, can also include contaminated soil. However, it doubts whether natural elements such as soil, water and air can be regarded as waste merely because they are  
c contaminated, the aim of the framework waste directive being rather to protect them. The Commission finds it hard to imagine the concepts of disposal and recovery being applied to these elements. In the event of contamination, they ought rather to be subjected to remedial action or otherwise treated to avoid any adverse effects. They cannot therefore be regarded as waste.

d 23. However, according to the Commission, as soon as contaminated soil is excavated, it is no longer to be regarded as a natural element but rather as a movable, a product or a substance contaminated in a mishap within the meaning of category Q4. The obligation to dispose of the leaked fuel—definable as waste—meant that the contaminated soil had to be excavated.

e  
2. Assessment

24. At the time the leak occurred and afterwards, the fuel mingled with the surrounding soil. It must be assumed that, at least in part, the mixture cannot be separated without special measures. Therefore, whether the leaked fuel  
f should be regarded as waste is not something that can be separately verified. The question is rather whether the contaminated soil as a whole should be classified as waste.

25. According to the third recital, the objective of the framework waste directive is the protection of human health and the environment against harmful effects caused by the collection, transport, treatment, storage and  
g tipping of waste. According to art 174(2) EC, Community policy on the environment is to aim at a high level of protection and is to be based, in particular, on the precautionary principle and the principle that preventive action should be taken. From this the court has concluded that the concept of waste cannot be interpreted restrictively<sup>6</sup>.

26. Article 1(a) of the framework waste directive defines waste as any  
h substance or object in the categories set out in Annex I which the holder discards or intends or is required to discard. The annex in question and the European Waste Catalogue clarify and illustrate that definition by providing lists of substances and objects which may be classified as waste. However, in the view of the court, these lists are only intended as guidance<sup>7</sup>.

27. The crux of the matter is whether the holder discards or intends or is  
i required to discard a thing. According to the ARCO judgment, this must be

6 See *ARCO Chemie Nederland Ltd v Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer, Vereniging Dorpsbelang Hees v Directeur van de dienst Milieu en Water van de provincie Gelderland* Joined cases C-418/97 and C-419/97 [2003] All ER (EC) 237, [2000] ECR I-4475 (para 38 et seq) and *Application by Palin Granit Oy* Case C-9/00 [2003] All ER (EC) 366, [2002] ECR I-3533 (para 23).

7 See the judgment in the *Palin Granit* case, cited in footnote 6, above (para 22).



determined in the light of all the circumstances, regard being had to the aim of the directive and the need to ensure that its effectiveness is not undermined<sup>8</sup>. a

(a) Waste category Q4

28. It follows from waste category Q4 that contaminated earth is waste. This category covers materials spilled, lost or having undergone other mishap, including any materials, equipment, etc, contaminated as a result of the mishap. The concept of 'material' is already very broad and could include earth as forming part of the soil. Moreover, the list is not exhaustive. b

29. To some extent, however, it may be inferred from waste category Q15, which, in particular, covers excavated soil, that as yet unexcavated contaminated soil is not waste<sup>9</sup>. At the same time, there is no reason to believe that waste category Q15 would conclusively define the circumstances in which soil can be waste. The inclusion of unexcavated soil is also suggested by subsection 17 05 of the European Waste Catalogue<sup>10</sup>, which is headed 'soil (including excavated soil from contaminated sites), stones and dredging spoil' and includes the items 17 05 03 'Soil and stones containing dangerous substances' and 17 05 04 'soil and stones other than those mentioned in 17 05 03'. In principle, these categories could also cover unexcavated soil. c

30. The view that unexcavated soil cannot be waste may be attributed to the fact that various member states restrict the concept of waste to movables<sup>11</sup>. However, the regulatory traditions of some member states cannot be the deciding factor where the interpretation of concepts of Community law is concerned. d

31. The Commission's argument that natural elements as such cannot be waste is based on the aim of art 4 of the framework waste directive which, among other things, calls for protection of the soil from the risks of waste. However, in the present case it is not a question of the indeterminate natural element 'soil' but of a precisely determinable quantity of earth, which is endangering the surrounding soil. Contrary to the view expressed by the Commission, this earth may be the subject of disposal or recovery operations. e

32. Bearing in mind the aim of a high level of protection set out in art 174(2) EC, the treatment of unexcavated contaminated soil as waste leads to perfectly reasonable results. From art 3 of the framework waste directive it follows that priority should be given to preventing or reducing the production of such waste and its harmfulness. According to art 4, such waste must be recovered or disposed of without endangering human health and without using processes or methods which could harm the environment. The rest of the legal framework for organising the disposal of waste, described in art 5 et seq, is also largely f

<sup>8</sup> See the *ARCO* judgment, cited in footnote 6, above (para 73). g

<sup>9</sup> See Ludger-Anselm Versteyl 'Der Abfallbegriff' im Europäischen Recht—Eine unendliche Geschichte', *Europäische Zeitschrift für Wirtschaftsrecht* (2000) 585, p 586; Martin Dieckmann *Das Abfallrecht der Europäischen Gemeinschaft* (1994) p 152 et seq. h

<sup>10</sup> See Commission Decision (EC) 2000/532 (replacing Commission Decision (EC) 94/3 establishing a list of wastes pursuant to art 1(a) of Council Directive (EEC) 75/442 on waste and Council Decision (EC) 94/904 establishing a list of hazardous waste pursuant to art 1(4) of Council Directive (EEC) 91/689 on hazardous waste) (OJ 2000 L226 p 3), as amended by Council Decision (EC) 2001/573 (amending Decision 2000/532 as regards the list of wastes) (OJ 2001 L203 p 18). i

<sup>11</sup> In particular, Germany and France; in Italy the restriction is based on a judgment of the Corte Suprema di Cassazione of 18 September 2002, No 31011. Austria, on the other hand, expressly extends the concept of waste to movables that have entered into environmentally harmful association with the soil (see para 2(2) of the *Abfallwirtschaftsgesetz* (the Law on Waste Management)).

a applicable to the treatment of contaminated soil and could help to achieve a high level of environmental protection.

33. Accordingly, preference should be given to the view that unexcavated contaminated soil can fall within the scope of category Q4.

b (b) The notion of 'discarding'

34. However, the decisive factor in determining the presence of waste is not assignment to a category of waste but rather whether the holder discards or intends or is required to discard the soil.

c 35. An intent to discard must be ruled out as long as the holder is unaware of the contamination of the soil. On the other hand, once the holder has become aware of a pollution incident that precludes further appropriate use of the soil, a (rebuttable) intent to discard may be presumed. Thus, for example, pollution of farmland may adversely affect the crop, while pollution of building land may harm or inconvenience the users of the building. This loss of utility creates the risk, typical of waste, that the holder will neither use nor properly dispose of the material in question, allowing it to pollute the environment. In the case of contaminated soil, this risk will be realised if no clean-up measures are taken, so that the pollution spreads. However, the presumption of an intent to discard can be rebutted if the holder, rather than discarding the soil, takes concrete measures to make it usable again.

d 36. Apart from the intent to discard, in the case of contaminated soil there may also be an obligation to discard which presupposes neither knowledge of the pollution nor an intention to discard. This obligation may arise from the risks associated with the pollution of the soil.

e 37. However, it is not possible to conclude from the general waste law clause of art 4 of the framework waste directive that there is an obligation to discard contaminated soil. Although a general obligation to deal with contaminated soil in such a way as to protect health and the environment is to be welcomed, this obligation is only a legal consequence of the property of being waste and cannot be used to show that something possesses that property. For this reason the argument of the Brussels-Capital Region that contaminated soil must always be regarded as waste to prevent the framework waste directive from being circumvented also fails.

f 38. In the case of an obligation to discard, the property of being waste derives rather from the interplay between waste law and the specialised law regulating the relevant risks. The latter may be determined wholly or in part by Community law or be exclusively national. Thus, art 6(2) of Council Directive (EEC) 92/43<sup>12</sup> requires the member states to take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated. For example, it may be necessary to remove contaminated soil that threatens the quality of the water in a protected wetlands area. An obligation to remove contaminated soil may also arise from the law on water, special soil conservation regulations or general regulations on accident prevention. According to the case law, even the regulations on waste disposal can form the basis of an obligation to clean up the soil<sup>13</sup>, which, depending on the circumstances, may also require the removal of contaminated soil. As the

12 On the conservation of natural habitats and of wild fauna and flora (OJ 1992 L206 p 7) (the Habitats Directive).

13 See *European Commission v Italy* Case C-365/97 [1999] ECR I-7773 (para 108 et seq).

Brussels-Capital Region explains, such an obligation can also be founded in civil law<sup>14</sup>. In all these cases, the holder must discard the soil, regardless of whether it can still fulfil the intended purpose. a

39. By contrast, an obligation to discard cannot be based on a risk created by pollution if that risk still allows the soil to be left in situ, perhaps because adequate protective measures can be taken without the need for excavation. In this case the holder does not have to discard the soil. b

40. Whether in the present case an obligation to excavate the contaminated soil exists and to what extent it can still be put to lawful use cannot be determined on the basis of the information submitted to the court. This is a matter for the competent national court.

41. From this analysis it follows that the question whether contaminated soil is classifiable as waste only after it has been excavated can be answered in the negative. Such soil may already be waste even before excavation. c

*(c) Interim finding concerning classification as waste*

42. Thus, to sum up, contaminated soil is to be regarded as waste if, because of the pollution, the holder is obliged to excavate it. Subject to rebuttal, the soil may be presumed to be waste if, because of the pollution, it is no longer fit for proper use. d

*B—Texaco's liability*

43. It is now necessary to determine whether Texaco can be regarded as a producer or holder of waste, on the assumption that in the present case the contaminated soil is waste. e

*1. Arguments of the parties*

44. The Brussels-Capital Region has supplemented the account of the facts given by the Cour d'Appel. It maintains that even after the discovery of the pollution Texaco delivered fuel to the service station. Moreover, the damage to the tank is attributable to a filling mistake made by Texaco in the 1980s, that is to say, before the latest operator of the service station took over. According to the Brussels-Capital Region, in the operating agreement Texaco reserved the right to check the fuel stocks at any time. A representative of Texaco checked the quantities sold on a monthly basis and the operator was allowed to use the service station to sell fuel, but was not entitled to change the installations without first obtaining Texaco's consent. When the service station was handed over the condition of the underground tanks was not documented, contrary to the operating agreement. f

45. In the view of the Brussels-Capital Region, the term 'holder of waste' should be interpreted broadly. It maintains that in the present case it covers Texaco, since Texaco leased the service station, effectively controlled its operation and at least partially cleaned up the contaminated soil. It was also a producer of waste since the leaked fuel could no longer be put to any lawful use. g

46. In the opinion of the accused and Texaco, the request for a preliminary ruling does not extend to the question of whether Texaco can be regarded as a holder or producer of waste. h

<sup>14</sup> See also the *ARCO* judgment, cited in footnote 6, above (para 86), where the example of an agreement is mentioned. i



- a 47. Texaco, they argue, clearly produced not waste but products, namely fuel. The operator of the service station alone was responsible for the fuel's having become waste. The original producer of a product cannot be held responsible if subsequently the product is not used properly but converted into waste.
- b 48. In their view, possession is characterised by actual physical control and Texaco had no such control over the tanks or the fuel in storage. The restriction on the operator's power of disposal with respect to the tank installations was primarily the result of the fact that the operator neither owned nor leased those installations. However, the operating agreement expressly provides for the operator to be responsible for maintaining and checking them. Moreover, it was agreed that the operator alone should be
- c liable for damage traceable to the installations. The operator was the sole owner of and fully responsible for the stored fuel. The checking of the fuel stocks by Texaco provided for in the agreement should not be equated with a technical inspection of the installations. It was intended solely to prevent fraud.
- d 49. The Commission takes the view that the holder of the waste may be determined in this case by establishing who held the fuel when it became waste. On purchasing the fuel the operator of the service station became the owner. Moreover, the fact that the fuel had been produced by Texaco cannot affect the outcome, since the waste accrued in the context of the service station operator's activities.

## 2. Assessment

- e 50. In the present case, Texaco can incur obligations under the waste legislation only if it can be regarded as the producer or holder of waste. According to art 8 of the framework waste directive, any holder of waste must have it handled by an authorised waste disposal undertaking or duly dispose of it himself. Article 15 of the same directive provides that, in accordance with the
- f 'polluter pays' principle, the cost of disposing of waste must be borne by the holder who has waste handled by a waste collector or disposal undertaking. According to art 1(c) of the directive, 'holder' means not only the actual holder of the waste but also the producer of the waste, as defined in art 1(b).

### (a) The meaning of 'producer of waste'

- g 51. Article 1(b) of the framework waste directive defines 'producer' as anyone whose activities produce waste ('original producer') and/or anyone who carries out pre-processing, mixing or other operations resulting in a change in the nature or composition of this waste.

- h 52. Texaco cannot be regarded as the producer of waste simply because it produced fuel which became waste as a result of a mishap. The notion of producer of waste is more closely linked with bringing about the state of being waste. When properly used, fuel burns without leaving any waste<sup>15</sup>. In the present case it became waste not as a result of Texaco's production activities but through being stored in defective tanks.

- i 53. In principle, therefore, the producer of the waste is whoever was operating the tank installations when the fuel leaked. Prima facie, that person was the operator of the service station. Whether, contrary to that impression, Texaco was responsible for the storage of the fuel—as the operator ran the service station for Texaco, not as part of her own business—can ultimately be decided only by the competent national court. In reaching its decision it will

<sup>15</sup> Cf the ARCO judgment, cited in footnote 6, above (para 66).

have to consider who, in law and in fact, controlled the storage operations and the state of the installations. Pointers may be found in the operating agreement and any other relevant provisions. Another important factor will be how Texaco actually behaved. Of course, Texaco cannot divest itself of legal obligations to provide supervision simply by not discharging them in practice. However, if Texaco on the basis of its position of economic strength relative to the service station operator went beyond the confines of its legal position and actually controlled the operation of the storage tanks, then it will also have to accept the ensuing liability. a

54. Moreover, Texaco might be considered to be the producer of waste if the damage to the tanks could be traced back to its actions. In this respect, the mistake in filling the tanks mentioned by the Brussels-Capital Region may be relevant. It is also possible that when it handed over the service station to the operator Texaco ought to have known about and made good any defects which later led to the fuel leak. However, in this respect also, the necessary findings will have to be made by the competent court itself. b

#### (b) The meaning of 'holder of waste' c

55. According to art 1(c) of the framework waste directive, the producer of the waste or the natural or legal person who is in possession of it is to be regarded as the holder. If Texaco is not the producer of waste, then it can only be the holder if it has waste in its possession. d

56. The notion of possession is not defined either in the directive or in Community law in general. In the usual sense of the word, possession means actual physical control of an object, but does not presuppose ownership or a legal power of disposal. However, the obligations under art 8 of the framework waste directive can only be met if there is not only actual possession of the waste but also an entitlement to dispose of it. For the purposes of art 1(c) of the framework waste directive, the notion of possession must therefore go beyond the narrow sense of the word<sup>16</sup> to include a legal power of disposal over the waste, in addition to actual (direct or indirect) physical control. e

57. Who had actual physical control over the waste and at what point is a matter for the national court. Here again, it appears at first sight that the operator had physical control, at any event until the service station was taken out of use. Whether this first impression is justified will have to be determined essentially on the basis of the same criteria as those used to determine who was the producer of the waste. However, it might be that even under the operating agreement the operator was exercising physical control over the tank installations and the surrounding soil not for herself but for Texaco. There would be grounds for reaching this conclusion if, as the Brussels-Capital Region and Texaco submit, the operator was prevented from making changes to the site without Texaco's consent. f

58. There are strong indications that after the service station was taken out of use Texaco took actual physical control. It seems unlikely that following termination of the operating agreement the operator still exercised physical control over the service station. Texaco, by contrast, continued to pay rent until the summer of 1993 and, up to May 1994, had clean-up works carried out, which presupposes physical control of the site. g

<sup>16</sup> Cf the opinion of Advocate General Mischo of 20 November 2001 in *Weidacher (as administrator of the insolvent company Thakiss Vertriebs- und Handels GmbH) v Bundesminister für Land- und Forstwirtschaft* Case C-179/00 [2002] ECR I-501 (para 76 et seq), in which he illustrates the imprecise use of the notion of holder. h

- a* 59. Who was authorised to have the contaminated soil disposed of can also be determined only by the competent court. From the information to hand, it seems unlikely that the operator had this authority. Whether Texaco should have had the contaminated soil disposed of, on the basis of the lease agreement with the property owner, or whether this lay solely within the authority of the latter, cannot be determined from the information available to the court.
- b* (c) Interim finding concerning the concepts of producer and holder of waste
60. To sum up, under art 1(c) of the framework waste directive a petroleum company which produces fuel and sells it to a manager operating one of its service stations under a contract of independent management excluding any relationship of subordination to that company is to be regarded as the holder of waste in the form of soil contaminated by leaked fuel:
- c* —if, taking all the legal and factual circumstances into account, the manager operated the service station not as part of his own business but for the petroleum company (art 1(c), first alternative—producer of the waste),
- if the damage to the tanks can be traced to the conduct of the petroleum company (art 1(c), first alternative—producer of the waste), or
- d* —if, taking all the legal and factual circumstances into account, the petroleum company has actual physical control and is entitled to dispose of the waste (art 1(c), second alternative—holder of the waste).

#### V—CONCLUSION

- e* 61. It is therefore proposed that the questions referred by the Cour d'Appel de Bruxelles be answered as follows:
- (1) Contaminated soil is to be regarded as waste if as a result of the pollution the holder is obliged to excavate it. Subject to rebuttal, the soil may be presumed to be waste if as a result of the contamination it is no longer fit for proper use.
- f* (2) A petroleum company which produces fuel and sells it to a manager operating one of its service stations under a contract of independent management excluding any relationship of subordination to that company is to be regarded as the holder of waste in the form of soil contaminated by leaked fuel:
- g* —if, taking all the legal and factual circumstances into account, the manager operated the service station not as part of his own business but for the petroleum company (art 1(c), first alternative—producer of the waste),
- if the damage to the tanks can be traced to the conduct of the petroleum company (art 1(c), first alternative—producer of the waste), or
- h* —if, taking all the legal and factual circumstances into account, the petroleum company has actual physical control and is entitled to dispose of the waste (art 1(c), second alternative—holder of the waste).

7 September 2004. **THE COURT OF JUSTICE (Second Chamber)** delivered the following judgment.

- i* 1. The reference for a preliminary ruling concerns the interpretation of art 1(a), (b) and (c) of Council Directive (EEC) 75/442 (on waste) (OJ 1975 L194 p 39), as amended by Council Directive (EEC) 91/156 (OJ 1991 L78 p 32), (hereinafter Directive 75/442).
2. The reference was made in the course of proceedings brought against Mr Van de Walle, Mr Laurent and Mr Mersch, senior staff of Texaco



Belgium SA (Texaco), and against Texaco itself (together Mr Van de Walle and others), who, as the result of an accidental leak of hydrocarbons from a service station under that company's sign, are charged with the offence of abandoning waste. a

## LEGAL FRAMEWORK b

### *Community legislation*

3. Article 1 of Directive 75/442 provides:

'For the purposes of this Directive:

(a) "waste" shall mean any substance or object in the categories set out in Annex I which the holder discards or intends or is required to discard ... c

(b) "producer" shall mean anyone whose activities produce waste ("original producer") and/or anyone who carries out pre-processing, mixing or other operations resulting in a change in the nature or composition of this waste;

(c) "holder" shall mean the producer of the waste or the natural or legal person who is in possession of it ...' d

4. Annex I to Directive 75/442, entitled 'Categories of waste', refers in heading Q4 to '[m]aterials spilled, lost or having undergone other mishap, including any materials, equipment, etc., contaminated as a result of the mishap'; in heading Q7 to '[s]ubstances which no longer perform satisfactorily (e.g. contaminated acids, contaminated solvents, exhausted tempering salts, etc.)'; in heading Q14 to '[p]roducts for which the holder has no further use (e.g. agricultural, household, office, commercial and shop discards, etc.)' and, in heading Q15, to '[c]ontaminated materials, substances or products resulting from remedial action with respect to land'.

5. The second paragraph of art 4 of Directive 75/442 states: 'Member States shall also take the necessary measures to prohibit the abandonment, dumping or uncontrolled disposal of waste.' f

6. Article 8 of Directive 75/442 provides that member states are to take the necessary measures to ensure that any holder of waste has it handled by a private or public waste collector or by an undertaking which carries out the disposal or recovery operations or that that holder carries out those operations himself. g

7. Article 15 of Directive 75/442 states:

'In accordance with the "polluter pays" principle, the cost of disposing of waste must be borne by:

—the holder who has waste handled by a waste collector or by an undertaking as referred to in Article 9,  
and/or h

—the previous holders or the producer of the product from which the waste came.'

### *National legislation*

8. Article 2(1) of the order of 7 March 1991 of the Council of the Brussels-Capital Region (Moniteur Belge of 23 April 1991) (the order of 7 March 1991) defines waste as 'a substance or object which the holder discards or intends or is required to discard'. i

9. Annex I to the order, which lists several categories of waste, refers in heading Q4 to '[m]aterials spilled, lost or having undergone other mishap,

a including any materials, equipment, etc., contaminated as a result of the accident', in heading Q7 to '[s]ubstances which no longer perform satisfactorily', and in heading Q12 to 'contaminated materials'.

b 10. Annex III to the order, entitled '[c]onstituents which render waste hazardous', includes a heading C51, which refers to 'hydrocarbons and their oxygen, nitrogen or sulphur compounds not otherwise taken into account in this annex'.

11. Article 8 of the order states:

c 'It is prohibited to abandon waste in a public or private area outside the sites authorised for that purpose by the competent public authority or without complying with the legislative provisions relating to the disposal of waste.'

12. Article 10 of the order of 7 March 1991 provides:

d 'Anyone producing or holding waste shall be required to dispose of it or have it disposed of in accordance with the provisions of this Order, under conditions which restrict harmful effects on soil, flora, fauna, air and water and, in general, without adversely affecting the environment or human health.

e The Executive [of the Brussels-Capital Region] shall ensure that the cost of disposing of waste is borne by the holder who has waste handled by a disposal undertaking or, failing that, by the previous holders or the producer of the product from which the waste came.'

13. Article 22 of the order of 7 March 1991 subjects to a penalty anyone who abandons his own waste or that of others in breach of art 8 of that order.

#### THE MAIN ACTION AND THE QUESTIONS REFERRED

f 14. The Brussels-Capital Region owns a building at 132 avenue du Pont de Luttre in Brussels, Belgium. The renovation of that building which it had undertaken in order to set up a social assistance centre had to be halted on 18 January 1993 as the result of the discovery that water saturated with hydrocarbons was leaking into the cellar of the building from the wall which separates that building from the adjacent building at 134 avenue du Pont de Luttre, where a Texaco service station was at that time located.

g 15. The service station was covered by a commercial lease between Texaco and the owner of the premises. Since 1988 it had been operated by a manager under an 'operating agreement' which provided that the land, building, equipment and movable property for the operation were made available to the manager by Texaco. The manager operated the service station on his own behalf but did not have the right to make changes to the premises without prior written permission from Texaco, which supplied the service station with petroleum products and, in addition, retained control over bookkeeping and supplies.

h 16. Following the discovery of the hydrocarbon leak, which was the result of defects in the service station's storage facilities, Texaco took the view that the station could no longer continue to operate and decided to terminate the management contract in April 1993, alleging serious negligence on the part of the manager. It subsequently terminated the commercial lease in June 1993.

i 17. Although disclaiming liability, Texaco proceeded to decontaminate the soil and replaced part of the storage facilities which gave rise to the hydrocarbon leak. It carried out no further activities on the site after May

1994. The Brussels-Capital Region took the view that decontamination had not been completed and paid for other remedial measures which it considered necessary in order to carry out its building plan. a

18. Since Texaco's actions appeared to constitute infringements of the order of 7 March 1991, and in particular arts 8, 10 and 22 thereof, proceedings were brought against Mr Van de Walle, Texaco's managing director, Mr Laurent and Mr Mersch, officers of the company, and Texaco as a legal entity before the Tribunal Correctionnel (Criminal Court) of Brussels. The Brussels-Capital Region claimed damages in those proceedings. By judgment of 20 June 2001, that court acquitted the defendants, exonerated Texaco and stated that it was not competent to rule on the application by the party claiming damages. b

19. The Ministère Public (Public Prosecutor) and the party claiming damages appealed against that judgment before the court which has made the reference. c

20. That court took the view that art 22 of the order of 7 March 1991 imposed penalties for failure to comply with the obligations set out in art 8 thereof and not for failure to comply with the requirements of art 10. It therefore considered that in order to be subject to criminal sanctions under art 22, the actions of the accused must constitute abandonment of waste within the meaning of art 8. It observed that Texaco had not rid itself of its waste by supplying it to the service station and that neither the petrol delivered nor the tanks which remained buried in the ground after the decontamination activities carried out by that undertaking could constitute waste within the meaning of art 2(1) of the order, that is to say, 'a substance or object which the holder discards or intends or is required to discard'. d

21. The court was in doubt, however, as to whether subsoil contaminated as the result of an accidental spill of hydrocarbons could be considered waste and stated that it doubted that that classification was possible, since the land in question had not been excavated and treated. It also pointed out that legal opinion differs as to whether the accidental spill of a product which contaminates soil is comparable to the abandonment of waste. e

22. Having noted that the definition of 'waste' in art 2(1) of the order of 7 March 1991 reproduces literally that in Directive 75/442 and that the annex to the order which lists categories of waste reproduces the terms used in Annex I to the directive, the Cour d'Appel of Brussels decided to stay the proceedings and refer the following questions to the Court of Justice of the European Communities for a preliminary ruling: f

(1) Are Article 1(a) of Council Directive 75/442/EEC ..., which defines waste as "any substance or object which the holder disposes of or is required to dispose of pursuant to the provisions of national law in force", and Article 1(b) and (c) of the Directive, which defines "producer of waste" as "anyone whose activities produce waste ('original producer') and/or anyone who carried out pre-processing, mixing or other operations resulting in a change in the nature or composition of this waste" and "holder" as "the producer of the waste or the natural or legal person who is in possession of it", to be interpreted as being applicable to a petroleum company which produces hydrocarbons and sells them to a manager operating one of its service stations under a contract of independent management excluding any relationship of subordination to the company, if such hydrocarbons seep into the ground, thus contaminating the soil and groundwater? g

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- a (2) Or must it be considered that the classification as waste within the meaning of the abovementioned provisions applies only if the contaminated soil has been excavated?

#### THE QUESTIONS REFERRED

- b 23. By those two questions, which it is appropriate to consider together, the national court asks, first, whether hydrocarbons which are spilled unintentionally and cause soil and groundwater contamination may be considered to be waste within the meaning of art 1(a) of Directive 75/442 and whether the soil thus contaminated may also be classified as waste within the meaning of that provision even when it has not been excavated, and secondly
- c whether, in circumstances such as those in the main action, the petroleum undertaking which supplies the service station may be considered to be the producer or holder of such waste within the meaning of art 1(b) and (c) of the directive.

#### *Observations submitted to the Court of Justice*

- d 24. The Brussels-Capital Region takes the view that Texaco satisfies the definition of 'holder of waste' inasmuch as it held the hydrocarbons at the outset, delivered them to the service station, closely controlled the station's operations and pumped water from the aquifer in order to clean the contaminated soil.

- e 25. The hydrocarbons fall outside the classification as waste only until the service station discards them for some reason, at which point they become waste, including for the undertaking, such as Texaco, which produced and delivered them.

- f 26. A petroleum undertaking which produced and sold products which have become waste must therefore be considered to be the holder of waste within the meaning of Directive 75/442 if it had access to the site where that waste was situated or had the right to take a decision as to how its client carried out its operations or to inspect the product's storage facilities which are the source of spills to land and groundwater. The petroleum undertaking which in fact dealt with some of that waste is the holder of waste.

- g 27. As for the hydrocarbons in question in the main proceedings, which leaked from the service station's tanks, their producer or their holder discarded them. The hydrocarbons are specifically covered by heading Q4 of Annex I to Directive 75/442 and are, moreover, hazardous waste. They must therefore be considered to be waste within the meaning of the directive.

- h 28. Soil contaminated by hydrocarbons must also be classified as waste. That is clear from the terms of headings Q5, Q12 and Q13 of the annex and from the obligation for the holder of those substances to discard them.

- i 29. That obligation derives, inter alia, from the aim of Directive 75/442 to protect human health and the environment, which could not be achieved if the holder or producer of waste was not required to discard contaminated soil or if he merely buried contaminated material in the soil.

- i 30. Mr Van de Walle and others argue that Texaco delivered petroleum products which were sound at the time they were sold to the service station, an operation which cannot be regarded as the production of waste or as indicative of an intention to get rid of waste.

31. Mr Van de Walle and others take the view that the Community legislature defined waste as any substance which the holder 'discards or intends or is required to discard' in order to include a subjective element beyond the

objective element (registration of a waste in a catalogue on the basis of its characteristics or its degree of toxicity), confining the scope to situations where there is action, intention or obligation on the part of the holder to discard waste, by either disposal or recovery.

32. The particularity of the main action lies in the fact that neither Texaco nor the manager of the service station knew or was aware that hydrocarbons had leaked from the tanks and had permeated the surrounding water and land. It is thus not possible to identify any action, intention or obligation to discard those substances.

33. Furthermore, Texaco was not ordered to decontaminate the site until January 1993, after the discovery that hydrocarbons were being leaked. That order, which they maintain was arbitrary, should have been addressed to the operator of the service station who, as an independent manager, should have been considered the only person required to discard those substances. Moreover, Texaco has always insisted that the soil decontamination work it carried out was 'without prejudice'.

34. As regards the meaning of 'producer' and 'holder' of waste for the purposes of Community law, Mr Van de Walle and others maintain that the wording of the question referred for a preliminary ruling and the statement of grounds in the judgment making the reference suggest that the Cour d'Appel of Brussels takes the view that Texaco is neither the producer nor the holder of the waste at issue and that that court is concerned not with those definitions but solely to have the court define what constitutes waste.

35. It is therefore only in the alternative, if the court deems it necessary to consider what is meant by 'producer' and 'holder', that Mr Van de Walle and others contend that Texaco merely delivered sound products to the service station and therefore did not cause to exist, create or produce waste. In the event that products are not used, it is the person who no longer uses those products who is the producer of the waste, not the person who delivered them at the outset. Therefore, it is only the manager of the service station who must, where relevant, be considered the producer of the waste and, moreover, its holder.

36. In that regard, several provisions in the service station's operating agreement, in particular art 6(10) thereof, make clear that the manager was fully liable as an operator and independent trader and that he was solely liable for damage caused to third parties as the result of his operations. Article 2 of the agreement provided that responsibility for the operation of the service station was 'conferred' on the manager by Texaco. Under art 6(2) of that agreement, the manager was required to 'maintain in perfect condition and at his own expense the property [conferred]' and to ascertain on a daily basis that the pumps and other equipment were functioning properly and immediately to advise Texaco of repairs envisaged. According to art 5 of the agreement, stocks were the 'exclusive property [of the manager]', who was required to assume 'full responsibility' for them.

37. The Commission of the European Communities observes that it follows from heading Q4 of Annex I to Directive 75/442, which refers to 'materials spilled, lost or having undergone other mishap', that the Community legislature expressly opted for the directive to cover the case where the holder of waste discards it accidentally. That is not incompatible with art 1 of the directive, which does not specify whether the action of 'discarding' must be 'intentional' or not. The holder may even, as in the main proceedings, not be aware that he has discarded a product.

- a 38. Similarly, the wording of heading Q4, which likewise refers to 'any materials, equipment, etc., contaminated as a result of the mishap', shows that Directive 75/442 treats materials contaminated by waste in the same way as waste, so as to ensure that where materials which constitute waste are spilled by accident, the holder of those materials does not abandon the contaminated substances or objects but becomes responsible for disposing of them.
- b 39. By contrast, soil contaminated by an accidental spillage of hydrocarbons, which like water and air forms part of the environment, does not lend itself to the recovery and disposal operations provided for under the directive and can only be subjected to decontamination. As a general rule, therefore, soil contaminated by waste should not itself be considered to be waste.
- c 40. However, a different conclusion is necessary when soil must be excavated for the purpose of decontamination. In that case, once it is excavated the soil is no longer an element of the environment but rather movable property which, because it is mixed with accidentally spilled materials that are classified as waste, must be treated in the same way as waste.
- d 41. Finally, the person who had hydrocarbons spilled by accident in his possession at the time when they became waste, in this case the manager of the service station who bought them from Texaco, must be considered to be the 'holder'. The substances became waste when they leaked from the tanks. The petroleum undertaking is the producer of the hydrocarbons, but only the retailer, through his operations, 'produced' waste by accident.
- e *The court's reply*
42. Article 1(a) of Directive 75/442 defines waste as 'any substance or object in the categories set out in Annex I which the holder discards or intends ... to discard'. The annex clarifies and illustrates that definition by providing lists of substances and objects which can be classified as waste. However, the lists are only intended as guidance, and the classification of waste is to be inferred primarily from the holder's actions and the meaning of the term 'discard' (see to that effect *Inter-Environnement Wallonie ASBL v Région Wallonie* Case C-129/96 [1998] All ER (EC) 155, [1997] ECR I-7411 (para 26) and *Application by Palin Granit Oy* Case C-9/00 [2003] All ER (EC) 366, [2002] ECR I-3533 (para 22)).
- f 43. The fact that Annex I to Directive 75/442, entitled 'Categories of waste', refers in heading Q4 to '[m]aterials spilled, lost or having undergone other mishap, including any materials, equipment, etc., contaminated as a result of the mishap' merely indicates that such materials may fall within the scope of 'waste'. It cannot suffice to classify as waste hydrocarbons which are spilled by accident and which contaminate soil and groundwater.
- g 44. In those circumstances, it is necessary to consider whether that accidental spill of hydrocarbons is an act by which the holder 'discards' them.
- h 45. First, as the court has held, the verb 'to discard' must be interpreted in the light of the aim of Directive 75/442, which, in the wording of the third recital in the preamble, is the protection of human health and the environment against harmful effects caused by the collection, transport, treatment, storage and tipping of waste, and that of art 174(2) EC (formerly art 130r(2) of the EC Treaty), which states that Community policy on the environment is to aim at a high level of protection and is to be based, in particular, on the precautionary principle and the principle that preventive action should be taken. The verb 'to discard', which determines the scope of 'waste', therefore cannot be interpreted restrictively (see to that effect *ARCO Chemie Nederland Ltd v Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer, Vereniging*
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*Dorpsbelang Hees v Directeur van de dienst Milieu en Water van de provincie Gelderland* Joined cases C-418/97 and C-419/97 [2003] All ER (EC) 237, [2000] ECR I-4475 (paras 36–40)). a

46. Secondly, when the substance or object in question is a production residue, that is to say, a product which is not itself wanted for subsequent use and which the holder cannot economically re-use without prior processing, it must be considered to be a burden which the holder seeks to 'discard' (see to that effect the *Palin Granit* case, cited above (paras 32–37)). b

47. It is clear that accidentally spilled hydrocarbons which cause soil and groundwater contamination are not a product which can be re-used without processing. Their marketing is very uncertain and, even if it were possible, implies preliminary operations would be uneconomical for their holder. Those hydrocarbons are therefore substances which the holder did not intend to produce and which he 'discards', albeit involuntarily, at the time of the production or distribution operations which relate to them. c

48. Finally, Directive 75/442 would be made redundant in part if hydrocarbons which cause contamination were not considered waste on the sole ground that they were spilled by accident. Article 4 of the directive provides, inter alia, that member states are to take the measures necessary to ensure that waste is recovered or disposed of without endangering human health and 'without risk to water, air, soil and plants and animals' and are to 'prohibit the abandonment, dumping or uncontrolled disposal of waste'. Pursuant to art 8 of the directive, member states are to take the measures necessary to ensure that any holder of waste has it handled by an operator responsible for its recovery or disposal or ensures those operations himself. Article 15 of the directive designates the operator who must bear the cost of disposing of waste 'in accordance with the "polluter pays" principle'. d

49. If hydrocarbons which cause contamination are not considered to be waste on the ground that they were spilled by accident, their holder would be excluded from the obligations which Directive 75/442 requires member states to impose on him, in contradiction to the prohibition on the abandonment, dumping or uncontrolled disposal of waste. e

50. It follows that the holder of hydrocarbons which are accidentally spilled and which contaminate soil and groundwater 'discards' those substances, which must as a result be classified as waste within the meaning of Directive 75/442. f

51. It should be pointed out that hydrocarbons spilled by accident are, moreover, considered to be hazardous waste under Council Directive (EEC) 91/689 (on hazardous waste) (OJ 1991 L377 p 20) and Council Decision (EC) 94/904 (establishing a list of hazardous waste pursuant to art 1(4) of Directive 91/689) (OJ 1994 L356 p 14). g

52. The same classification as 'waste' within the meaning of Directive 75/442 applies to soil contaminated as the result of an accidental spill of hydrocarbons. In that case, the hydrocarbons cannot be separated from the land which they have contaminated and cannot be recovered or disposed of unless that land is also subject to the necessary decontamination. That is the only interpretation which ensures compliance with the aims of protecting the natural environment and prohibiting the abandonment of waste pursued by the directive. It is fully in accord with the aim of the directive and heading Q4 of Annex I thereto, which, as pointed out, mentions 'any materials, equipment, etc., contaminated as a result of [materials spilled, lost or having undergone other mishap]' among the substances or objects which may be regarded as waste. The classification as h

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a waste in the case of land contaminated by hydrocarbons does indeed therefore depend on the obligation on the person who causes the accidental spill of those substances to discard them. It cannot result from the implementation of national laws governing the conditions of use, protection or decontamination of the land where the spill occurred.

b 53. Since contaminated soil is considered to be waste by the mere fact of its accidental contamination by hydrocarbons, its classification as waste is not dependent on other operations being carried out which are the responsibility of its owner or which the latter decides to undertake. The fact that soil is not excavated therefore has no bearing on its classification as waste.

c 54. As regards whether, in the circumstances of the main action, the petroleum undertaking supplying the service station can be considered to be the producer or holder of waste within the meaning of art 1(b) and (c) of the directive, under the division of functions provided for by art 234 EC (formerly art 177 of the EC Treaty) it is for the national court to apply to the individual case before it the rules of Community law as interpreted by the court (see *Staatssecretaris van Financiën v Shipping and Forwarding Enterprise Safe BV* Case C-320/88 [1990] ECR I-285 (para 11)).

d 55. Article 1(c) of Directive 75/442 provides that the holder is 'the producer of the waste or the natural or legal person who is in possession of it'. The directive therefore defines 'holder' broadly, without specifying whether the obligation to dispose of or recover waste is as a general rule a matter for the producer or the possessor of the waste, that is to say, the owner or the holder.

e 56. Article 8 of Directive 75/442 states that those obligations, which are the corollary to the prohibition on the abandonment, dumping or uncontrolled disposal of waste laid down in art 4 of the directive, are the responsibility of 'any holder of waste'.

f 57. In addition, art 15 of Directive 75/442 provides that, in accordance with the 'polluter pays' principle, the cost of disposing of waste must be borne by the holder who has waste handled by an operator responsible for disposing of it and/or previous holders or the producer of the product from which the waste came. The directive therefore does not preclude the possibility that, in certain cases, the cost of disposing of waste is to be borne by one or several previous holders, that is to say, one or more natural or legal persons who are neither the producers nor the possessors of the waste.

g 58. It follows from the provisions cited in the three preceding paragraphs that Directive 75/442 distinguishes between practical recovery or disposal operations, which it makes the responsibility of any 'holder of waste', whether producer or possessor, and the financial burden of those operations, which, in accordance with the 'polluter pays' principle, it imposes on the persons who cause the waste, whether they are holders or former holders of the waste or even producers of the product from which the waste came.

h 59. The hydrocarbons spilled by accident as the result of a leak from a service station's storage facilities had been bought by that service station to meet its operating needs. They are therefore in the possession of the service station's manager. Moreover, it is the manager who, for the purpose of his operations, had them in stock when they became waste and who may therefore be considered to be the person who 'produced' them within the meaning of art 1(b) of Directive 75/442. Under those conditions, since he is at once the possessor and the producer of that waste, the service station manager must be considered to be its holder within the meaning of art 1(c) of Directive 75/442.

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60. Nevertheless, if in the main action, in the light of information which only the national court is in a position to assess, it appears that the poor condition of the service station's storage facilities and the leak of hydrocarbons can be attributed to a disregard of contractual obligations by the petroleum undertaking which supplies that service station, or to any actions which could render that undertaking liable, the activities of that undertaking could be considered to 'have produced waste' within the meaning of art 1(b) of Directive 75/442 and it may accordingly be regarded as the holder of the waste. a  
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61. In the light of all the foregoing considerations, the answer to the question referred by the national court must be that hydrocarbons which are unintentionally spilled and cause soil and groundwater contamination are waste within the meaning of art 1(a) of Directive 75/442. The same is true for soil contaminated by hydrocarbons, even if it has not been excavated. In circumstances such as those in the main proceedings, the petroleum undertaking which supplied the service station can be considered to be the holder of that waste within the meaning of art 1(c) of Directive 75/442 only if the leak from the service station's storage facilities which gave rise to the waste can be attributed to the conduct of that undertaking. c  
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#### COSTS

62. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the court, other than the costs of those parties, are not recoverable. e

On those grounds, the Court of Justice (Second Chamber) rules as follows:

Hydrocarbons which are unintentionally spilled and cause soil and groundwater contamination are waste within the meaning of art 1(a) of Council Directive (EEC) 75/442 (on waste), as amended by Council Directive (EEC) 91/156. The same is true for soil contaminated by hydrocarbons, even if it has not been excavated. In circumstances such as those in the main proceedings, the petroleum undertaking which supplied the service station can be considered to be the holder of that waste within the meaning of art 1(c) of Directive 75/442 only if the leak from the service station's storage facilities which gave rise to the waste can be attributed to the conduct of that undertaking. f  
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